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# AN ABRIDGMENT

OF

# CASES

ARGUED AND DETERMINED

IN

# The Courts of Law,

DURING THE REIGN OF HIS PRESENT MAJESTY,
KING GEORGE THE THIRD.

WITH TABLES OF THE NAMES OF CASES AND PRINCIPAL MATTERS.

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VOLUME THE THIRD.

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AN

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ERRATA.

# AN ABRIDGMENT

OF

# CASES

ARGUED AND DETERMINED

IN

# THE COURTS OF LAW.

## Damages.

See titles ACTION, COSTS, and NEW TRIAL.

## Delivery of Goods.

THE plaintiff agreed to ſell a quantity of wool to the defendant, and a ſhilling earneſt was paid, on the part of the defendant, to bind the bargain: the wool was afterwards packed in cloths, furniſhed by the defendant for that purpoſe, and left at an hovel belonging to the plaintiff, and the defendant was to ſend his waggon, in a few days, to take it away. BUT while the defendant's ſervant was weighing and packing it, and propoſing to the plaintiff to fix the time when the waggon ſhould come, the plaintiff declared, that *it ſhould not go off his premiſes till he had the money for it.* He afterwards brought an action for goods ſold and delivered to recover the value of the wool, and THE COURT held that he could not maintain the action as there was no delivery, and directed a nonſuit to be entered.

Goodall *v.* Skelton, Tr. Ter. 34 Geo. 3. C. B. 2 *Hen. Black.* 316.

## Demurrer,

See PLEADINGS.

## Demurrer to Evidence.

IN this caſe, the court of King's-Bench held that, on a demurrer to evidence, every fact which the jury can infer, in favour of the party offering it, from the evidence demurred to, is to be conſidered as admitted. And on a writ of error, the court of Exchequer Chamber were all of opinion with

Cockſedge *v.* Fanſhaw, Ea. Ter. 19 Geo. 3. B.R. 1 *Doug.* 119.

the court of King's-Bench, except the Lord Chief Juſtice (then Mr. Baron) *Eyre*, but afterwards, in the Houſe of Lords, his Lordſhip concurred with the other judges, in anſwering the following queſtion propoſed to them, in the affirmative, viz. "Whether the evidence and facts admitted, upon "which that demurrer had been joined, were ſufficient in "law to maintain the iſſue for the defendant in error?"

Gibſon and Johnſon, *v.* Hunter, in the Houſe of Lords, in error, 33 Geo. 3. 2 *Hen. Black.* 187.

On a demurrer to circumſtantial evidence, the party offering the evidence is not obliged to join in demurrer, unleſs the party demurring will diſtinctly admit upon the record every fact and every concluſion, which the evidence offered conduces to prove.—This was an action brought by *Hunter*, the defendant in error, as indorſee, againſt *Gibſon* and *Johnſon*, as acceptors of an inſtrument, purporting to be a bill of exchange, and hereinafter ſet forth. The cauſe came on to be tried before Lord *Kenyon*, and a ſpecial jury, at Guildhall, when the plaintiffs in error demurred to the evidence. The demurrer to the evidence was as follows: "And the jurors of the jury, whereof mention is within made, being called, likewiſe come, and being choſen, tried and ſworn, to ſay the truth of the premiſes within contained, the ſaid *Robert Hunter* produced to the jury aforeſaid, a certain inſtrument in writing, in the words and figures following (that is to ſay):

£.521. 7*s*.

*Falmouth*, 11*th March*, 1788.

Two months after date, pay to Mr. *Will. Fletcher*, or order, five hundred twenty-one pounds, 7*s*. value received, with or without advice.

*Nath. Hingſton.*

To No. 2068.

Meſſrs. *Gibſon* & *Johnſon*,
Bankers, *G.* & *J.*
*London.*

And whereupon are the following indorſements, "*William Fletcher*," "by pro^n^. of *Liveſey*, *Hargreave*, and Co." "*A. Goodrich.*" And the ſaid *Robert Hunter*, to prove and maintain the iſſue within joined on his part, ſhews in evidence to the jury aforeſaid, by *Robert Booth*, a witneſs duly ſworn in that behalf, that he, the ſaid *Robert Booth*, was a clerk to certain perſons uſing trade and commerce as copartners, in the copartnerſhip, name and firm of *Liveſey*, *Hargreave*, and Company, and that one *Nathaniel Hingſton* was, at the time of the drawing of the ſaid inſtrument, a ſhopkeeper, and carried on the buſineſs of a ſhopkeeper, at *Falmouth*, in the county of *Cornwall*: that the name of *Nathaniel Hingſton* ſubſcribed to the ſaid inſtrument, was the handwriting of the ſaid *Nathaniel Hingſton*, and that he drew the ſame as agent to the ſaid *Liveſey*, *Hargreave*, and Company; that *Liveſey*, *Hargreave*, and Company, uſed to ſend

ſend down to the ſaid *Nathaniel Hingſton* blank bills of exchange for him to ſign as the drawer thereof: that many ſuch blank bills were ſent down together: that when they were returned to the ſaid *Liveſey, Hargreave*, and Company, they filled up the blanks with the ſum to be paid, and the name of the perſon to whom the ſame was to be payable: that when the bills were ſo drawn and filled up, they were carried indiſcriminately with other bills, to the houſe of *Thomas Gibſon* and *Joſeph Johnſon*, the defendants, for their acceptance: that *Liveſey, Hargreave*, and Company, gave *Gibſon* and *Johnſon* advice of the bills ſo drawn by the ſaid *Nathaniel Hingſton*: that ſuch bills, indiſcriminately with the ſaid other bills, uſed to be carried two or three times a day from the houſe of *Liveſey, Hargreave*, and Company, to the houſe of *Gibſon* and *Johnſon* for acceptance, and were often carried wet: that the acceptance of the bill produced was the acceptance of the defendants *Thomas Gibſon* and *Joſeph Johnſon*: that the ſaid *Robert Booth*, upon thoſe occaſions, uſed to ſee the defendant *Johnſon*; that *Liveſey, Hargreave*, and Company, were generally indebted to the defendants, *Gibſon* and *Johnſon*, upon the balance of accounts, for caſh advanced by the ſaid *Gibſon* and *Johnſon* to the ſaid *Liveſey, Hargreave*, and Company: that the defendants, *Gibſon* and *Johnſon*, were covered for theſe acceptances by bills of exchange given as a ſecurity for the ſame, but that the ſaid bills ſo given as a ſecurity have not been paid: that no ſuch perſon as *William Fletcher*, in the ſaid inſtrument and indorſement named, exiſted; and that the name *William Fletcher*, ſo indorſed on the ſaid inſtrument, was not the hand-writing of any perſon of the name of *William Fletcher*. And the ſaid *Robert Hunter* further ſhews in evidence to the jury aforeſaid, by one *Stephen Barber*, a witneſs duly ſworn in that behalf, that he negotiated the inſtrument now produced, with the plaintiff *Robert Hunter*; that he carried it from *Liveſey, Hargreave*, and Company, to get it diſcounted for them; and that he told the ſaid *Robert Hunter* from whom he came; that the ſaid *Robert Hunter* gave him the value for the ſaid inſtrument in money, and he took it back to be indorſed by *Liveſey, Hargreave*, and Company; and that it was indorſed by *Abſalom Goodrich*, by procuration of *Liveſey, Hargreave*, and Company; that the ſaid inſtrument had been accepted by *Gibſon* and *Johnſon* before it was carried to be diſcounted. And the ſaid *Thomas Gibſon* and *Joſeph Johnſon* ſay, that the aforeſaid matters, to the jurors aforeſaid, in form aforeſaid, ſhewn in evidence by the ſaid *Robert Hunter*, are not ſufficient in law to maintain the ſaid iſſue within joined on the part of the ſaid *Robert Hunter*, and that they, the ſaid *Thomas Gibſon* and *Joſeph Johnſon*, to the matters aforeſaid, in form aforeſaid, ſhewn in evidence,

have no neceſſity, nor are they obliged by the law of the land to anſwer; and this they are ready to verify: wherefore, for want of ſufficient matter in that behalf, ſhewn in evidence to the jury aforeſaid, the ſaid *Thomas Gibſon* and *Joſeph Johnſon* pray judgment, and that the jury aforeſaid may be diſcharged from giving any verdict in the ſaid iſſue, and that the ſaid *Robert Hunter* may be precluded from having his ſaid action againſt the ſaid *Thomas Gibſon* and *Joſeph Johnſon*. And the ſaid *Robert Hunter*, for that he hath ſhewn ſufficient matter in maintenance of the ſaid iſſue in evidence to the ſaid jurors, which matter the ſaid *Thomas Gibſon* and *Joſeph Johnſon* do not deny, nor in any manner anſwer thereto, prays judgment and his damages, by reaſon of the premiſes to be adjudged to him. Whereupon it is told to the jurors aforeſaid, that they ſhall inquire what damages the ſaid *Robert Hunter* has ſuſtained, as well by reaſon of the matter ſhewn in evidence as aforeſaid, as for his coſts and charges, by him about his ſuit in this behalf expended, in caſe it ſhall happen that judgment ſhall be given upon the evidence aforeſaid, for the ſaid *Robert Hunter*, and the jurors aforeſaid, upon their oaths aforeſaid, thereupon ſay, that if it ſhall happen that judgment ſhall be given for the ſaid *Robert Hunter* upon the evidence aforeſaid, then they aſſeſs the damages of the ſaid *Robert Hunter*, by him ſuſtained by reaſon of the matter ſhewn in evidence as aforeſaid, beſides his coſts and charges by him about his ſuit in this behalf expended, to 521*l.* 7*s.* and for thoſe coſts and charges to 40*s.* And thereupon the ſaid jurors, by the aſſent of the ſaid parties, are diſcharged from giving any further verdict upon the premiſes. And thereupon all and ſingular the premiſes being ſeen by the ſaid court of our ſaid lord the king, before the king himſelf, now here fully underſtood and conſidered, it ſeems to the ſaid court here, that the aforeſaid matter, to the jury aforeſaid, in form aforeſaid, ſhewn in evidence by the ſaid *Robert Hunter*, is ſufficient in law to maintain the ſaid iſſue above joined, on the part and behalf of the ſaid *Robert Hunter*. Therefore it is conſidered by the ſaid court of our lord the king before the king himſelf here, that the ſaid *Robert Hunter* doth recover his aforeſaid damages, by the jury aforeſaid, in form aforeſaid, aſſeſſed: and alſo 199*l.* 3*s.* for his coſts and charges, by the ſaid court of our ſaid lord the king now here adjudged of increaſe to the ſaid *Robert Hunter* by his aſſent, which ſaid damages in the whole amount to 722*l.* 10*s.* and that the ſaid *Thomas Gibſon* and *Joſeph Johnſon* be in mercy, &c.—In Hilary Term, 1792, this demurrer to evidence was ſet down for argument before the court of King's-Bench; but it being the underſtanding of both parties, that a writ of error was to be brought, the Court gave judgment for the defendant in error, without argument.

gument. Upon this judgment a writ of error was brought, returnable in parliament; and the plaintiffs in error having aſſigned general errors; and the defendant in error having pleaded that there was no error in the record and proceedings. THE CASE WAS FULLY ARGUED AT THE BAR OF THE HOUSE, AND THE FOLLOWING QUESTIONS WERE PROPOSED TO THE JUDGES:—1ſt. Whether upon the ſtate of the evidence given for the plaintiff in this caſe, it was competent to the defendants to inſiſt upon the jury being diſcharged from giving a verdict by demurring to the evidence, and obliging the plaintiff to join in demurrer?—2dly. Whether on this record, any judgment can be given?—3dly. In caſe no judgment can be given, what ought to be the award? TO WHICH QUESTIONS, LORD CHIEF JUSTICE EYRE thus delivered the unanimous anſwer of the judges:—The queſtions ariſe upon a proceeding, which is called a demurrer to evidence, and which, though not familiar in practice, is a proceeding well known to the law. It is a proceeding, by which the judges, whoſe province it is to anſwer to all queſtions of law, are called upon to declare, what the law is upon the facts ſhewn in evidence, analogous to the demurrer upon facts alleged in pleading. In the nature of the thing, the queſtion of law to ariſe out of the fact, cannot ariſe till the fact is aſcertained. It is the province of a jury to aſcertain the fact, under the direction and aſſiſtance of the judge; the proceſs is ſimple and diſtinct, though in our books there is a good deal of confuſion with reſpect to a demurrer upon evidence, and a bill of exceptions, the diſtinct lines of which have not always been kept ſo much apart, as they ought to have been.—In the firſt ſtage of that proceſs, under which facts are aſcertained, the judge decides, whether the evidence offered conduces to the proof of the fact, which is to be aſcertained: and there is an appeal from his judgment by a bill of exceptions. The admiſſibility of the evidence being eſtabliſhed, the queſtion *how far* it conduces to the proof of the fact which is to be aſcertained, is not for the judge to decide, but for the jury excluſively; with which judges interfere in no caſe, but where they have in ſome ſort ſubſtituted themſelves in the place of the jury; in attaint; upon motions for new trials. When the jury have aſcertained the fact; if a queſtion ariſes whether the fact thus aſcertained maintains the iſſue joined between the parties, or, in other words, whether the law ariſing upon the fact (the queſtion of law involved in the iſſue depending upon the true ſtate of the fact) is in favour of one or other of the parties; that queſtion is for the judge to decide. Ordinarily he declares to the jury what the law is upon the fact which they find, and then they compound their verdict of the law and fact thus aſcertained. But if the party wiſhes to withdraw from the jury, the application of the law to the fact, and all conſi-

deration of what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation of that demurrer is, to take from the jury, and to refer to the judge, the application of the law to the fact. In the nature of things therefore, and reasoning by analogy to other demurrers, and having regard to the distinct functions of judges and of juries, and attending to the state of the proceeding in which the demurrer takes place, the fact is to be first ascertained.

THE FIRST QUESTION proposed to the judges is, "*Whether, "upon the state of the evidence given for the plaintiff in this "case, it was competent to the defendants, to insist upon the jury "being discharged from giving a verdict, by demurring to the "evidence, and obliging the plaintiff to join in demurrer?*" Your lordship's question is confined to this particular case; but it will be necessary for me to proceed by steps. All our books agree, that if a matter of *record*, or other matter in *writing*, be offered in evidence, in maintenance of an issue joined between the parties, the adverse party may insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering the evidence to join in demurrer. He cannot refuse to join in demurrer, he must join, or waive the evidence. Our books also agree, that if *parol* evidence be offered, and the adverse party demurs, he who offers the evidence *may* join in demurrer if he will. We are therefore thus far advanced, that the demurrer to evidence is not necessarily confined to *written* evidence. The language of our books is very indistinct upon the question, whether the party offering *parol* evidence should be *obliged* to join in demurrer. Why is he obliged to join in demurrer, when the evidence which he has offered is in writing? The reason is given in *Croke*'s report of *Baker*'s case (1), because, says the book, "*there cannot be any variance of matter in "writing.*" Parol evidence is sometimes certain, and no more admitting of any variance than a matter in writing, but it is also often loose and indeterminate, often circumstantial. The reason for obliging the party offering evidence in writing to join in demurrer, applies to the first sort of parol evidence, but it does not apply to parol evidence which is loose and indeterminate, which may be urged with more or less effect to a jury, and least of all will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. And yet, if there can be no demurrer in such cases, there will be no consistency in the doctrine of demurrers to evidence, by which the application of the law to the fact on an issue is

(1) *Cro. Eliz.* 753. *Middleton* v. *Baker*, 5 *Co.* 104. S. C.

meant

meant to be withdrawn from a jury, and transferred to the judges. If the party who demurs will admit the evidence of the fact, the evidence of which fact is loose and indeterminate, or in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this parol evidence, than in a matter in writing, and the reasons for compelling the party who offers the evidence to join in demurrer, will then apply, and the doctrine of demurrers to evidence will be uniform and consistent. That this is the regular course of proceeding, in respect to parol evidence of the nature that I have been describing, I think may be collected from the known case upon this subject, *Baker*'s case. There is also another case, *Wright* v. *Pindar*, as it stands reported in *Aleyn*'s Reports (1), which carries the doctrine further, and home to every case of evidence circumstantial in its nature, affording ground for a conclusion of fact from fact; and the two cases taken together, I think, prove satisfactorily, that the course is that which I have already supposed, and which would remove all the difficulties that are in the way of obliging the party to join in demurrer upon parol evidence. *Baker*'s case, after stating that the party must join in demurrer, or waive his evidence, where a matter in writing is shewn in evidence, goes on thus: "If "the plaintiff produces witnesses to prove any matter in fact "upon which a question in law arises, if the defendant "admits their testimony to be true, there also the defendant "may demur in law upon it, but then he ought to admit "the evidence given by the plaintiff to be true." Those cases have very carefully marked the precise ground, upon which a party may demur to evidence; and prove that if a party *may* demur, the other party *must* join in demurrer. According to *Aleyn*'s report of the case of *Wright* v. *Pindar*, which case underwent very serious consideration, it was resolved, "that he that demurs upon the evidence, ought to "confess the whole matter of fact to be true, and not refer "that to the judgment of the Court; *and if the matter of fact* "*be uncertainly alleged, or that it be doubtful whether it be* "*true or no, because offered to be proved only by presumptions or* "*probabilities*, and the other party demurs thereupon, he "that alleges this matter *cannot* join in demurrer with "him, but ought to pray the judgment of the Court, that he "*may not be admitted* to his demurrer, unless he will *confess* "*the matter of fact to be true.*" It seems to follow as a necessary conclusion, that if he will confess the matter of fact to be true, there he is to be admitted to his demurrer, and

(1) *Al.* 18. S. C. *Style* 22, loosely reported by the name of *White* v. *Pyndar*.

that, if he is admitted, the other party must join in demurrer. My Lords, it is said in some of our books, that upon a demurrer entered upon parol evidence, the party offering the evidence may choose whether he will join in demurrer or not. But after having stated the two authorities which I have mentioned, I think those passages in the books must be understood with the qualification mentioned in both those authorities, "unless the adverse party will confess the evidence to be true." The matter of fact being confessed, the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury; and being entered on record will remain for the decision of the judges. And this operation of entering the matter upon record, and indeed the whole operation of conducting a demurrer to evidence, ought to be under the direction and controul of the judge at *nisi prius*, or of the Court, if the trial be at the bar of one of the king's courts. I take the whole proceeding upon a demurrer to evidence to be under the controul of the judge before whom the trial is had. In the case of *Worsley* v. *Filisker*, which is reported in 2 *Rolle*'s Reports, 117, Mr. Justice *Dodderidge*, who was one of the ablest men upon the bench, said, "the Court might deny and "hinder a party from demurring, by overruling the matter "in demurrer, if it seemed to them to be clear in law:" and the Court did, in point of fact, in that case, overrule the demurrer, and leave the case to the jury. The demurrer in that case was certainly frivolous; but if it had been overruled improperly, it might, I presume, have been the subject of a bill of exceptions. If the Court may overrule, it may also regulate the entry of the proceedings upon the record, and the admissions which are to be made, previous to the allowing of the demurrer. And, my Lords, after this explanation of the doctrine of demurrers to evidence, I have very confident expectations that a demurrer like the present will never hereafter find its way into this House.

My Lords, the answer to the first question that the judges have agreed upon, and which I have endeavoured to lay a foundation for, in what I have now offered to the House, is, "That, upon the state of the evidence given for the plaintiff in this case, it was *not* competent to the defendants to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the plaintiff to join in demurrer, *without distinctly admitting upon the record every fact, and every conclusion, which the evidence given for the plaintiff conduced to prove.*"

Your Lordship's SECOND QUESTION is, Whether on this record, any judgment can be given? To which we answer, that WE CONCEIVE NO JUDGMENT CAN BE GIVEN. The examination of the witnesses in this case has been conducted so loosely, or this *demurrer has been*

*so*

*So negligently framed*, that there is no manner of certainty in the ſtate of facts, upon which any judgment can be founded.

To THE THIRD QUESTION, in caſe no judgment can be given, what ought to be awarded? We anſwer, that there ought to be an award of a *venire facias de novo*: the iſſue joined between theſe parties in effect has not been tried, and the caſe of *Wright* v. *Pindar*, is expreſsly in point, that another *venire facias* ſhould iſſue.—*Venire de novo* awarded.

## Deviſes.

### *Who may deviſe.*

Selwyn, eſq. *v.* Selwyn, widow, *et al.* Hil. Ter. Geo. 3. B. R. 2 *Burr.* 1131. 1 *Black* Rep. 222. 251.

Lands will paſs by a will made before a recovery is completely ſuffered, if the will be after the deed to lead the uſes.—On a caſe out of chancery, it appeared that the premiſes were limited in ſtrict ſettlement to *John Selwyn*, the elder, for life; remainder to his firſt and every other ſon by his wife *Mary*, ſucceſſively, in tail male; remainder to *John Selwyn* the elder, and his heirs.—*John Selwyn the younger was the eldeſt ſon; and, as ſuch, ſeiſed of the remainder in tail male.* By bargain and ſale, dated the 20th of April, 1751, inrolled in the Common Pleas, between *John Selwyn* the elder, and *John Selwyn* the younger, of the firſt part; *John Wakelin*, gent. of the ſecond part; and *Francis Dowce*, gent. of the third part; it is witneſſed, that for barring all eſtates-tail remainders and reverſions, the ſaid *John Selwyn* the elder, and *John Selwyn* the younger, did grant, bargain, and ſell unto the ſaid *John Wakelin* and his heirs, all, &c. deſcribing the premiſes, to the end a common recovery might be ſuffered of the premiſes, as of the following Eaſter term, the uſes of which were declared to be to the ſaid *John Selwyn* the elder, for life; remainder to the ſaid *John Selwyn* the younger, in fee. Eaſter term ended on the 20th of May, 1751. On the 30th of May, 1751, the writ of entry was ſued out. This writ of entry was returnable on the 16th of June, 1751. Trinity term begun on the 7th of June, 1751. On the 8th of June, 1751, *John Selwyn* the younger made his will, and deviſed as follows: "I do hereby "give and deviſe unto my honoured father *John Selwyn*, "eſq. all that my manor or lordſhip of Luggerſhall, in the "county of Wilts, and all my manor of Matſon, in the "county of Glouceſter, with the rights, members, and ap- "purtenances, thereunto belonging, and all other my ma- "nors, meſſuages, farms, lands, tenements, rectories, ad- "vowſons, rents, and hereditaments, whatſoever, and all "the freehold and other eſtate of inheritance, whereof I, the "ſaid *John Selwyn* the younger, or any perſon or perſons "what-

" whatſoever in truſt for, or to my uſe, are, or is, ſeiſed or " poſſeſſed, either in poſſeſſion, reverſion, remainder, or " expectancy, and all my eſtate, right, title, and intereſt " therein; to hold the ſame unto and to the uſe of my ſaid " father, his heirs and aſſigns for ever." On the 12th of June, 1751, the bargain and ſale of the 20th of April, 1751, was acknowledged, and afterwards inrolled. The writ of entry *ſur diſſeiſin en le poſt*, was returnable on the 16th of June, in the ſame year. The writ of *ſeiſin* was teſted the 19th of June, returnable forthwith. The ſheriff executed the writ of ſeiſin on the 22d of June, 1751, and on the 26th of the ſame June, he made his return on the above writ. Trinity term ended on the 26th of June. *John Selwyn the younger died on the* 27th of June, 1751, without altering or republiſhing his will.—THE QUESTION was, whether the ſeveral lands, tenements, and hereditaments, comprized in the deed of the 20th of April, 1751, paſſed by the will of *John Selwyn* the ſon? And this turned upon two points: 1ſt, whether *John Selwyn* the younger, at the date of his will, had any uſe, eſtate, or intereſt, in the premiſes, to deviſe? 2dly, If he had, whether the ſubſequent recovery was a revocation. AND THE JUDGES, viz. Lord MANSFIELD, Ch. J. Deniſon, J. Forſter, J. and Wilmot, J. returned a certificate to the court of chancery, that they were of opinion, that the ſeveral lands, tenements, and hereditaments, comprized in the deed of the 20th of April, 1751, paſſed by the will of *John Selwyn*, the ſon.—

Sir *James Burrows*, in his report of this caſe, adds, that the judges did not give the reaſons of their opinion, but ſuggeſts that it is likely that they conſidered the whole as one conveyance, which muſt relate to the date of the bargain and ſale; which was perfected, made abſolute, and delivered from objections, by the ſubſequent ceremonies.—

That it was probable, from ſome expreſſions dropped, that they might think that *John Selwyn* the younger, by virtue of the bargain and ſale, had a voidable, contingent, executory uſe, to ariſe out of the ſubſequent common recovery;—that ſuch an uſe was deviſable;—and that the ſubſequent recovery executed ſuch uſe, and made it abſolute.

Roe *ex dim.* Perry *v.* Jones *et al.* Tr. Ter. 28 Geo. 3. C. B. 1 *Hen. Black.* 30.

A perſon, having a poſſibility coupled with an intereſt, may deviſe the ſame.—The teſtator, *John Lockyer*, being ſeiſed in fee of the premiſes in queſtion, made his will; and after charging all his lands and hereditaments with the payment of certain annuities, deviſed in the following manner: " And my ſaid lands and hereditaments, thus charged as " aforeſaid, I give unto my brother *Thomas Lockyer*, until " his ſon *John*, or any other of his younger ſons, ſhall attain " the age of 21 years, which ſhall firſt happen; and in caſe " he ſhall have no younger ſon that ſhall live to attain the

" ſaid

" ſaid age, but ſhall have only one ſon that ſhall live to " attain the ſaid age, then until ſuch only ſon ſhall attain the " ſaid age, in truſt that the clear rents, iſſues, and profits of " the premiſes, after all charges and reparations deducted " (except my now dwelling-houſe at *Ivelcheſter*, and the " garden and orchard thereto belonging, which I will ſhall " be enjoyed by him for his own uſe during the time above " mentioned), be preſerved and improved; and the ſame, " with the produce thereof, I will ſhall be laid out and em- " ployed in manner as is hereinafter directed with regard to " the overplus of the perſonal eſtate. And when and as " ſoon as my ſaid nephew *John Lockyer*, or any other of " the younger ſons of my ſaid brother *Thomas Lockyer*, " born or to be born, ſhall attain the age of 21 years, then " I give my ſaid dwelling-houſe, orchard, and garden, and " all other my ſaid lands and hereditaments, thus charged as " aforeſaid, *unto my ſaid nephew* John Lockyer, *or unto ſuch* " *other ſon as for the time being ſhall be a younger ſon of my* " *ſaid brother* Thomas Lockyer, *and ſhall firſt attain his ſaid* " *age of* 21 *years, and to the heirs and aſſigns of ſuch younger* " *ſon for ever:* but if my ſaid brother *Thomas Lockyer*, ſhall " have but one ſon that ſhall live to attain the ſaid age, then " I give the ſame unto ſuch only ſon, his heirs and aſſigns " for ever. And in caſe my ſaid brother *Thomas Lockyer*, " ſhall have no ſon that ſhall live to attain the age of 21 " years, then I give the ſame unto my ſaid brother *Thomas* " *Lockyer*, his heirs, &c." The teſtator died, leaving the ſaid *Thomas Lockyer* his brother his heir at law, and *Joſeph Tolſon Lockyer*, and *John Lockyer*, the two ſons of *Thomas Lockyer*, living at the time of his deceaſe, and who were the only iſſue of the ſaid *Thomas Lockyer*. *John Lockyer*, the younger ſon, died under 21 years of age. *Joſeph Tolſon Lockyer* married *Maria Perry*, the leſſor of the plaintiff, and on the 26th of September, 1759, made his will in the follow- ing words; " *All ſuch worldly eſtate, of what nature, or kind ſoever, whether in poſſeſſion, remainder, or reverſion, that I ſhall die ſeiſed or poſſeſſed of, intereſted in, or entitled to, in- veſted in, or ſhall belong to me at my deceaſe, whereſoever or howſoever, in any manner or wiſe, I do give, deviſe, and be- queath, and every part and parcel thereof, fully, wholly, and abſolutely, unto my wife* Maria Lockyer, *to be by her, her executors, adminiſtrators, and aſſigns, peaceably and quietly held, occupied, and enjoyed for ever, free from the claims or demand of any other perſon or perſons whatever, out of, from, or to, the ſame, or any part.*" *Joſeph Tolſon Lockyer* died in March, 1765: *Thomas Lockyer*, the father of *Joſeph Tolſon Lockyer*, entered into poſſeſſion of the premiſes on the death of *John Lockyer*, the original teſtator, and continued in poſſeſſion till his death in 1785; when the defendants obtained poſſeſſion.

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—THREE QUESTIONS were made in this case. 1st. Whether there was a vested interest in *Joseph Tolson Lockyer?* 2dly. Whether, if it were contingent, it was devisable? 3dly. Whether it passed by the will of *Joseph Tolson Lockyer?* LORD LOUGHBOROUGH, CH. J. delivered the opinion of the Court. The discussion of the first question is unnecessary; for taking it to be a springing contingent executory use in *Joseph*, we are all of opinion that it was devisable, and passed by his will.—The case of *Selwyn* v. *Selwyn*, has determined this point; and we think ourselves bound by that determination, confirmed as it is by the case of *Moor et Ux.* v. *Hawkins*, in chancery, before Lord *Northington*, in the year 1765, which was this: "*James Grubb* devised all his real estates, "in trust for his son *James*, and if he should die without "issue under age, then, that all his estates should go to *Coch-* "*ran*, his heirs and assigns." *Cochran* devised, "all the "estates whereof he was seised in possession, remainder or "reversion, to the plaintiff, and died in the life-time of *James* "*Grubb* the son, who afterwards died under twenty-one "and without issue." On a bill brought by the devisee of *Cochran*, a question was made, whether the possibility given to *Cochran* was devisable? Lord Chancellor said, "I have "never had any doubt, since I was twenty-five years old, "but that these contingent interests were devisable, notwith- "standing some old authorities to the contrary. I sent the "question however into the king's bench, in the case of "*Selwyn* v. *Selwyn*, for the satisfaction of the parties, and "the certificate of the judges in that case implies, I think, "that they agreed with me in this opinion. Upon which "the Solicitor-general *De Grey* and Mr. *Skinner* waived "all further argument on the other side, and Lord *North-* "*ington* added, this argument is properly withdrawn, as the "point is settled and ought not to be shaken. It is a liberal "and right determination."

Judgment for the lessor of the plaintiff; but postea stayed till the event of a writ of error, which the defendants meant to bring, should be known, on an undertaking, to account for the mesne profits from the day of the demise.

Jones *et al.* v. Roe, Lessee of Perry in error, from C. B. Hil. Ter. 29 Geo. 3. B. R. 3 *Ter. Rep.* 88.

The defendants having removed the record in the foregoing case into B. R. by a writ of error, the cause was fully argued there, after which, the judgment of the Court of C. B. was unanimously affirmed.—Lord KENYON, Ch. J.—It is high time that this question should be understood to be completely at rest: it affects a great deal of the real property in this country; and miserable indeed would be the state of property here, if such a question as this still remained unsettled. If we consider the statute of wills, which first gave a power of disposing of real property by devise, it is matter of astonishment that this question should ever have arisen; *for it enables persons*

*perſons having any manors, lands, &c. to deviſe*; which muſt mean *having an intereſt in the lands.* There are two kinds of poſſibilities; the one, *a bare poſſibility*; that which the heir has from the courteſy of his anceſtor, and which is nothing more than a mere hope of ſucceſſion. Such a poſſibility, undoubtedly, is not the object of diſpoſition; for if the heir were to diſpoſe of it during the life of the anceſtor, though it afterwards devolved on him from his anceſtor, ſuch diſpoſition would be void. The other, *a poſſibility, or contingency*, like the preſent, and which is widely different from the former. Now, in order to ſee whether this ſort of contingency be or be not deviſable, let us conſider ſome of the analogous caſes. Suppoſe an eſtate be limited to *A.* for life, remainder to *B.* for life, and that the ultimate reverſion in fee was given to another; it never was doubted but that ſuch a reverſion was deviſable. That was not doubted by Lord Ch. J. *Holt*, in *Broncker* v. *Coke*, 2 *Eq. Caſ. Abr.* 296. 3. nor in *Brett* and *Rigden*, *Plowd.* 341. But it is ſaid that this, which depended on an executory ſpringing uſe, is not the ſubject of a deviſe. Undoubtedly the ſtatute of wills had been paſſed ſome time before any queſtions aroſe on executory deviſes; for they took riſe in Queen *Elizabeth*'s time, and aroſe very rarely for ſome time afterwards. When they did, it was decided by degrees that they were deſcendible, releaſable, and aſſignable; but it is contended that they were not deviſable. But it is difficult to aſſign any reaſon why they ſhould be capable of diſpoſition by one mode of conveyance, and not by another. It is ſaid that a *choſe in action* is only aſſignable in equity: but equity will only interfere when a perſon claims for a valuable conſideration paid, and not between volunteers: and in thoſe caſes *equitas ſequitur legem.* This queſtion however, does not depend upon reaſon by analogy to other caſes, or an abſtract reaſoning. The caſe of *Goodtitle* d. *Gurnel* v. *Wood*, *Tr.* 14 *Geo.* 2. *C.B.* cited in the argument in *Selwyn* v. *Selwyn* by Mr. *Norton*, was a deviſe to *A.* and if he dies before 21, then to *B.* and his heirs. *B.* died, and then the contingency happened by the death of *A.* before 21. *Willes*, Ch. J. ſaid, "The queſtion is, whether an executory deviſe "be tranſmiſſible? Moſt of the old caſes which hold that "they are not deviſable, were before executory deviſes were "well eſtabliſhed; but that doctrine is now exploded. "Executory deviſes are not naked poſſibilities, but are in "the nature of contingent remainders; and there is no "doubt but that ſuch eſtates are tranſmiſſible, and *conſe-* "*quently deviſable.*" Here then the Chief Juſtice gave a clear opinion that a poſſibility was deviſable. That it is alſo tranſmiſſible appears from the caſes of *King* v. *Withers*, *Rep. Temp. Talb.* 117. and *Marks* v. *Marks*, 1 *Strange*, 132.

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And the caſe of *Selwyn* v. *Selwyn* is a very ſtrong authority on the queſtion in this caſe. I therefore think the judgment of the court of Common Pleas muſt be affirmed, and ſincerely hope that this point will be now underſtood to be perfectly at reſt. ASHHURST, J.—There are ſeveral caſes, which, though not on the ſame point, go the length of ſupporting the doctrine, that contingencies like the preſent are deviſable. It was held in ſome of the caſes that an intereſt of this kind is aſſignable, in others that it is tranſmiſſible, and that it is an hereditament; and if ſo, it follows that it is alſo deviſable. The doubt appears to have ariſen on the word "*having*" in the ſtatute of wills; and the old caſes determined that a contingency like the preſent was not the ſubject of a deviſe. But that doctrine has been exploded in all the modern caſes. And it is ſtrange that in former times the Courts ſhould have been governed by ſuch narrow reaſoning, when they were conſtruing this act of parliament. For the plain meaning of the ſtatute is, that *every perſon who has a valuable intereſt in lands ſhall have the power of diſpoſing of it by his will.* BULLER, J.—The ſhort queſtion is, *Whether the intereſt which a perſon takes by virtue of an executory deviſe, be or be not deviſable?* From the time when executory deviſes were firſt known in the law, they have been attacked in every poſſible ſhape: and yet it is obſervable that the attack has, as often as it has been made, in modern times at leaſt, always failed. The true reaſon why they have been thus attacked is to be found in every modern caſe which treats of the ſubject, namely, that in early times when the queſtion was firſt diſcuſſed, the nature of an executory deviſe was not underſtood. It was firſt contended, that an executory deviſe was not tranſmiſſible; then, that it was not aſſignable; then, that it was not deſcendible; and, laſtly, that it was not deviſable. But if it be ſuch an intereſt as is deſcendible, it ſeems ſtrange to ſay that it is not alſo deviſable. They muſt both be governed by the ſame principle. It was held to be deſcendible, becauſe the perſon taking it has an intereſt in the lands which is known to the law, and will deſcend if the anceſtor does not diſpoſe of it; then if he has that intereſt, he has a right to diſpoſe of it by his will. It is a ſound diſtinction, which has been taken by my Lord Chief Juſtice, between a *bare* poſſibility, and a poſſibility *coupled with an intereſt.* The caſes on this ſubject have been uniformly determined the ſame way for nearly fifty years paſt. The caſe of *Goodtitle* d. *Gurnell* v. *Wood* was 49 years ago in the Common Pleas. The next in order was that of *Selwyn* v. *Selwyn* in this court; *and the opinion at the end of that caſe, was not the opinion of Sir* James Burrow *himſelf, but of the Court.* It has been openly acknowledged by Lord *Mansfield*, and I have had repeated opportunities of hearing

hearing it from him in private, that he has given to Sir *J. Burrow* his own note and opinion of a caſe, which he could not deliver publicly in court; for it was not at that time the practice of this Court to give their opinions here in caſes which came from the court of Chancery. This note at the end of that caſe ſhews decidedly what was the opinion of the Court: but even if there were any doubt about it, we find that, in *Roe* d. *Noden* v. *Griffiths* (*infra*), Lord *Mansfield* declared that he was prepared (in the former caſe) to have ſhewn, with the concurrence of the whole Court, that contingent, ſpringing, and executory uſes, were deſcendible, and alſo deviſable. Then the counſel for the plaintiffs in error endeavoured to ſhew, on the forms of pleading, that this was not a deviſable intereſt. The general rule of pleading is, that if you ſhew a particular eſtate, you muſt ſhew the commencement of it, and a ſeiſin in fee of the perſon laſt ſeiſed. In this caſe the mode would be this; that the deviſor was ſeiſed in his demeſne as of fee; that he deviſed (*prout* the will), by which it appears that *J. Lockyer* took an intereſt in the eſtate by an executory deviſe; that he, being ſo entitled by virtue of the will, deviſed all his right and intereſt, *&c.* that the meſne eſtates had failed, and that the ſecond deviſee became entitled, *&c.* This mode of pleading is not liable to any objection, when it is ſtated that he had a deviſable intereſt. GROSE, J.—This queſtion depends on the ſtatutes of wills; and I have no doubt but that this, which is now claimed, was a deviſable intereſt. The fourth ſection of the 34 & 35 *H.* 8. *c.* 5. which is explanatory of the 32 *H.* 8. *c.* 1. declares that all perſons having a ſole eſtate or *intereſt* in lands, *&c.* may deviſe: This does not include a *bare poſſibility, or hope of ſucceſſion, but a poſſibility, accompanied with an intereſt.* The idea which has been entertained by ſome perſons of the profeſſion, that ſuch a contingency as the preſent was not deviſable, may be traced from the caſe of *Biſhop* v. *Fountain*, 3 *Lev.* 427.; there lands were deviſed to *Fountain* in fee in truſt to pay an annuity to the deviſor's daughter *Mary*, and, if ſhe had children, to convey ſucceſſively to thoſe children; for want of ſuch iſſue the lands were directed to be conveyed to the eldeſt ſon of his nephew *J. Cater*, and the heirs of ſuch eldeſt ſon; and an annuity was given to ſuch eldeſt ſon till the eſtate ſhould come to him: but if he claimed any thing during the life of *Mary*, or any of her iſſue, then both the father and ſon were to be excluded from having any thing out of his eſtate. The eldeſt ſon of *J. Cater* was *Anthony*, who had two ſiſters, the defendants. *Anthony* died, and left iſſue *John* his ſon, who in the lifetime of *Mary* deviſed to the plaintiff, and died without iſſue. *Mary* afterwards

wards died without iſſue. The Court held that *John* had no eſtate deviſable, but a mere poſſibility, during the life of *Mary* or any of her iſſue. But the reaſons are not mentioned why it was to be conſidered as a mere poſſibility, unleſs by recurring to the above clauſe, which might be conſidered as rendering the deviſe to the eldeſt ſon of his nephew depending upon the condition of his not claiming during the life of *Mary* or any of her iſſue, and conſequently contingent until that condition was performed, which could not be till the death of *Mary* without iſſue. He would rather have taken an equitable remainder in fee expectant on the death of *Mary*, and the failure of iſſue of her body, which would have been a veſted eſtate, and conſequently deviſable. *The ſtatute of wills was not at all touched upon or conſidered by the Court; and the only way in which I can account for this doctrine having been afterwards adopted by* Lord Chief Juſtice PARKER, *and* Lord HARDWICKE, *was becauſe they conſidered it as a point already determined, and therefore did not enter into the reaſons on which it could be ſupported.* Now if the caſe in *Levinz* cannot be conſidered as law, the foundation, on which the other caſes were built, is deſtroyed. And the modern caſes have decided the other way; on the authority of which I think the point is now ſettled. And even if it were not already ſo decided, I think it ſhould be ſo on the words of the ſtatutes.—Judgment affirmed.

Thruſtout, *ex dim.* Gower, *v.* Cunningham, Mic. Ter. 16 Geo. 3. C.B. 2 *Black.* 1046.

On the 29th of Auguſt, 1733, the teſtator, *Thomas Gower*, ſurrendered the copyhold premiſes in queſtion to the uſe of his will.—On the 2d of November, 1744, he ſurrendered the premiſes, to the intent that the lord ſhould regrant them to the uſe of the ſaid *Thomas*, and his heirs, till his marriage with *Sarah Burroughs*, and then to the uſe of the ſaid *Thomas* and *Sarah* for their reſpective lives, remainder to the heirs of their two bodies, remainder to the right heirs of *Thomas*, but no admiſſion was had by *Thomas* under this ſurrender. On the 7th of October, 1757, the teſtator, *Thomas Gower*, deviſed the premiſes to *Sarah* his wife for life, remainder to *John Gower* his youngeſt ſon, and *Martha* his wife, the leſſor of the plaintiff, for their reſpective lives. It was contended that, by the ſurrender in 1744, every thing paſſed out of *Thomas Gower* the deviſor, and that there was, therefore, an end of the ſurrender to the uſe of his will in 1733, and never having been admitted, nor of courſe ſurrendered, to the uſe of his will; in conſequence of the new limitation in 1744, nothing paſſed by the will of 1757 (1 *Leon.* 101). BUT THE COURT were unanimouſly of opinion, that the old uſe in fee, which *Thomas Gower*, the teſtator, ſurrendered to the uſe of the will, was not taken out of him by the new limitations and ſurrender of 1744, and, therefore, that he had no occaſion to be re-admitted to it, for the purpoſe of ſurrendering to the

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uſe of his will, but ſhould be conſtrued to be in, as of his old eſtate.

## *Who may take.*

Lands, &c. are deviſed to *B.* for life, and, after his deceaſe, *to all and every ſuch child or children of* B. *as ſhall be living at the time of his deceaſe:* held that a poſthumous child of *B.* ſhall ſhare equally with thoſe who were born in his life-time. An infant *en ventre ſa mère* is conſidered as born, for all purpoſes which are for his benefit.—The teſtator, *William Pearce Clarke*, being ſeiſed in fee of the premiſes in queſtion, by his will, dated the 27th of February, 1782, devised the ſame "to his brother, *Henry Clarke*, and his aſſigns, *for and during* "*the term of his natural life*, and from and after the deceaſe "of his ſaid brother, *Henry Clarke*, to the uſe and behoof of "*all and every ſuch child or children, whether male or female, of his ſaid brother*, Henry Clarke, *as ſhould be living at the time of his* deceaſe (other than and except *Bridget*, his, the "teſtator's, niece (1)), *as tenants in common, and not as joint* "*tenants*, and of the ſeveral and reſpective heirs and aſſigns "of ſuch child or children for ever." The teſtator died on the 1ſt of May, 1782, leaving his brother, *Henry Clarke*, ſurviving, who died on the 21ſt of October, 1782, leaving his widow, *Elizabeth, pregnant at the time of his death*, who was delivered of a daughter, *Harriet Clarke*, on the 23d of May, 1783. THE QUESTION was, whether an infant *en ventre ſa mère* at the time of the deceaſe of the father could be conſidered as a child *living* at his deceaſe?—LORD CH. J. EYRE: It is plain on the words of the will, that the teſtator meant that all the children whom his brother ſhould leave behind him ſhould be benefited: but, independent of this intention, I hold that an infant *en ventre ſa mère*, who, by the courſe and order of nature, is then living, comes clearly within the deſcription of "children living at the time of his deceaſe." BULLER, J. in equity, there are two claſſes of caſes on this ſubject; the firſt, where the bequeſt is in the nature of a portion or proviſion for children, and there an after-born child takes his ſhare with the reſt, of which claſs is the caſe of *Millar* v. *Turner*, 1 *Veſey*, 85: the ſecond, where the bequeſt ariſes from ſome motives of perſonal affection, and there it is confined to children actually in exiſtence. Here the bequeſt is not confined to children living at the death of the teſtator, but is kept open till the death of his brother. It ſeems indeed now ſettled, that an infant *en ventre ſa mère* ſhall be conſidered, generally ſpeaking, as born for all purpoſes, for his own benefit, *Lancaſhire* v. *Lancaſhire*, 5 *Term. Rep.* B. R. 49. (2). And, in a

Doe, on the demiſe of Clarke, v. Clarke, *et al.* Hil. Ter. 35 Geo. 3. C. B. 2 *Hen. Black.* 399.

(1) His ſaid brother's daughter by a firſt wife.
(2) See this caſe under title WILLS.

senſible treatiſe lately publiſhed, *Watkin*'s Law of Deſcents, 142. after a diſcuſſion of the intereſts of poſthumous iſſue, the whole is well ſummed up by ſaying, "It is now laid "down as a fixed principle, that wherever ſuch conſidera- "tion would be for his benefit, a child *en ventre ſa mère* "ſhall be conſidered as abſolutely born."—Heath, J. and Rooke, J. agreed. Lord Ch. J. EYRE: The two claſſes of caſes in equity proceed on a diſtinction which has always appeared to me extremely unſatisfactory, and unfit to be the ground of any deciſion whatever.—Poſtea to the plaintiff.

John Thomas, on the ſeveral demiſes of Llewellyn Evans and Elinor his Wife, J. William and Elizabeth his Wife, R. Davies and Mary his Wife, George Thomas and William Davies, *v.* Mary Thomas, an infant, by D. Evans her guardian, *et al.* Ea. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 671.

If a deviſe be to *A.* by name, with a deſcription annexed, not applicable to *A.* but ſhewn by parol evidence to be applicable to *B.* ſo that it is uncertain which was intended, the deviſe is void, and the heir at law ſhall take; and no parol evidence can be admitted to ſhew, that previous to the making of his will, the deviſor had declared that he meant to leave the premiſes to *A.* But parol evidence may be admitted, to ſhew that the name of *A.* was inſerted, by miſtake, for the name of *B.*—The teſtator, *George Evans*, by his will, after ſeveral deviſes of land and the profits of land, proceeds thus: "Item, I give to my four daughters, *Margaret*, *Anne*, *Mary*, "and *Elizabeth*, one ſhilling each. *Item*, I give to my three "grandchildren of Llanteway, *Anne*, *Elizabeth*, and *Elinor*, "40l. each. *Item*, I give to my granddaughter, *Elinor* "*Evans*, of Merthyr pariſh, 40l. *Item*, I deviſe to my "granddaughter, *Mary Thomas*, of Llechlloyd, in Merthyr "pariſh, the reverſion of the houſe in Water-ſtreet (the "premiſes in queſtion), the ſaid houſe being to continue in "the poſſeſſion of my wife, *Elizabeth Evans*, during her "widowhood." At the time of his death, the deviſor had a granddaughter of the name of *Elinor Evans*, one of the leſſors of the plaintiff, who lived at Llechlloyd, in Merthyr pariſh, and a great-granddaughter, *Mary Thomas*, the defendant, an infant of about the age of two years, the granddaughter of his eldeſt daughter, *Margaret*, by her ſecond huſband *John Thomas*, being the only perſon of that name in the family; but it appeared that ſhe lived at Green-caſtle, in the pariſh of Llangain, ſome miles from Merthyr pariſh, in which latter pariſh ſhe had never been in her life. The other leſſors of the plaintiff were the heirs at law of the deviſor. At the trial the plaintiffs' counſel propoſed giving parol evidence, to ſhew a miſtake in the name of the deviſee; that, when the will was read over to the deviſor by a Mr. *Phillips* who drew it, and who is ſince dead, the deviſor ſaid, that *there was a miſtake in the name of the woman to whom the houſe was given*; *that* Phillips *then ſaid he would rectify it, but the deviſor anſwered, that there was no occaſion, as the place of abode and the pariſh would be ſufficient.* To this evidence the defendant's counſel objected, contending that there was not that *ambiguitas latens* which authoriſed the

the receiving of parol evidence. That, if the doubt had ariſen from there being two perſons of the name of *Mary Thomas*, parol evidence might be admitted to explain which of them was meant; but that here the inaccuracy of the deſcription was not ſuch as to raiſe a ſufficient degree of doubt to let in the parol evidence, *for granddaughter would properly enough ſignify great-granddaughter*; and the miſtake of the reſidence was only in a matter of deſcription which was perpetually varying, and could not raiſe any doubt where a name not applicable to any other than the defendant was uſed, which is a circumſtance of the greateſt weight in theſe caſes. But *Lawrence* J. received the evidence, ſubject to the opinion of the Court on its admiſſibility, in caſe the jury ſhould be of opinion that the *name* Mary Thomas *had, by miſtake, been inſerted inſtead of* Elinor Evans; but the jury being of opinion that there was no ſuch miſtake, they were directed to find for the defendant on the firſt count, laying the demiſe from *Elinor Evans* and her huſband, which they accordingly did; and, conſequently, any further conſideration of this point became unneceſſary. The defendant's counſel then offered *evidence of declarations made by the deviſor at other times, previous to the making of his will, expreſſive of his regard for his great-granddaughter the defendant, and of his intention of giving her the Star in Water-ſtreet.* This evidence was rejected by the judge, who thought that nothing *dehors* the will could be received to ſhew the intention of the deviſor, which could only be collected from the words of the will itſelf, after the removal of any latent ambiguity there might be in the deſcription of perſons, or other terms made uſe of in the will. And the jury, under his direction, found for the plaintiff, on the ſeveral counts which were on the demiſes of the heirs at law, on the ground that the deviſe was void for uncertainty; the defendant having liberty to move the Court to enter a nonſuit if they ſhould be of a different opinion, and ſhould think that the great-granddaughter, *Mary Thomas*, might take under the will.—A rule to ſhew cauſe having been obtained to that purpoſe, and cauſe ſhewn. Lord KENYON, Ch. J. It muſt be admitted that the heirs at law are not to be diſinherited by conjecture, but only by expreſs words, or neceſſary implication. When the rule for a new trial was moved for, I alluded to the maxim that *falſa demonſtratio non nocet*, but in doing ſo I wiſhed that the ſenſe of that rule ſhould be attended to; I have always underſtood that ſuch *falſa demonſtratio* ſhould be ſuperadded to that which was ſufficiently certain before; there muſt *conſtat de perſonâ*, and if to that an inapt deſcription be added, though falſe, it will not avoid the deviſe. It has been a long eſtabliſhed rule, that where there is a *latent ambiguity* in a will, the parties may go into extrinſic evidence, to render that

certain, which, without the aid of ſuch evidence, is uncertain. But here the evidence given has itſelf raiſed the ambiguity. On the face of the will there is no uncertainty; one perſon, namely, *E. Evans*, is named, who is the granddaughter of the deviſor, and of Llechlloyd, in Merthyr pariſh; two of the deſcriptions, therefore, in the conteſted deviſe, apply to her; but inſtead of her name (it was ſaid) that that of *Mary Thomas* was inſerted; it turns out that *Mary Thomas* is not the granddaughter, but the great-granddaughter of the deviſor, and that ſhe does not live at Llechlloyd, in Merthyr pariſh, the place mentioned in this clauſe. Then do we arrive at any certainty reſpecting the perſon of the deviſee? If we do, it muſt decide the caſe; but if the parol evidence has introduced uncertainty reſpecting the deviſee, then the heirs at law muſt take. The caſe of *Beaumont* v. *Fell*, 2 *P. Wms.* 141. might have been referred to, where the name of the legatee was miſtaken; the teſtator gave a legacy to *Catherine*; it turned out that there was a perſon whom he frequently called *Gatty*, and not according to her real name, which was *Gertrude*; and when parol evidence of that was received, it left no doubt but that the teſtator meant *Gatty*. So here it was proper to let in the parol evidence to remove the latent ambiguity, but when received it leaves the queſtion in uncertainty. If there had been no perſon anſwering the deſcription of granddaughter, living at Llechlloyd, in Merthyr pariſh, I ſhould have rejected the deſcription, and have ſaid, that the deviſe applied to *Mary Thomas*: but it appears that there is another perſon anſwering that part of the deſcription, who is alſo an object of the teſtator's bounty. Then, as there are two parts of the deſcription not anſwering to *Mary Thomas*, who is named in this clauſe in the will, we are left to conjecture who was meant by the deviſor: but the law will not allow an heir at law to be diſinherited by conjecture. With regard to the other queſtion reſpecting the rejection of evidence: it ſeems that the learned judge did right in rejecting it, the ſuppoſed declarations having been made by the teſtator long before the will was made; though, had they been made at the time of making the will, I ſhould have thought them admiſſible in evidence.—Ashhurst J. and Grose J. agreed. Lawrence J.—I received parol evidence for one purpoſe, and rejected it for another, on this ground; I thought that I could not receive parol evidence of declarations of the teſtator, relative to his intention made before the will, but that parol evidence might be received to remove a latent ambiguity, not appearing on the face of the will, or to clear up a miſtake of a name in the will. As the deſcription in the clauſe in queſtion anſwered to *E. Evans*, and as it was ſtated that the deviſor, at the time of making his will, ſaid, that he meant that *E. Evans* ſhould take under it,

it, I permitted the counsel for the plaintiffs to go into parol evidence, to see whether or not the name of *Mary Thomas* were, by mistake, inserted for that of *E. Evans*. And, in so doing, I found myself warranted by former decisions, 8 *Vin. Abr.* 312. *pl.* 29, and 2 *Vez.* 216. With regard to the evidence which was rejected, I thought that a will could not be construed by any declarations made by the testator before the making of the will; but that his intention must be collected from the words of the will, or from what passed at the time of making it. There is no doubt but that the parol evidence to remove the latent ambiguity in the will was properly received; but when it was received, it became extremely doubtful who was intended to take. I perfectly agree in the opinion given by my Lord Chief Justice on this point: if the parol evidence had clearly shewn who was intended to take, that person would have been entitled to our judgment: but if the parol evidence does not remove but raises the doubt, then the title of the heirs at law must prevail. In many cases, the description of the devisee is of importance; suppose a devise of a house to *A.* by name, on condition that he keep up the house, &c. and it turned out that *A.* was of too tender an age to keep house, the person so named could not take, because it is evident from the description, that the devisor did not mean that person so named. If there had been no person answering the description in this clause, *Mary Thomas*, who is named, might have taken, and the description might have been rejected: but here the description, both as to the degree of relationship and as to the place of residence, does apply to another person; therefore it is uncertain who the devisor meant, and, consequently, the heirs at law must take.—Rule discharged.

A devise to the heir of *M.* may be good as *designatio personæ*, and he may take in the life-time of *M.*—The testator, *Richard Brooking*, grandfather to the lessor of the plaintiff, on 17th of August, 1753, "for preventing strife after his decease," devised *(inter alia)* certain annuities. And subject to the said annuities, he gave the premises in question to his daughter, *Margaret White*, for two years, from and after his decease, with remainder to *Richard Brooking*, his son (if then living), for ninety-nine years, if he so long lived; and subject to such ninety-nine years term, he devised the premises to his son, *Richard Brooking*, *his heirs male*, AND TO THE HEIRS OF HIS DAUGHTER, *Margaret White*, jointly and equally, to hold to the heirs male of *Richard*, lawfully begotten, and to the heirs of *Margaret*, jointly and equally, and their heirs and assigns for ever. And, for want of heir-male, lawfully begotten of the body of the said *Richard*, at the time of his decease, he devised the premises, charged as aforesaid, TO THE HEIRS AND ASSIGNS OF THE SAID MARGARET, LAWFULLY

Goodright, on the demise of Brooking, *v.* White, Ea. Ter. 15 Geo 3. C. B. 2 *Black. Rep.* 1010.

LAWFULLY BEGOTTEN OF HER BODY, *to hold to the heirs and aſſigns of the ſaid* Margaret *for ever.* For the leſſor of the plaintiff, who was the ſon and heir of *Richard Brooking*, the ſon and deviſee, it was argued, that *the deviſe to the heir of Margaret*, in the event that had happened, was void; for, at the expiration of the particular eſtate by the death of the deviſee, *Richard*, the ſon, living the daughter *Margaret*, nobody could take as the heir of *Margaret*; for *nemo eſt hæres viventis.* On the other hand, it was inſiſted for the defendant, that, this being *deſcriptio perſonæ*, the word *heir* is equivalent to *iſſue*, and therefore the ſon of *Margaret* might take, as to one moiety of the premiſes. DE GREY, Ch. J.—THE QUESTION is, Whether here is a ſufficient deſignation of the perſon, to make the ſon of *Margaret* take as her heir, living the mother? Two hundred years ago it might have been thought not ſufficient, becauſe the deſcription is not legally and technically true. There are caſes and *dicta* to this amount in *Archer*'s caſe. *Co. Litt.* and *Dyer.* But within a century paſt, a more liberal conſtruction of the words of a teſtator has prevailed; and they have been generally taken in their popular ſenſe, which is moſt likely to have been his meaning. In 29 *Car.* 2. 2 *Jon.* 99 *heirs of the body* now living were ſettled to be good words of purchaſe, where there was an heir apparent in being, and known to the teſtator. S. C. 2 *Lev.* 232. and other cotemporary reporters. In *Long* and *Beaumont*, *P. Wms.* 229. the ſame point determined: words of remainder were to the *heirs male of the body of his aunt*, whom he knew to be living, and to have ſons, having left both her and them ſpecific legacies. In the preſent caſe, the intent of the teſtator is clear, that the ſame favour ſhould be extended to the heirs of *Margaret*, as to the heirs male of the body of *Richard.* He took notice that his daughter was living, by leaving her a term, and meant a preſent intereſt ſhould veſt in her heir, that is, her heir apparent, during her life: therefore the leſſor of the plaintiff is entitled to no more than one moiety of the premiſes—*Gould*, *Blackſtone*, and *Nares*, Juſtices, were of the ſame opinion.

Saunders, *et al.* v. Lowe, Ea. Ter. 15 Geo. 3. C. B. 2 *Black.* 1014.

The teſtator, *Henry Saunders*, deviſed "to *Cole* and *Lowe*, "and their heirs, his eſtate at Tenbury, in truſt to receive "the rents and profits during the lives of his four daughters, "and the ſurvivor of them, and AFTERWARDS *to pay ſuch* "*rents and profits to and amongſt ſuch ſurvivor, and the child* "*and children of ſuch my daughters, who ſhall firſt happen to* "*die*, and from and immediately after the deceaſe of the ſur-"vivor of my ſaid four daughters, *then* my will is, that they do "ſell the premiſes, and pay the monies ariſing therefrom, in "four equal parts, to and among the ſeveral children of my "ſaid reſpective four daughters, ſhare and ſhare alike." In a ſubſequent clauſe, he bequeaths the reſidue of his goods and chattels

chattels among all his children equally, except his daughter *Hester*, "who is only to receive, in full satisfaction of what "is before bequeathed her, 3s. per week during her life, or "until her distributive share be exhausted out of my estate "at Tenbury, and personal effects for her sole and separate "use, exclusive of her husband." THE COURT were clearly of opinion, that the rents and profits should be divided among the four daughters immediately, they being all living; and that the same ought not to be left to accumulate, and, after the decease of three of the daughters, be divided among the survivor, and the children of those who were dead, for the testator never meant to leave all his daughters without any provision, till three of them were dead, and then capriciously leave it to chance, which of them should survive and share the accumulated profits; and that this was clear from the subsequent clause, which shewed, that his daughter *Hester* was, in his opinion, intitled to a distributory share of his estate at *Tenbury*, during her life.

Baldwin v. Karver, *et al.* Tr. Ter. 15 Geo. 3. B R. *Cowp.* 309.

The testator, *Richard Ashwin*, being seised and possessed of a considerable real and personal estate, by his will, after making provision for his wife, and leaving certain legacies, divided the residue of his estate thus: "I do hereby give and "bequeath all the rest, residue and remainder of my personal "estate and *effects whatsoever*, not hereinbefore or hereinafter "bequeathed unto my said wife, *Sarah Ashwin*, *Thomas* "*Taylor*, and *John Karver*. In trust, nevertheless, that "they, my said trustees, and the survivor and survivors of "them, and *the heirs*, executors, and administrators of such "survivor, do and shall stand seised and possessed of the said "lands, premises, and personal estate and effects, *to and for* "*the use* and behoof of *the heirs male of the body of* my ne-"phew, *John Ashwin*; and in default of such issue male, "then to the use and behoof of the heirs male of the body of "my nephew, *Richard Ashwin*; AND IN DEFAULT OF "SUCH ISSUE, *then to and for the use and behoof of all and* "*every the grandchildren of my late brother, John Ashwin*, "deceased, *and the grandchildren of my late sister, Sarah* "*Morris*, deceased, TO HOLD all and singular the said lands "and premises to them, the said grandchildren, and their "heirs, as tenants in common, and not as joint tenants; *and* "*my personal estate and effects to be equally divided between* "*them, share and share alike.*" By a codicil, bearing even date with the will, he directs the trustees "to pay and dispose "of all the interest, and produce, and increase, that shall, from "time to time, arise, or be made of his said real and per-"sonal estate, unto his said wife, *Sarah Ashwin*, and his "nephews, *John Ashwin* and *Richard Ashwin*, and to their "assigns, share and share alike, with survivorship, for and "during the term of their three natural lives." The two

nephews, *John Aſhwin* and *Richard Aſhwin*, died without iſſue, but there were *eight grandchildren*, viz. *two* of *Sarah Morris*, and *ſix* of *John Aſhwin*, living at the time of the teſtator's making his will: *a ninth*, a granddaughter of *John Aſhwin*, was born after the will, and before the teſtator died; and after his deceaſe, *twelve* more grandchildren of *John Aſhwin* were born, and all of them in the lifetime of *Richard Aſhwin*, the laſt ſurviving nephew. THE QUESTION WAS, Whether all, or any, and which of the grandchildren of the teſtator's late brother, *John Aſhwin*, and his ſiſter, *Sarah Morris*, deceaſed, were intitled under this deviſe? Lord MANSFIELD: All caſes on the conſtruction of wills, depend upon the particular penning of the wills themſelves, and the ſtate of the families to which they relate, taking alſo into conſideration ſome general rules to prevent property from being unalienable too long. A grandchild may mean one that a perſon may have at any diſtance of time, according to the manner in which the teſtator uſes the word. The great point in all caſes of this kind is, the time when the legacy is to veſt, for that is the period which the teſtator looks forward to, when he directs his property to paſs from one channel into another: here the teſtator does not conſider the grandchildren as immediate objects of his bounty, but only gives them a poſſibility, or a chance, after an indefinite dying of *John* and *Richard*, without iſſue male; he means them as another ſucceſſion, and therefore *all who were in eſſe* upon that contingency, are equally intitled. BUT THE DIFFICULTY is upon the limitation of the real and perſonal eſtate; the rule of law moſt undoubtedly is, that a deviſe to the heirs general or ſpecial of a man alive, is void: if the deviſe, therefore, to the heirs of the body of *John* is to be conſtrued an immediate deviſe, it is, of courſe, void. BUT ſuppoſe, by incorporating the will and codicil together, the deviſe of the real eſtate could be ſupported, it would become a queſtion, whether the ſubſequent limitation of the perſonalty was not too remote. THE COURT, entertaining their doubts, ordered notice to be given to the heir at law of the teſtator, and to the perſonal repreſentative, or next of kin of *John*, that they might be heard by their counſel, if they thought proper.—ADJORNATUR. Afterwards, no counſel appearing for him, Lord MANSFIELD, Ch. J. delivered the opinion of the Court upon the queſtion, as between the grandchildren, as follows: A doubt occurred upon the argument, whether ANY of the grandchildren at all were entitled; *firſt*, in reſpect of the real eſtate, as being deviſed to the *heirs male* of *John*, who was alive at the death of the teſtator; and *ſecondly*, in reſpect of the perſonal eſtate, as being too remote. As to the firſt it was ſaid, that the codicil, by which the rents and profits are given to *Sarah*, *John*, and *Richard*,

*Richard*, during their lives, was made to obviate this objection; and, if ſo, they would take *a joint eſtate during their lives, with limitation in tail male to* John *and* Richard, with *remainder in fee to the grandchildren*, but in that caſe the ſubſequent deviſe of the perſonalty would be too remote; for *John*, as being the firſt tenant in tail, would take the abſolute property.—Upon the laſt argument it was ſaid, that the deviſe of the real and perſonal eſtate might be conſidered as a deviſe upon a double contingency, that is, in caſe *John* ſhould have a ſon living at his death, then to ſuch ſon, but if none, then to the grandchildren: *upon that way of ſtating it, it does occur, that the whole may be ſupported.* It is clear by the will, that nothing was meant to paſs to *John*, the anceſtor; the deviſe is to *the heirs male of his body*, but thoſe are followed by others, which ſhew that the teſtator meant to uſe them as *ſynonymous* to "*iſſue male*," for he goes on thus: *and in default of ſuch iſſue male.*—Suppoſing he did uſe them as *ſynonymous*, to be ſure the reaſonable conſtruction is, that he meant ſuch perſon as ſhould be iſſue male at the time of the death of *John*, and if he left no iſſue, then to the grandchildren. As to the question, *how many* of the grandchildren are to take, it muſt, in all caſes, depend upon the ſubject-matter of the will: the doctrine is very well laid down in the caſe of *Elliſon* v. *Airey*, 1 *Vez.* 114. "where "one deviſes *to children*, if it be an *immediate* deviſe, there it "ſhall only be intended to relate to children in *eſſe* at the "time." There is a material diſtinction between this ſort of bequeſt and a proviſion for children in marriage ſettlements, becauſe in them, as there are no children in *eſſe* before the marriage, and the number is uncertain, it muſt be ſuppoſed the benefit was intended equally for all; but if, in a will, a deviſe is limited *to children* by way of remainder, or upon a contingency, which, in the contemplation of the teſtator, *is uncertain when it may take place*, if it ever happens at all; then the ſame reaſon holds, why it ſhould not be confined to thoſe only who were alive at the time of making the will: *here the deviſe is a remainder after two eſtates tail.* Therefore we are clearly of opinion, that all the grandchildren in *eſſe*, at the time when the deviſe veſted, were equally entitled to take.

*A.* deviſed lands in truſt, to pay the rents and profits to his daughter (whoſe huſband was then living) for her life, notwithſtanding her coverture, and *not to be ſubject to any controul*, &c. *of her huſband*, nor liable to any debts which he *had* or *ſhould contract*; afterwards the diviſor made a codicil, *taking notice of the death of his daughter's huſband*, wherein he ratified and confirmed his ſaid will: held that the daughter was entitled, under this deviſe, to the rents and profits, &c. *free from the controul of any future huſband.*—The teſtator, *William Ley*, being

Beable *v.* Dodd, Ea. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 193.

being ſeiſed in fee, made his will, and thereby deviſed "*all* "*that his manor of Wrangaton*, &c. [deſcribing the premiſes] "*unto* Jacob Ley, *his heirs and aſſigns*, for and during the "natural life of his daughter, *Anne Churchward*; UPON "TRUST, nevertheleſs, that he, the ſaid *Jacob Ley*, his heirs "and aſſigns, ſhould, from time to time, *during the life of his* "*ſaid daughter*, Anne Churchward, *pay the rents, iſſues, and* "*profits thereof unto the ſaid* Anne Churchward, or unto "ſuch perſon or perſons, in ſuch parts and ſhares, and for "ſuch uſes, intents, and purpoſes, as the ſaid *Anne Church-* "*ward*, by any writing or writings under her hand, from "time to time, *notwithſtanding her coverture*, ſhould limit "and appoint, and not into her huſband's hands, nor to be "ſubject to any controul, miſmanagement, or diſpoſal of her "huſband; nor liable to any debts which he had or ſhould "contract, the ſame being deſigned by him for her ſeparate "uſe and benefit, and to be at her own diſpoſal, notwith- "ſtanding her coverture; with divers remainders over; "AND IN DEFAULT OF ISSUE OF THE SAID ANNE "CHURCHWARD, remainder *to the ſaid* Jacob Ley, *his* "*heirs and aſſigns, for and during the natural life of his* "*daughter*, Alice Fowler; *upon truſt, nevertheleſs, that he,* "*the ſaid* Jacob Ley, *his heirs and aſſigns, ſhould, from time* "*to time, during the life of the ſaid* Alice Fowler, *pay the* "*rents, iſſues, and profits thereof, unto the ſaid* Alice Fowler, "*or unto ſuch perſon and perſons, in ſuch parts and ſhares, and* "*for ſuch uſes, intents, and purpoſes, as the ſaid* Alice Fowler, "*by any writing or writings under her hand, from time to* "*time, notwithſtanding her coverture, ſhould limit and appoint,* "*and not into her huſband's hands, nor to be ſubject to any* "*controul, management, or diſpoſal of her huſband, nor liable* "*to any debts which he had or ſhould contract, the ſame being* "*deſigned by the teſtator for her ſeparate uſe and benefit, and* "*to be at her own diſpoſal, notwithſtanding her coverture*; "with remainder to the ſaid *Jacob Ley* and his heirs, for "and during the natural life of his ſaid daughter, *Alice Fow-* "*ler*, in truſt to ſupport and preſerve contingent re- "mainders, and from and immediately after the death of "the ſaid *Alice Fowler, remainder to the iſſue male of the ſaid* "Alice Fowler *in tail, remainder to her iſſue female*, with "ſeveral remainders over." *Anne Churchward*, in the will firſt named, at the time of making the ſame, *was married to one James Churchward*, and the ſaid *Alice Fowler* to one *John Fowler, and, between the time of making the ſaid will and the time of making the codicil hereinafter mentioned, the ſaid* John Fowler *died, leaving the ſaid* Alice *his widow*, who, after the death of the ſaid *William Ley*, intermarried with *Francis Thomas Rybot*. THE TESTATOR, *William Ley*, *made* and duly executed *a codicil* to his ſaid will, and *thereby*

*took*

*took notice of the death of the ſaid* John Fowler, *and ratified and confirmed the ſaid will, and all the gifts, deviſes, and bequeſts, matters and things therein contained, not thereby altered and revoked.* THE QUESTION WAS, WHETHER *the ſaid* Alice Rybot *is entitled to the rents, iſſues, and profits, of the premiſes in the pleadings mentioned, parcel of the manor of Wrangaton, free from the controul of her preſent huſband,* Francis Thomas Rybot? WILLES, J.—What eſtate *Alice Rybot* took under the will depends on the words of the will, from which the intention of the teſtator is to be collected. The eſtate is given to truſtees, "in truſt to pay the rents "and profits thereof to *Alice Fowler*, &c. notwithſtanding "her coverture, &c. and not to be paid into her *huſband's* "hands." The doubt ariſes on the words "*her huſband:*" whether they are reſtrained to her *preſent*, or any *future*, huſband. It being left indefinite, the Court muſt judge of the intention of the teſtator, which is to be found out by the words accompanying it. And it is made clear by the words which immediately follow: "the ſame being deſigned by "the teſtator for her ſeparate uſe and benefit, and to be at "her own diſpoſal, notwithſtanding her coverture." It was manifeſtly the intention of the teſtator, that ſhe ſhould have the eſtate, at all times, independent of *any* huſband. There was the ſame deviſe to the other daughter; and it is material to obſerve, that neither of the huſband's names is mentioned. By the ſubſequent words it is evident, that he looked to the poſſibility of her having a ſecond huſband; for in the limitations over, it is limited to the iſſue male of the daughter, remainder to the iſſue female, without confining it to the iſſue of that marriage; ſo that the children of any future marriage were to take under this deviſe. On the whole of the will, I am of opinion that the teſtator meant, that both his daughters ſhould take the eſtate, independent not only of their preſent, but of their future huſbands. Then as to the effect of the codicil: that is not making a new will, but republiſhing the old one. It recites that *J. Fowler* was dead, and ſtill he confirmed the will, which ſhews that he intended that Mrs. *Fowler* ſhould take the eſtate, independent of any future huſband: for he ſuffered the reſtriction ſtill to remain, that the eſtate ſhould not be liable to any debts "which her huſband had or *ſhould* contract" after the death of *Fowler*, her firſt huſband. Theſe latter words, therefore, can only relate to ſome future huſband. ASHHURST, J.—Taking this on the conſtruction of the will alone, it is very clear that the teſtator meant that this reſtriction ſhould not be confined to the preſent huſband, becauſe he has expreſsly excluded the huſbands of both his daughters from any controul over their reſpective eſtates; which ſhews a general jealouſy of any huſbands, and not

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any particular jealouſy with regard to *Fowler* alone. And he does not even mention either of their names. But this intention appears ſtill ſtronger from the words of the codicil; for having firſt taken notice of the death of *Fowler*, he then confirmed and ratified all the deviſes in the will, and ſtill continued the reſtriction with regard to their huſbands. This therefore was as much as if he had ſaid, that "even if there "were a doubt upon my meaning before, I now repeat theſe "words, and mean to extend them to any future huſband." So that whatever doubt there might be conſidering the will alone, it is removed by taking the will and codicil together. BULLER, J.—Whatever might be the conſtruction upon the will alone, yet taking both the will and the codicil together, it is clear that this reſtriction applies to any future as well as a preſent huſband. The names of the huſbands are not mentioned. The limitation to truſtees is during the life of the wife; this, therefore, muſt extend to any huſband ſhe may ever have. Whether the codicil is to be conſidered as a republication of the will, or as an explanation of the teſtator's former intention, it is equally clear. It has been compared to the confirmation of a deed, but there is nothing more unlike. In the caſe of a will, nothing paſſes till the teſtator's death. It is only to be conſidered as ſpeaking from that time. It may be altered whenever the party pleaſes; and therefore the codicil comes as a republication of every part which it does not alter. As where a man deviſes all his real eſtates, and afterwards ſells them, and purchaſes other lands, and then republiſhes his will, the will muſt be taken to relate to the after-purchaſed lands. Then taking this codicil as a republication of the will, it is impoſſible to raiſe a queſtion upon it; for the defendant's counſel are driven to a conſtruction which makes it abſurd, by ſaying that theſe words can only relate back to *Fowler*, there being no ſuch perſon in exiſtence at the time of ſuch republication. The intention of the teſtator clearly was, that his daughter ſhould enjoy the eſtate free from the controul of any huſband. Again, taking this codicil as explanatory of the will, it is equally clear, for he took notice in the codicil of the death of *John Fowler*; now if his intention had only been to have excluded *John Fowler* perſonally, the continuance of the reſtriction was nugatory after his death.—Judgment for the plaintiff.

Roe *ex dim.* Nightingale and Mary his Wife, *v.* Quartley and Conſtantia his Wife, Hil. Ter. 27 Geo. 3. B. R. 1 *Ter. Rep.* 630.

A deviſe to the right heirs of huſband and wife, is a deviſe to ſuch perſon as anſwers the deſcription of heir to both, namely, a child of both; and if no preceding eſtate be given to the father and mother, ſuch child ſhall take as a purchaſer. The teſtator, *Charles Blunt*, being ſeiſed in fee of the premiſes in queſtion, by a codicil to his will, deviſed the ſame "to *Heſter Read*, daughter of *Walter Read*, "and

" *and to the heirs of her body for ever*, and for default of " ſuch iſſue then to ſuch child or children as the wife of " *Walter Read* is now *enſient* with, and to the heirs of the " body or bodies of ſuch child or children, *and for default of* " *ſuch iſſue to the right heir of* Walter Read *and his wife for* " *ever.*" *Heſter Read* entered on the death of the teſtator, and died ſeiſed, without iſſue, inteſtate, and without having barred the entail, leaving *Mary Nightingale*, one of the leſſors of the plaintiff, her couſin and heir at law on the part of the father. Both *Walter* and *Mary Read* died in the life-time of *Heſter*. *Mary Read*, who was not *enſient* when the codicil was made, nor had any child afterwards, died before her huſband; he married again, and had iſſue of that marriage one child only, the abovenamed *Conſtantia*, the wife of *Quartley*. THE QUESTION was, " *Whether the plaintiff was* " *entitled to recover the whole, or any, and what, part of the* " *premiſes?*"—ASHHURST, J. delivered the opinion of the Court: Several objections have been taken on the part of the defendant to the plaintiff's right of recovering. The firſt which goes to the right to recover any part is, that this limitation to the right heirs of *Walter* and *Mary* is too remote, for which was cited 2 *Co.* 51 (1). This objection ſeems not to have been much relied on by the defendants' counſel; and indeed, ſince the ſtatute 10 & 11 *W.* 3. *c.* 16. which puts poſthumous children on the ſame footing with children born in the life-time of the anceſtor, this objection ſeems to be removed, whatever might have been the caſe before. Beſides, the limitation muſt veſt on the death of *Walter* and his wife, and might have been barred by the tenant in tail; therefore there was no danger of a perpetuity. The limitation then being a good limitation as a contingent remainder, THE NEXT QUESTION is, *Who took, and in what manner, after the death of* Walter *and his wife?* And as to this we are of opinion that *Heſter* took the *whole, not by way of limitation, but* as *a purchaſer, and under the deſcription of right heir of* Walter *and* Mary, *in the ſame manner as ſhe would have done, if the limitation had been to the right heir of the body of* Walter *and* Mary. That the party ſhall take as a *purchaſer* under ſuch a deſcription, ſeems to be eſtabliſhed by the caſe of *Allen* v. *Palmer*, *Leon.* 101. where the limitation of a copyhold was to the uſe of a ſtranger for life, and afterwards to the uſe of the right heirs of the copyholder. The Court ſaid, the difference is where the ſurrender is to the uſe of himſelf for life, afterwards to another in tail, and the remainder to the right heirs of him who ſurrendered; there,

(1) " That if a leaſe be made for life, remainder to the right heirs of *J. S* there " being no ſuch perſon as *J S* in being at the time of the limitation, but ſuch a " perſon is afterwards born, and dies during the life of the tenant for life, never- " theleſs the limitation over is void."

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his heir ſhall have it by deſcent. But it is otherwiſe where the ſurrenderor hath not an eſtate for life, or in tail limited to him; for there his heir ſhall enter as a purchaſer, as if ſuch uſe had been limited to the right heirs of a ſtranger. This caſe therefore is diſtinguiſhable from the caſe put in *Co. Litt.* 14. *b.* (1), for there the huſband, to whoſe right heirs the remainder was limited, had an antecedent eſtate, and therefore the reverſion in fee deſcended, and, remaining expectant on the eſtate-tail, it remained as it were in abeyance; and therefore the brother of the half-blood, being heir to the father, after the death of the elder brother, took. But, in the preſent caſe, there being no limitation to the father, but the firſt limitation being to the heir, on the death of the father, it muſt veſt in *Heſter*. But it has been argued, that this deſcription of the right heirs of *Walter* and *Mary*, muſt either mean the heirs of the ſurvivor, or elſe it muſt mean to give an eſtate in moieties to the heirs of each; and if ſo, the plaintiff can only be entitled to a moiety. But we are of opinion that the heirs of *Heſter* ought to take the whole. In the firſt place, we think that it may plainly be collected from the will, that ſuch was the teſtator's intention, which ought in all caſes to govern, if not contrary to any rule of law. His bounty ſeems to be confined to the children of *Walter* and *Mary*: he firſt entailed it upon *Heſter* and her iſſue; then he deviſed it to the child *Mary* might be then *enſient* with in tail; and then he limited the remainder in fee to their heirs. Now it is impoſſible that any perſon can anſwer the deſcription of heir to both, unleſs he be a child of both; and ſuch conſtruction ſhould be put upon a will, if it may be, as will fully ſatisfy the words; and the words here are ſatisfied, if they be taken to mean the children of both of them. It is to be collected from the paſſage cited from *Co. Litt.* 187. *a.* "that a grant to huſband and wife is not conſidered "in the ſame light as a grant to other perſons; for if a joint "eſtate be made to huſband and wife and a third perſon, in "this caſe the huſband and wife have, in law, in their right "but the moiety, and the third perſon ſhall have as much as "the huſband and wife; for the huſband and wife are but "one perſon in law:" and "ſo if made to a huſband and "wife and two others, in this caſe the huſband and wife "ſhall have but a third." If then they are but as one perſon, by reaſon of the relation they ſtand in, when a limitation is made to their heirs without any prior eſtate limited to

(1) "That if land be given to a man and his wife, and the heirs of their two "bodies, remainder to the heirs of the huſband, and they have iſſue a ſon, and "the wife dieth, and he taketh another wife and hath iſſue a ſon, the father dieth, "the eldeſt ſon entereth and dieth without iſſue, the ſecond brother of the half-"blood ſhall inherit; becauſe the eldeſt ſon by his entry was not actually ſeiſed of "the fee-ſimple, being expectant, but only of the eſtate-tail."

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them, it must most naturally mean heirs to them both according to that relation, which can only be children of them both.—Postea to the plaintiff.

A devise to trustees till *A.* shall attain the age of 24, and when he shall attain that age, to him in fee, gives him a vested interest, which will descend to his heirs, though he die before 24.—The testator devised the premises in question, "to *Thomas Lea* and *Edward Johnston*, and their heirs and "assigns, to hold to them and their heirs, until *Michael Lea*, "second son of his nephew *Thomas*, then an infant of about "thirteen years of age, should attain the age of 24 years, "on condition that they should, out of the rents and profits, "during all that time keep the buildings in repair. Item, he "devised unto *Michael Lea*, his great nephew, and to his "heirs and assigns for ever, when and so soon as he should "attain his age of 24 years, the premises in question, and "directed the trustees to surrender the premises accordingly." *Michael Lea* attained the age of twenty-one, but died under twenty-four, intestate, and without issue, leaving *Thomas Lea*, the defendant, his brother and heir at law. The lessor of the plaintiff claimed under the heir at law of the devisor. THE ONLY QUESTION was, WHETHER, in the event of *Michael Lea*'s dying before he attained his age of twenty-four, this was a vested interest in him, descendible to his heir at law? and, consequently, Whether a title is derived to the defendant, who claims under him? *Per Curiam*, it has been argued, that this depended on a condition precedent, and that not having happened, that the estate never vested in *Michael Lea*. And certainly the consequence contended for would follow, if this were a condition precedent. The only case cited in support of it, is that of *Brownsword* v. *Edwards*, 2 VEZ. 243; but it must be remembered, that the words there are very different from the present. There it was, "if he should attain the "age of twenty-one:" but the words in this case only denote the time when the beneficial interest was to accrue. But this question does not depend on argument merely; it has been settled ever since the time of Lord *Coke*. The first case on this subject is *Boraston*'s case (1); in which case the words are, "when my son shall attain the age of twenty-one." There the Court held, that the remainder was executed in the son immediately after the death of the testator, and that it did not rest in contingency: and that the words *then* and *when*, only denote the time when the remainder shall take effect in possession; for when these adverbs refer to a thing which must of necessity happen, there they make no

Doe *ex. dim.* Wheedon v. Lea, Hil. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 41.

(1) 3 *Rep.* 19.

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contingency. The same doctrine is to be found in *Manfield* v. *Dugard* (1), which case was directly similar to the present. The last case on this subject is that of *Goodtitle dem. Hayward* v. *Whitby* (2). That was a devise to trustees in trust to lay out the rents and profits of the devised premises for the maintenance and education of *T.* and *J. Hayward* (sons of the testator's sister), during their minorities, and when and as they should respectively attain their ages of twenty-one, then to the use of the said sons of his sister and their heirs equally: one of the testator's nephews died under the age of twenty-one; and the question was, Whether, as he did not live till the time when the estate was to come into possession, it was a vested remainder? After argument, the Court decided that it was. And Lord *Mansfield* recognized *Boraston*'s case, and the case of *Manfield* and *Dugard*; adding, that these words could not operate as a condition precedent, but as giving an absolute interest in the fee, and denoting the time when the remainder was to take effect in possession; and that the devise to the trustees during the minorities of the nephews, was an exception out of the absolute property devised to them. These cases are not to be distinguished from the present, and therefore the defendant is entitled to judgment. ASHHURST, J. Had the devisor used these words, "IF *Michael Lea* shall attain the age of twenty-four," that would have made it a condition precedent, and no interest would have vested in him, unless he had attained that age. But here the devisee's estate was to take effect in possession WHEN he should attain the age of twenty-four. And this is like the case of a legacy *to be paid* WHEN the party attains the age of twenty-one; that is a vested legacy: but if the legacy be to be paid IF *the legatee attain the age of* twenty-one, is not vested. GROSE, J. agreed.

Doe *ex dim.* Lucy Freestone, *v.* Edward Parratt and Mary his Wife, Tr. Ter. 34 Geo 3. B.R. 5 *Ter. Rep.* 652.

On the 2d *October*, 1741, *Thomas Osbourn*, then being the customary tenant of the premises in question, surrendered them to the use of the testator *Mary Eames*, by way of mortgage, and on the default of payment by the mortgagor, she was admitted tenant of the premises on the 10th of *June*, 1743, saving to every one his, her, or their right, to hold to her, the said *M. Eames*, her heirs and assigns for ever. She thereupon entered, and received the rents from thence until her death in 1756; having previously, namely, on 1st of *April*, 1749, surrendered to the use of her will. On the 5th of *August*, 1750, *M. Eames*, considering the premises as irredeemable, "devised her copyhold estate, &c. (being the "premises in question) and the reversion, &c. *to her nephew* "*in law*, John Freestone *and* Lucy *his wife*, *and to their heirs*

(1) 1 *Eq. Cas. Abr.* 195. *Gilb. Eq. Rep.* 36. S. C. (2) 1 *Burr.* 228.

"*and*

"*and assigns for ever.*" Then after bequeathing some small legacies, "she gave her ready money, money out at interest, "on any security or securities whatsoever, and personal "estate whatsoever, not therein before bequeathed, unto "the said *J. Freestone*, his executors, &c. for ever." On the 30th of April, 1757, *J. Freestone* was admitted, and afterwards, on the 14th of May, 1774, surrendered the premises to *James Rickson* in fee, under whom, the defendants claimed. *John Freestone* died in the year 1790, and on the 22d of November, 1791, *Lucy Freestone*, the lessor of the plaintiff, was admitted to the premises in question, as surviving devisee under the will of the said *Mary Eames*, to hold to her in fee. THE QUESTION was, Whether the lessor of the plaintiff was entitled to recover for the whole or a moiety? OR, whether a verdict should be entered for the defendant generally? Lord KENYON, C. J. It seems to me, from the manner in which the case is drawn, that it was intended to be argued that the devise in the first will to the nephew, *J. Freestone* and *L.* his wife *created a joint tenancy*, but that question has been properly abandoned; for though a devise to *A.* and *B.* who are strangers to, and have no connection with, each other, creates a joint tenancy, the conveyance by one of whom severs the joint tenancy and passes a moiety, yet *it has been settled for ages that when the devise is to the husband and wife they take by entireties and not by moieties, and the husband alone cannot by his own conveyance, without joining his wife, divest the estate of the wife.* This is sufficient to warrant us, sitting in a court of law, in determining in favour of the present plaintiff. But even in a court of equity it cannot be said that the legal estate belongs to the persons entitled to the beneficial interest: if it did, there would have been no occasion for the statute of *Ann*, 7 *Anne*, c. 19, to compel infant minors to convey, when they have the bare legal estate. Besides, if the defendant went into a court of equity; from the time when the mortgage was made in 1741 to the present moment, there is not a single circumstance to shew that the parties considered the interest of the mortgagor as existing. This estate was given absolutely, and it has been considered as irredeemable by all the parties through whose hands it has passed. If the mortgagee conveys subject to the equity of redemption, that right may be kept alive for any indefinite length of time as far as I know: the court of chancery has determined that it may be preserved for fifty years. But if twenty years have passed without any redemption, in whom does the legal estate vest? In the mortgagee; and it would escheat to the lord for want of the heirs of that person. Therefore neither in law nor in equity can the defendants' title be supported.—Postea to the plaintiff.

Long v. Blackall et al. Hil. Ter. 37 Geo. 3 B. R. 7 *Ter. Rep.* 100.

The teſtator, *George Blackall*, by his will, directed that his wife ſhould poſſeſs the premiſes in queſtion during her widowhood, &c. &c. "*He then bequeathed the ſaid premiſes, &c. to the "child with which his* (the teſtator's) *wife was then* enſient, "*in caſe it ſhould be a ſon, during his life, and after his deceaſe "then to ſuch iſſue male or the deſcendants of ſuch iſſue male of "ſuch child as at the time of his death ſhould be his heir at "law; and in caſe at the time of the death of ſuch child there "ſhould be no ſuch iſſue male nor any deſcendants of ſuch iſſue "male then living, or in caſe ſuch child ſhould not be a ſon, then he "bequeathed the ſame to* Philippa Long, *her executors, &c.*" *Martha Blackall*, the wife of the teſtator, at the time of making his will and of his death, was *enſient* with a ſon, who was afterwards born and called *John Blackall*; the ſaid *John Blackall* died without iſſue. THE QUESTION was, WHETHER the limitation to *Philippa Long* was good in the events that had happened. Lord KENYON, Ch. J. The rules reſpecting executory deviſes have conformed to the rules laid down in the conſtruction of legal limitations, and the courts have ſaid that the eſtate ſhall not be unalienable by executory deviſes for a longer time than is allowed by the limitations of a common law conveyance. In marriage ſettlements, the eſtate may be limited to the firſt and other ſons of the marriage in tail; and until the perſon to whom the laſt remainder is limited is of age, the eſtate is unalienable. In conformity to that rule the Courts have ſaid, ſo far we will allow executory deviſes to be good. To ſupport this poſition I could refer to many deciſions: but it is ſufficient to refer to the Duke of *Norfolk*'s caſe, in which all the learning on this head was gone into; and from that time to the preſent every Judge has acquieſced in that deciſion. It is an eſtabliſhed rule, that an executory deviſe is good if it muſt neceſſarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of geſtation. (1) LAWRENCE, J. The deviſe over in this caſe muſt take effect, if at all, after a life which muſt be in being within nine months after the deviſor's death (2).

(1) See the Duke of *Norfolk*'s Caſe, 3 *Cham. Caſ.* 1 *Pollex*, 223.

(2) In *Goodtitle* d. *Gurnall* v. *Wood*, 23d of *June*, 1740, *C. B.* Ld. Ch. J. *Willes*, in delivering the opinion of the Court, ſaid, "They (namely, executory deviſes) have not been conſidered as bare poſſibilities, but as certain intereſts and eſtates, and have been reſembled to contingent remainders in all other reſpects, only they have been put under ſome reſtraints to prevent perpetuities; as, firſt, it was held that the contingency muſt happen within the compaſs of a life or lives in being or a reaſonable number of years; at length it was extended a little farther, namely, *to a child in* ventre ſa mère *at the time of the father's death, becauſe as that contingency muſt neceſſarily happen within leſs than nine months after the death of a perſon in being, that conſtruction would introduce no inconvenience*; and the rule has, in many inſtances, been extended to twenty-one years after the death of a perſon in being, as in that caſe likewiſe there is no danger of a perpetuity." M.S. 7 Ter. Rep. 103. (n. a.)

PER

PER CURIAM: We are of opinion that the limitation to *Philippa Long* is good in the events that have happened.

The teſtator, *S. Lyde*, *poſſeſſed of a term in the premiſes* not yet expired, by will, gave them to his ſon, *G Lyde*, "*for life*, "and after his deceaſe to *Margaret* his wife for life, and "after the deceaſe of the ſurvivor to the *children of George*, "*ſhare and ſhare alike*; BUT *if* George *ſhould die without iſſue* "*of his body*, then to his ſon *Robert Lyde* for life, AND AFTER "HIS DECEASE to *Mary his wife*, *with the like limitations to* "*the children of Robert*, as to thoſe of *George*; and if *Robert* "ſhould die *without iſſue*, then over." The teſtator died: afterwards *Margaret* died; having had one daughter only by *George Lyde*, who died an infant in the life-time of the teſtator, and before the date of his will. Afterwards, *Robert Lyde* died *without iſſue*, having made his will and appointed *Mary*, the leſſor of the plaintiff, his executrix. *Then George Lyde* died without iſſue, leaving a ſecond wife, the defendant, his executrix and reſiduary legatee. THE QUESTION was, Whether the plaintiff was entitled to recover? ON THE PART OF THE LESSOR OF THE PLAINTIFF, the rule was admitted to be that the words of a deviſe, if they can carry an eſtate tail of a freehold, will give the whole intereſt in perſonalty (1): but it was argued that in the latter caſes, the intention of the teſtator has been attended to; and a deviſe over of a chattel "after failure of iſſue," or, "dying without iſſue," has been held good, where it could be collected that the teſtator meant, "without iſſue *living at the time of the death* of the "deviſee." ON THE OTHER HAND it was contended for the defendant, that the limitation under which the leſſor of the plaintiff claimed was too remote, as being to take effect after an indefinite failure of iſſue. That if this had been a deviſe of a freehold, *George Lyde* would have taken an eſtate tail. And the rule is, that where a limitation of a freehold will carry an eſtate tail, in the caſe of perſonalty the firſt deviſee takes abſolutely.—ASHHURST, J. There has been a variety and contradiction of determinations upon this ſubject: but the general principle that governs theſe kind of caſes is this; *where there is an expreſs limitation of a chattel by words, which, if applied to a freehold, would create an expreſs eſtate-tail, the whole intereſt veſts abſolutely in the firſt taker, and a limitation over of ſuch a chattel is too remote to take effect.* But where there is no ſuch expreſs legal limitation, the Court will conſider the intention of the teſtator. Here, there is no ſuch ſtrict legal limitation; and the intention of the teſtator is evident. The words are, "I give and bequeath, &c. to my "ſon *George* for life, then to his wife for life, and after the

Doe *ex dim.* Mary Lyde *v.* Ann Lyde, Hil. Ter. 27 Geo. 3. B.R. 1. *Ter. Rep.* 593.

(1) 3 *Ch. Caſ.* 1.

" deceaſe of the ſurvivor of them, then to his children, and " in *default of iſſue*, then over;" this is not ſuch a limitation as muſt in its legal operation conſtitute an eſtate tail. Then it is open to us to conſider the intention of the teſtator; and of that there can be no doubt. The plaintiff is entitled. BULLER, J. Two diſtinctions have been taken in former caſes, which, if they hold, will govern the preſent. The firſt is, that in the caſe of a bequeſt of a term or chattel, the words " dying without iſſue" ſhall be conſidered with a double aſpect compriſing two contingencies; the one, *if the perſon die without leaving iſſue*; the other, *if he die leaving iſſue, which afterwards die without iſſue.* Now unleſs that rule be exploded, it will decide the preſent caſe; the contingency, on which the limitation was to take effect, having happened within the time limited.—The ſecond diſtinction, which was taken by Lord *Macclesfield*, is between an *expreſs* and an *implied* eſtate tail, in the caſe of a bequeſt of a term: whether that diſtinction has been ſhaken, or whether it was wiſe to depart from it after it became a rule, it is unneceſſary now to determine. Becauſe in this caſe, upon the face of the will, the intention is plain; and *if the intention of the teſtator is clear, there is no caſe in law which ſays that the intention ſhall not prevail.—As to the argument, that if this had been a deviſe of a freehold, the words would have created an eſtate-tail, and therefore that when applied to perſonalty, the whole intereſt veſts in the firſt taker:* if the foundation of that argument fail, there is an end of every thing which is built upon it. *Now, in my opinion, nothing is ſo clear as that, if this had been a deviſe of a freehold, it would not have given an eſtate tail.* It is to *George Lyde*, and after his deceaſe to *M.* his wife for life, and after the death of the ſurvivor of them to their children *ſhare and ſhare alike. But an eſtate tail is to a man and the heirs of his body in ſucceſſion:* that is not the caſe here, for by the expreſs words all the children are to take *equally*; and to do that they muſt take as purchaſers.—But this being a bequeſt of a term, I ſhall again have recourſe to Lord Ch. J. *Wilmot*'s doctrine in *Keily* and *Fowler*, where the words were " heirs of the body;" and he there ſaid, " the " truth is, we are bound to an artificial and technical ſenſe " of thoſe words, *unleſs there is an apparent intention in the* " *teſtator of uſing them in their natural meaning.*" And for that purpoſe, which is in favour of common ſenſe, the moſt trifling circumſtance is ſufficient.—In that caſe the words " heirs of the body," though ſtrict legal words of limitation, were controled by very ſlight circumſtances indeed. *In this caſe the circumſtances are very ſtrong.* The teſtator has given to the children the intereſt of theſe premiſes, ſhare and ſhare alike, that is for ever; ſo that the contingency, upon which the limitation over is founded, could only be in caſe there were

were no children. As to the real intent of the teſtator, it is evident, if it were only from the circumſtance of the remainder over to *Robert* being for life, that the teſtator meant the limitation muſt take place (if at all) within the ſcope of a life in being, which entirely excludes the idea of an indefinite failure of iſſue. The teſtator has expreſsly given the eſtate to *R. Lyde* for life, in the event of *G. Lyde*'s dying without iſſue; which ſhews, that the teſtator looked to the event of *G. Lyde*'s dying without iſſue at the time of his death.—Poſtea to the plaintiff.

Goodtitle *ex dim.* Peake *v.* Pegden, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 720.

The teſtator, *Thomas Biley*, being poſſeſſed of the premiſes in queſtion for a term of years, by will, "gave them to his "grandſon, *T. B. Peake*, ſon of *Daniel* and *Sarah Peake*, "and the heirs lawful of him for ever; but, in caſe he "ſhould happen to die and leave no lawful heir, then and in "that caſe he gave them, after the death of the ſaid *T. B.* "*Peake, to the next eldeſt ſon or heir of the ſaid Daniel Peake* "and *Sarah* his wife; and ſo on to the next eldeſt ſon or "heir, if the laſt ſhould die without heirs." *T. B. Peake*, the deviſee, took poſſeſſion of the leaſehold eſtate in queſtion, and died without iſſue; the defendant claimed under him. The leſſor of the plaintiff claimed the eſtate under the will of the teſtator, *Thomas Biley*, being the next eldeſt ſon of *Daniel* and *Sarah Peake*, living at the time of the death of the ſaid *Thomas Biley Peake*. PER CURIAM: It is apparent on the will, that the teſtator, by "lawful heirs," meant "heirs of the body;" and "leaving no lawful heir," muſt be confined to "leaving no iſſue at the time of his death." This is conformable to all the rules of limitations; for a limitation over may take effect, if the contingencies on which it depends muſt happen within a life or lives in being, and twenty-one years afterwards. In ſome of the caſes it has been doubted, whether the particular words uſed confined it to dying without iſſue, at the time of the death of the perſon to whom the bequeſt is made; but where they are ſo confined, as we think they are in the preſent caſe, it never was doubted but that the limitation over was good.—Poſtea to the plaintiff.

Doe, *ex dim.* Blake, *v.* Luxton, clerk, Ea. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 289.

If a freehold leaſe for lives be limited to *A.* and the heirs of his body, with remainders over, *A.* may diſpoſe of the whole and defeat the remainders, by any conveyance during his life-time.—The teſtator, *Robert Blake*, deceaſed, being ſeiſed of the premiſes in queſtion, by virtue of a freehold leaſe thereof, dated the 5th of June, 1751, from the biſhop of Bath and Wells, for the lives of himſelf, *Robert Blake* his ſon, and *John Cridland*, and the ſurvivor of them: he deviſed them, together with all his other lands, &c. in Somerſetſhire "to *J. Francis* and "*Thomas Cridland*, and their heirs (ſubject to the ſum of "930l. due to *A. B.* on a mortgage; which ſum of 930l. the "deviſor borrowed, as well to pay his ſiſter *S. Blake* her

" portion, as alſo to purchaſe two lives in the eſtate in queſ-
" tion, with a direction to the truſtees to pay that portion
" of 500l. to his ſiſter *Suſannah*, on the 25th of July next;
" and alſo ſubject to the payment of all other his debts and
" legacies), upon truſt that *J. Francis* and *Thomas Cridland*,
" and the ſurvivor of them, ſhould receive the rents and
" profits thereof, and pay out of the ſame unto his wife
" *Elizabeth*, the ſum of 40l. *per annum* during her life, and
" allow his ſon, *Robert Blake*, for his education and main-
" tenance, as much as they (the truſtees) ſhould think fit,
" until he arrived at the age of twenty-one, and, when he
" attained that age, then *the truſtees were to be ſeiſed of the*
" *ſaid lands*, &c. *to the uſe of his ſon* Robert, *and the heirs*
" *male of his body*, and for want of heirs male of his body,
" then to the iſſue female of his body, and for want of ſuch
" iſſue, *then to the truſtees*, &c. *in truſt for the deviſor's*
" *brother*, J. Blake, *and the heirs male of his body*, &c."
*Robert Blake*, the ſon, ſurrendered the leaſe, bearing date the
5th day of June, 1751, to the then biſhop of Bath and Wells;
and on the 6th day of June, 1770, the biſhop, *in conſideration*
*of the ſaid ſurrender*, and of a competent ſum of money paid
to him by *R. Blake*, the ſon, granted a leaſe of the premiſes
to the ſaid *Robert Blake*, his heirs and aſſigns, for the lives of
himſelf, *John Blake* his brother, and *John Cridland*, and the
ſurvivor of them. And on the 22d of Auguſt, 1782, *R.*
*Blake*, the ſon, deviſed all his meſſuages, lands, tenements,
and hereditaments, &c. to his wife, *Frances*, for life, with
divers remainders over; and afterwards died, ſeiſed of the
premiſes, without iſſue, leaving *Frances Blake* his widow,
who afterwards married the defendant, *Luxton*, and is ſtill
living. THE QUESTION was, Whether the leſſor of the
plaintiff *Blake* was entitled to recover?—Lord KENYON,
Ch. J.—Though it is not alleged in terms, that the truſtees
ſurrendered the old leaſe, yet the new leaſe ſtates that, with-
out which it could not have been granted; for it was granted
" *in conſideration of the ſaid ſurrender*;" ſo that we muſt
now take it, that the old leaſe was ſurrendered by thoſe
who had authority to ſurrender. But, even if the former
leaſe were not legally ſurrendered, ſtill the legal eſtate is not
in the plaintiff. The legal eſtate was veſted in the truſtees,
by the will of *R. Blake* the firſt deviſor, for ſeveral purpoſes,
and nothing appears to have been done to take it out of
them, unleſs they joined in the ſurrender; nor are there any
words in the will to reſtrain their eſtate to the time of the
widow's death; the eſtate is deviſed to them and their heirs,
and they would hold the legal eſtate as ſpecial occupants
after the truſts are determined. Theſe queſtions on eſtates
*per autre vie* do not frequently ariſe. Such eſtates certainly
are not eſtates of inheritance: they have been ſometimes
called, though improperly, deſcendible freeholds; ſtrictly
ſpeaking,

ſpeaking, they are not deſcendible freeholds, becauſe the heir at law does not take by deſcent. If an action at common law had been brought againſt the heir on the bond of his anceſtor, he might have pleaded *riens per deſcent*, for theſe eſtates were not liable to the debts of the anceſtor before the ſtatute of frauds (1). That act made them chargeable in the hands of the heir as aſſets by deſcent, if he took by reaſon of a ſpecial occupancy; and if there be no ſpecial occupant, it directs that they ſhall go to the executors, ſubject to the debts of the teſtator; and the ſtat. 14 *Geo.* 2. c. 20. renders them diſtributable as perſonalty. An eſtate *per autre vie*, therefore, partakes ſomewhat of the nature of a perſonal eſtate, though it is not a chattel intereſt; it ſtill remains a freehold intereſt for many purpoſes; ſuch as giving a qualification to vote for members of parliament, and to kill game, and ſome others; a will to diſpoſe of it muſt alſo be atteſted by three witneſſes, under the ſtatute of frauds. If ſuch an eſtate be given to *A.* and the heirs of his body, the heirs of the body will take as ſpecial occupants, if no diſpoſition be made of it by the firſt taker: but it is abſolutely in his power to make what diſpoſition of it he pleaſes. *Norton* v. *Frecker* (2); *Duke of Grafton* v. *Hanmer* (3); and *Grey* v. *Mannock* (4). But in this caſe I cannot get over the great difficulty, that (ſuppoſing the truſtees did not ſurrender the old leaſe) there being nothing to limit the duration of the legal eſtate, which was given to the truſtees by the will of the firſt deviſor, *R. Blake*, the legal eſtate is now outſtanding in them. Therefore I am of opinion, that the ſtrict law of the caſe is againſt the leſſor of the plaintiff, the legal intereſt not being in him. It fortunately happens, that the law of the caſe falls in with the equity of it, as far as I can judge, though it is ſufficient here that the law is with the defendant.—Poſtea to the defendant.

*A.* having three daughters, *B. C.* and *D.* by will gave a ſmall legacy to *B.* and *C.* and then gave a leaſehold eſtate to *D.* "but if ſhe died without *having* child or children," then "to *B.* and after her, to her child or children:" *D.* had a child, who died in her lifetime:—held that *D.* took the abſolute intereſt in the term, and, conſequently, that ſhe might diſpoſe of it by will.—The teſtator, *W. Owen*, poſſeſſed of the remainder of a term for 1000 years, having three daughters, *B. Chilcott*, *Mary Owen*, and *Anne Owen*, by will, after

Weakley, *ex dim.* Knight, and Ann his wife, v. J. Rugg, Tr. Ter. 37 Geo. 3. B R. 7 *Ter Rep.* 322.

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(1) 29 *Car.* 2. c. 3. ſ. 12. (2) 1 *Atk.* 524. (3) *P. Wms.* 266. *n.* E.

(4) Lord KENYON here read the following MS. note of the above caſe. *Grey* v. *Mannock* and others, *Trin. Vac.* 1765. *A biſhop's leaſe for three lives was deviſed to truſtees, in truſt for* B. *for life, remainder to* F. *for life, remainder to firſt and other ſons in tail male, with limitations over.* B. died, and Sir *F. Mannock*, who was the firſt ſon, did, in the lifetime of *F.* his mother, who was then in poſſeſſion, by fine,

after giving 5s. to his eldeſt daughter, and 5l. to *Mary*, gave the premiſes in queſtion "to his daughter *Anne*, *but if ſhe* "*ſhould happen to die without having child or children law-* "*fully begotten*, then he willed that the ſaid premiſes ſhould "be and remain to his daughter *Mary*, and after her, to "ſuch child or children as ſhe ſhould happen to have law- "fully begotten." *Anne* entered after the death of her father, and married *W. Rugg* in September, 1753, by whom ſhe had three children, who, as well as the huſband, died in *Anne*'s lifetime; *Anne* afterwards, by will, gave the whole to her ſiſter *Mary* (who is ſince dead) *for life*, remainder to *Anne Knight*, one of the leſſors of the plaintiff, and who was a daughter of *Mary*. THE QUESTION reſerved was, Whether *Anne*, the daughter of *W. Owen*, took the whole intereſt in the term. PER CURIAM: The teſtator had three daughters, the youngeſt of whom (*Anne*) he ſelected as the chief object of his bounty. *The eſtate was given to her, without ſaying* "*for her life*," or adding any other words to that bequeſt; then he proceeded thus: "*but if ſhe ſhall die without having* "*a child*, &c." then to *Mary* and her children. The teſtator's intention ſeems to have been firſt to provide for *Anne*'s family, truſting, when he gave the eſtate to her, that ſhe would diſpoſe of it properly among them. In the event of *Anne*'s having children, it might have been deſireable to provide for them during *Anne*'s lifetime, but that object would

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fine*, *ſur conceſſit* and deed of uſes, limit the eſtate to himſelf and his heirs; after which, upon his mother's death, he entered, and afterwards ſurrendered, the then ſubſiſting leaſe, and took a new one for freſh lives. Subſequent to this he made his will, and deviſed this eſtate to his wife, who contracted for the ſale of it: but the purchaſer having ſome doubt, whether the limitations over were well barred, a bill was brought for performance of the contract, and the preſent Sir *F. Mannock* an infant, and the remainder-men, and other proper parties, were brought before the Court. Lord *Northington* C.—This is a deſcendible freehold, not intailable within the ſtatute *de donis*, and therefore no common recovery could be ſuffered of it: but *the perſon who would have been tenant in tail, had it been an inheritance, is entitled to the abſolute ownerſhip; as at common law the conditional fee became abſolute by the party's having iſſue.* He therefore decreed performance of the contract, and the widow (who was the deviſee of Sir *F. Mannock*) to convey. N.B. His Lordſhip ſeemed to be of opinion, that Sir *F. Mannock* might have defeated the remainders by his will alone. To this latter part, Lord KENYON obſerved that he had added a quære: but he ſaid; at that time I was young in the profeſſion, and I had generally underſtood, that the remainders in ſuch an eſtate could only be defeated by ſome act *inter vivos*; but on further conſideration, I am not ſure that the firſt taker may not deſtroy them by his will. I deſire, however, to have it underſtood, that I am not deciding any thing on this point by which I am to be bound in future, when it may become neceſſary to conſider it: but at preſent I am rather inclined to think, that the firſt taker may bar the remainders over by his will alone; he certainly may do ſo by any conveyance in his lifetime, by livery of ſeiſin, covenant to ſtand ſeiſed to uſes, bargain and ſale, &c.

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* His Lordſhip, in reading the note, obſerved that this fine had no other effect than any other act *inter vivos*, and ſuppoſed that it had been levied in this caſe, in conformity to what was done in D. of *Grafton* v. *Hanmer*, though the ſame reaſon † did not apply.

† In that caſe the fine ſeems to have been neceſſary, on account of the Ducheſs of *Grafton* having married again.

have

have been defeated, if *Anne* had had no power of diſpoſing of the eſtate until the time of her death. Conſidering, therefore, that it was the teſtator's intention, that *Anne* ſhould take the whole intereſt in this eſtate, if ſhe had children, though they did not exiſt at the time of her death: in order to further that intention, the beſt conſtruction that we can put on the will, is to decide, that this eſtate veſted abſolutely in *Anne*, in the event of her having a child at any time; and, conſequently, that the plaintiff is entitled to recover for the whole. And ASHHURST, J. obſerved, that this being the caſe of a term, a bequeſt of the eſtate to *Anne* carried the whole intereſt, and that was only to be diveſted by a ſubſequent event which has not happened; therefore it remained to her abſolutely.—Poſtea to the plaintiff.

## *What will paſs under general Words.*

*A.* being *ceſtui que* truſt of a term, afterwards purchaſes the fee in his own name, and deviſes the premiſes in fee to his heir, whom he makes executor and reſiduary legatee, and dies: held clearly that the term ſhall go with the fee to the heir, and not to the perſonal repreſentative.—*John Cooke* was ſeiſed in fee of the premiſes in queſtion, ſubject to a mortgage thereof by him, theretofore made: and by an indenture of three parts, dated the 18th of *December*, 1751; made between *Samuel Crompton*, ſole executor of the will of *Abraham Crompton*, deceaſed [the mortgagee], of the firſt part, *John Hoole* of the ſecond part, and *Thomas Sheppard* of the third part. The premiſes were aſſigned to *Sheppard*, for the reſidue of a term of 500 years, in truſt for *Hoole*, ſubject to redemption: afterwards by indentures of leaſe and releaſe, dated the 11th of January, 1752, made between *John Cooke*, ſon and heir of the beforenamed *John Cooke* [the mortgagor], deceaſed, *Catharine Jerome*, widow, and *Elizabeth Port*, widow, daughters of the ſaid *Cooke* deceaſed, of the firſt part, the ſaid *John Hoole* of the ſecond part, and *Richard Roſe* of the third part; in conſideration that the ſaid *Hoole* had paid to the ſaid *Crompton* 76l. 1s. in diſcharge of the ſaid mortgage, and other conſiderations, the ſaid *John Cooke*, *Catharine Jerome*, and *Elizabeth Port*, granted and conveyed the ſaid reſidue of the premiſes in queſtion, to the ſaid *Roſe*, *his heirs and aſſigns, to the uſe of the ſaid* John Hoole, *his heirs and aſſigns for ever. John Hoole* being ſo ſeiſed and intitled, received the rents till his death. And on his death, *Mary Launder*, his grand-daughter, and heir at law, entered upon and received the rents, and afterward intermarried with the defendant *Sales*, *from which time ſhe, or her ſaid huſband in her right, continued in the poſſeſſion and receipt of the rents and profits of the premiſes to the time of her death, without iſſue*,

Goodright *ex dim.* Francis Hoole *v.* Joſeph Sales, Ea. Ter. 7 Geo. 3. C.B. 2 *Wils.* 329.

*iſſue, on the 13th day of March*, 1766.—"*John Hoole* made "his will, dated the 3d of February, 1756, whereby he de- "viſed *the premiſes in queſtion*, and all other his meſſuages, "houſes, tenements, and real eſtate whatſoever, *to the ſaid* "Mary *his grand-daughter in fee*, AND APPOINTED HER "RESIDUARY LEGATEE AND EXECUTRIX OF HIS SAID "WILL."—*Francis Hoole*, the leſſor of the plaintiff, *was nephew and heir at law of the ſaid* John Hoole, *and alſo heir at law of the ſaid* Mary Sales, *on the part of the mother.* —The grand-daughter being heir at law of the teſtator, *was in of the fee by deſcent* (her ſuperior title), *and not by the will:*—her huſband, *Sales*, relied on the aſſignment of the mortgaged term to *Sheppard*, in truſt for *John Hoole*, to prevent the leſſor of the plaintiff, *Francis Hoole*, the heir at law, from recovering the premiſes in queſtion, and objected that the leſſor of the plaintiff could not recover, becauſe of the ſubſiſting term of years which was in *Sheppard*, in truſt for *John Hoole* the teſtator, *who by his will had deviſed it to his grand-daughter, who was his reſiduary legatee*, and therefore the defendant, her huſband, ought to have the benefit thereof, and it ſhall not attend the inheritance, there being no mention made in the aſſignment thereof to *Sheppard, that it was in truſt for* John Hoole *to attend the inheritance.* THE QUESTION was, therefore, *Whether this term could be ſet up to bar* the plaintiff, the heir at law to the fee, from recovering poſſeſſion in the ejectment? PER CURIAM: This is a queſtion *between the perſonal repreſentative of the wife* under a ſatisfied mortgage term, *and her heir at law*; when *Hoole* purchaſed the fee the mortgaged term was gone, though it did not extinguiſh the term in point of law (becauſe that was in *Sheppard*), yet it became attendant upon the inheritance, and muſt follow it in point of law, as much as if it had been made to do ſo by the act of the party *John Hoole* himſelf.—But it is objected, that *although this will is void as to the deviſe of the fee, yet that the deviſe will have ſome effect*, becauſe it is evidence that the teſtator intended to give his grand-daughter ſome intereſt in his real eſtate by his will, and if ſhe cannot take the whole fee by deviſe, why ſhall ſhe not take part, *viz.* the term? in anſwer to this, it is plain he had no intention to ſever the term from the fee, but he intended to give her the whole inheritance entire; the words are, all my meſſuages, &c. to her and her heirs for ever, not having it in contemplation to divide the term from the fee; and the caſe of *Whitchurch* v. *Whitchurch*, 2 *Wms.* 236. *Gilb. Eq. Caſes*, 168. S. C. 9 *Mod.* 124. S. C. is in point; *A.* being poſſeſſed of a term of 500 years in Blackacre afterwards purchaſes the fee-ſimple in *B.*'s name, and deviſes Blackacre to *J. S.* in fee, but if the will is not atteſted by three witneſſes, the term ſhall not paſs, becauſe attendant on and part of the inheritance; the intention of the teſtator in that caſe

was

was to give the inheritance; the attendant term could not paſs, but was conſidered as part of the inheritance. It is admitted, that if it had been mentioned in the aſſignment of the term that it was to attend the inheritance, it could not be ſet up againſt the heir at law; now it is as much as if it had been ſo expreſſed upon legal principles, and it ſhall not be ſet up againſt the heir. *Lit. ſect.* 464. *ceſtui que uſe* at common law, was conſidered as the owner of the land, and was ſworn in aſſizes and other inqueſts in pleas real and perſonal; and the ſe ſſee to uſes was to make ſuch conveyance or eſtate, as *ceſtui que uſe* directed, or he would have been guilty of a breach of truſt; and, by Lord *Hobart*, an action would lie againſt him at law to recover damages for breach of truſt, 1 *Vern.* 344. therefore it would be very abſurd to ſanctify a thing, for which an action would lie at law; for when a truſtee accepts of a truſt, he agrees in effect, that *ceſtui que truſt* ſhall enjoy the land; and it would be againſt the truſt to hinder him from having that which is his own by law.

A meſſuage, &c. will, under ſpecial circumſtances, paſs lands in a deviſe by will.—*William Smith*, the teſtator, in the year 1706, purchaſed the premiſes in queſtion, and on the 27th and 28th of March, 1706. By leaſe and releaſe, *John Dancaſtle* conveys to *William Smith* and his heirs, "*All that meſſuage or tenement, with the appurtenances*," in Midgham Berks, "*then in the poſſeſſion of ſaid* William Smith, *and therein after more particularly mentioned and expreſſed, that is to ſay, two cloſes of meadow, and ſix acres of arable*" (therein particularly deſcribed), with the uſual general words. On the 24th of February, 1707, *William Smith* made his will, and after bequeathing *(inter alia)*, "*thoſe three meſſuages* (one lying and being in Midgham, and the others in Henwick), *with all houſes, barns, ſtables, ſtalls, &c. that ſtands upon or belongs to the ſaid meſſuages*," to *Elizabeth* his wife for life, with power for them, to whom ſhe ſhall give, "*what ſhe leaves at her death upon the ſaid meſſuages, to rid off the ſame within thirty days.*" HE GAVE "THE ABOVESAID MESSUAGE, LYING IN MIDGHAM, *with all houſes, barns, ſtables, ſtalls, &c. that are upon or belong to the ſaid meſſuage*," after thirty days from his wife's deceaſe, to his couſin *John Jefferies, and the heirs male of his body for ever.*—THE QUESTION was, Whether the leſſor of the plaintiff, who was ſon and heir male of the body of *John Jefferies*, the deviſee, was entitled to recover? AND FOR THE DEFENDANT it was inſiſted, that, &c. could not mean lands; and for this were cited *Cro. Car.* 57. 293. 2 *And.* 123. *Cro. Eliz.* 704. BUT THE COURT WERE OF OPINION, upon all the circumſtances of the caſe, that, as the whole farm was purchaſed in 1706, by the name of a meſſuage with the appurtenances, and as the words

Gulliver *ex. dim.* of Jeffreys *v.* Poyns, Mic. Ter 11 Geo. 3. C. B. 2 *Black.* Rp. 726. 3 *Wils.* 143.

words of the will applied to the meſſuage are more properly applicable to lands, it muſt be ſuppoſed that by meſſuage he underſtood a farm, bargain, or tenement: and finding it conveyed to him by that name, he tranſcribed it into his will; and, though they laid no ſtreſs upon the words, &c. (as it would be dangerous to ſay that, &c. means lands), yet, taking the other words along with the, &c. and all the circumſtances above ſtated together, they manifeſted the teſtator's intention that the lands and meadow, as well as the meſſuages, ſhould paſs by the deviſe: and they were all of opinion, that they did paſs thereby as an *integer*, or whole form, as much as if the teſtator had ſaid, "I give and deviſe all *that my farm*, "with the appurtenances which I purchaſed of *A. B.*" which, without doubt, would have paſſed the whole, both meſſuages and lands.

Buck, Leſſee of Whalley Clerk and Wife, *et. al.* v. Nurton. Tr. Ter. 37 Geo. 3. C. B. 1 *Pul.* & *Baſ.* 53.

Lands uſually occupied with a houſe, will not paſs under a deviſe of "a meſſuage, with the appurtenances," unleſs it clearly appears that the teſtator meant to extend the word "appurtenances" beyond its technical ſenſe. — The teſtator, *Edward Clarke*, being ſeiſed (among other things) of the premiſes in queſtion, deviſed as follows: "I give "and deviſe unto my good friend and relation *Elizabeth* "*Whalley*, wife to the ſaid *Thomas Sedgwick Whalley* (the "ſaid *Elizabeth Whalley* being one of the coheirs of the "teſtator), *all that my capital manſion-houſe wherein I now* "*live, and the lands and grounds thereto belonging, and there-*"*with held and enjoyed, with the appurtenances:* and alſo "all that, &c. *for and during the term of her natural life:* "AND IT IS MY EXPRESS WILL AND DESIRE, and I do "hereby direct, that the ſaid *John Nurton* [who was acting "for the teſtator at his death as his ſteward], *ſhall hold* "*and enjoy my ſaid capital manſion-houſe, with the ap-*"*purtenances, for the ſpace of one year next after my death.* Then, after giving a legacy of 1000l. to the huſband of *Elizabeth Whalley*, "*he bequeathed the reſidue* of his perſonal "eſtate to *John Nurton*," and concluded thus: "And I do "hereby make, conſtitute, and appoint him, the ſaid *John* "*Nurton*, whole and ſole executor of this my will." The teſtator died on the 28th of March, 1796, having for many years previous to and at his death, conſtantly occupied the premiſes in queſtion (viz. *ſixty-four acres and a half of land, conſiſting of a park, meadow land, paſture land, and orchards*); with his ſaid capital manſion-houſe, and the gardens and pleaſure-grounds of Chipley; which include the parlour-garden, the herb-garden, the pond-garden, the old houſe-garden, the arbour-garden, the ſhrubbery, the lime-tree-grove, and a court adjoining, and the public and private walks or road-ways, one of the latter of which was through the park to Chipley Houſe, beſides a back court, and other curtilages.—THE QUESTION was, WHETHER *the leſſors of the*

*the plaintiff were entitled to recover all or any, and what part, of the above-named premiſes?* OR, WHETHER they, or any of them, paſſed to *John Nurton*, by the clauſe which directs that he is to have the manſion-houſe, WITH THE APPURTENANCES, for a year after the teſtator's death?—EYRE, LD CH. J. I have no doubt upon the caſe, unleſs it be with reſpect to *the orchards*. Lands will not paſs under the word "*appurtenances*," taken in its ſtrict technical ſenſe: but they will paſs, if it appears that a larger ſenſe was intended to be given to it. If the Courts had always adhered to this line of conſtruction, many reported caſes would not now diſgrace the books. Every teſtator ought to be ſuppoſed to take legal words in a legal ſenſe, unleſs, according to the marginal note to the caſe in *Hobart* (1), there be demonſtration plain of an intent to uſe them in a different ſenſe. In the former part of the will, there is a deviſe of a houſe with lands in terms expreſs, to which is added, "with the appurtenances," in order to comprize all which might not fall within the deſcription. Then follows a declaration that the defendant ſhall have for one year, ſomething which was included in the above deviſe. The teſtator muſt be ſuppoſed to have underſtood what he was talking about. If he had intended to have given the whole, the words were before him, and he ought to have uſed them. Suppoſe there had been nothing ſtated to let us into the intention of the teſtator, but the mere deviſe to the defendant, we muſt have examined what was occupied by the teſtator; and if we had found a houſe ſituated in a park, which had always been occupied with it, and was, as it were, an integral part of the thing, this might have proved the intention of the teſtator to paſs the whole together. There, if nothing to the contrary had appeared, we might have ſuppoſed the teſtator to have uſed the word "appurtenances," in a ſenſe different from its technical ſenſe. But this is not the caſe. It is true that the premiſes were occupied for a conſiderable time together with the houſe: but firſt, the whole of the premiſes are not neceſſarily connected; in the next place, there is here ſolid ground to argue, that the teſtator underſtood the meaning of the words employed in the deviſe, having ſometimes uſed the word "lands" as a part of the deſcription, and ſometimes dropt it. The defendant being the teſtator's executor, and having been his ſteward, affords a fair ground of argument. The teſtator gave him the excluſive enjoyment of the manſion-houſe, "with the appurtenances," for one year only, after having deviſed the manſion-houſe and lands alſo "with the appurtenances," to Mrs. *E. Whalley* for her life, with

(1) *Hob.* 33. The note is---No man ſhall ſhew me a caſe in law, where by purchaſe, by deviſe to an heir, any may take that is not heir indeed, without declaration plain.

remainder

remainder to the defendant. Now with what view was this done? Moſt probably for the convenience of the defendant, in the execution of the duty impoſed upon him. The general intent, therefore, as collected from the deviſe, and the relation in which the deviſee ſtood to the teſtator, does not call upon us to go beyond the ſtrict rule in conſtruing the technical word "appurtenances."—HEATH, J. We ought to adhere to the ſtrict technical ſenſe of the word "appurtenances." For though the intention is not clearly expreſſed, why the defendant ſhould have the manſion-houſe at all, yet it appears that he was executor and reſiduary legatee; and as ſuch was entitled to the ſtock, the arrears of rent, the furniture, &c. A year's occupation therefore was given him, to ſettle his accounts, and collect what belonged to him. He ought to have the houſe, and what comes within the ſtrict ſenſe of the word "appurtenances." Beſides, this may be diſtinguiſhed from the caſes cited, for it is a ſeparation of the premiſes for a year only; whereas, in ſome of the other caſes, it was for a great length of time, and in ſome perpetual, which might induce the Court to lean againſt it.—ROOKE, J. Agreed.—Poſtea to the plaintiff for all the premiſes except the orchards.

Doe *ex. dim.* Lempriere *v.* Martin. Ea. Ter. 17 Geo. 3. C. B. 2 *Black. Rep.* 1148.

*Richard Tonſon*, eſq. was ſeiſed of a meſſuage called Paſſars, with a parcel of land thereto belonging, being copyhold of inheritance under the manor of Fulham in Middleſex, in his own occupation. And *Matthew Ramſey* being ſeiſed of ſeveral other copyhold meſſuages, and gardens adjoining in part to Paſſars, by an indenture of the 10th of July, 1762, *demiſed to the ſaid* Richard Tonſon, *a meſſuage and two acres of garden adjoining to Paſſars, for twenty-one years, at the annual rent of* 37l. And afterwards *Juliana Ramſey*, the widow of *Matthew Ramſey*, who was entitled to all the copyhold eſtates of *Matthew Ramſey*, under his will, *ſurrendered all the copyhold eſtates deviſed to her by her huſband, to the uſe of the ſaid* Richard Tonſon, *his heirs and aſſigns for life*, and he was admitted accordingly, and ſurrendered the ſame, "to the uſe of ſuch perſons and for ſuch eſtates, as "he by his laſt will already made, or hereafter to be made, "ſhall give, limit, declare, and appoint." *Richard Tonſon*, on taking the leaſe of the 10th of July, 1762, *laid the greater part of the garden, thereby demiſed, into his own premiſes, called Paſſars*; "and let the reſt, together with the meſſuage, "to *Elizabeth Bibby*, at the yearly rent of 25l." He alſo pulled down certain cottages demiſed to him, and laid the ſcite of them into his court-yard. On the 25th of November, 1767, *Richard Tonſon* ſurrendered all his copyhold eſtates to the uſe of his will; and on the 26th of November, 1767, he deviſed to *Catharine Whitburne* and her heirs, "*all that his copyhold meſſuage with all out-houſes, gardens,* "AND APPURTENANCES TO THE SAME BELONGING, "*ſituate*

"*situate and being at Fulham, in the county of Middlesex,* "*and then in his possession.*" On the 9th of October, 1772, *Richard Tonson* died, leaving *Ann Lempriere*, his youngest sister and heir by the custom, who as such was admitted to the messuage and garden let to Mrs. *Bibby*, *and also to the great garden laid to Passars* (being all the premises in question). *Catherine Whitburne* was also admitted to *Passars*, *and also all the said premises in question*, *for such estate as Richard Tonson* had therein, and the defendant *Martin* is entitled to all her estate and interest under such admission.—THE QUESTION was, Whether any and what part of the premises in question, passed to *Catherine Whitburne* by the said *Richard Tonson*'s will and codicil, and his said surrenders? or, Whether the plaintiff is entitled to recover the same, or any, and what part thereof? PER CURIAM: Though in copyhold estates there can be no general occupant, since the freehold is never out of the lord; yet it does not follow there can be no *special occupant*, when the lord has expressly granted the estate to one and his heirs, during the life of *A. B.* Indeed the term of *special occupant* is in such case, and in all others, a very forced and improper phrase; and there is great weight in what is said by *Vaughan*, 201, that the heir takes it as a descendible freehold. Such, however, is the language of the law.—The next consideration is, what the testator meant to devise; for that is the rule of construing a will. *Yates* v. *Clincard*, in *Cro. Eliz.* 704. is only that *a copyhold cannot be appurtenant to a freehold.* But here both are of a copyhold tenure, though held for a different term. And *Archer* v. *Bennet*, in 1 *Lev.* 131. says only, that *occupying one thing together with another shall not make it legally appurtenant.* It is also the case of a deed, and not of a will. And even there it was held, that (if necessary for the use of the principal), the thing so occupied shall become appurtenant. And sure a court-yard is necessary for the use of a house.—The testator's plain meaning was to unite, as far as he could, the scite of the cottages to his house, *and to devise all that he so personally occupied.* And, therefore, he meant to devise the scite of the four cottages as appurtenant to his house, but not the messuage and lands which he had demised to Mrs. *Bibby.*

Doe *ex dim.* Hannah Clements *v.* Collins. Ea. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 498.

This was an ejectment for two granaries, stables, and sheds, and an acre of land, in Reading, and the case was as follows: The testator was entitled, under an assignment of a lease, to a messuage and garden in his own occupation, and also to four messuages or tenements, in the occupation of certain other persons, and also the garden-plot and piece of ground before the house, and 36 feet of ground in length, from east to west, and 18 feet in breadth, from north to south, whereon a wash-house formerly stood; and to two stables, with the granaries over the same, for the residue of several terms of

of years unexpired. And being ſo entitled, the ſaid *William Clements* by will deviſed *(inter alia)* to *Hannah Clements*, the leſſor of the plaintiff, as follows: "To *Hannah Clements* I "GIVE THE HOUSE I LIVE IN AND GARDEN, and alſo the "houſehold goods, as long as ſhe lives; and the houſe that "Mrs. *Purſhouſe* lives in, not to be diſpoſed of; to go to her "children afterwards; *and the four tenements below the houſe* "*I live in.*" The teſtator let out the four tenements, *but had occupied the ſtables and granaries, and the gardens, in front and to the eaſt ſide of the houſe, together with the houſe, ſince* 1749. It was contended, that nothing paſſed by this deviſe of the houſe, except what was uſually and neceſſarily occupied with it for domeſtic purpoſes. And that, as the premiſes mentioned in the declaration, did not fall under the deſcription of houſe and gardens, they did not paſs by his will. For whatever was uſed by the teſtator in the courſe of his trade, could not be conſidered as falling under this deſcription; and the mere circumſtance of his having occupied the various premiſes in queſtion, at one and the ſame time, cannot vary the queſtion, or alter the nature of the property; for if a trader had warehouſes in different parts of the town, which he occupied in his trade, at the ſame time as his houſe, it could not be pretended that a deviſe of his dwelling-houſe would paſs ſuch tenements. And the only way in which the teſtator occupied theſe ſtables and the ſheds, was in the courſe of his trade.—ASHHURST, J. There is no diſtinction between houſe and meſſuage at this time; for whatever would paſs by the one, would equally paſs by the other. It is well known that on an indictment for a burglary in a dwelling-houſe, proof of breaking and entering a ſtable, which is conſidered as part of the dwelling-houſe, will ſupport the indictment; and that is ſtronger than the preſent caſe. When a perſon uſes words as a deſcription of the thing which he intends to give; there premiſes which have been recently built and annexed to a houſe, would paſs as appurtenant to the houſe. It has been objected, on the part of the defendant, firſt, that the ſtables, and, ſecondly, that the ſhed, did not paſs under this bequeſt. With reſpect to the firſt, there is no ſort of doubt, for the ſtables are within a ring-fence, which encloſes the whole tenement together; and we cannot ſuppoſe that the teſtator intended to ſeparate them, for then the ſtables would be in the occupation of one perſon, and the ſtable-yard of another. As to the ſhed, we muſt take it for granted, that it never was annexed to any other tenement; and then a ſlight degree of evidence is ſufficient for the purpoſe of ſhewing that it ſhould paſs with the houſe. And though it is ſtated that the ſhed was uſed by the deviſor in his trade, yet it appeared that he likewiſe uſed it for the purpoſe of keeping coals to be conſumed in his own houſe; and though that is a ſlight circumſtance, yet it is an additional

additional reaſon for ſaying it ſhall paſs as part of the houſe. —Buller, J. In conſtruing wills we do not look at technical words ſo much as the teſtator's intention, which can only be collected from the whole will. The deviſor had premiſes in different parts of *Reading*, and he was in the poſſeſſion of a houſe, and the premiſes now in diſpute, which he had occupied with his houſe from the year 1749: then in common parlance they are conſidered as part of this houſe. The teſtator meant to give every thing in his own occupation; for in his bequeſt he particularly deſcribed every thing around him, beſides that which was in his own poſſeſſion; which is a ſtrong argument to ſhew that he thought that every thing which was in his own occupation, would paſs under the bequeſt of the houſe. Then, not having particularly bequeathed the ſhed, that alſo muſt paſs under the general words.—Grose, J. It is clear that he meant to give the deviſee more than the houſe in which he lived, for he alſo gave her the houſe in which Mrs. *Purſhouſe* lived, and four tenements beſides; the two former of which he gave to Mrs. *Clement*'s children; therefore he meant to give her a permanent intereſt.—Rule diſcharged.

The teſtator, *Chriſtian Riccardſon*, being ſeiſed in fee of ſeveral lands, and alſo poſſeſſed of the two farms in queſtion for the remainder of two terms of 1000 years, deviſed "*all* "*and every of his ſeveral lands, meſſuages, tenements, and here-* "*ditaments, whatſoever and whereſoever, whereof he was ſeiſed* "*and intereſted in, or entitled to,*" to his ſon for life, remainder to the heirs of his body. He then deviſed his *perſonal eſtate* to his wife and daughter, and made the wife ſole executrix. The queſtion was, Whether the ſon took the leaſehold lands by the above words of the will, or whether they were part of the perſonal eſtate? After two arguments, Lord *Mansfield* delivered the opinion of the Court, "That the leaſehold lands did not paſs to the ſon, but were part of the perſonal eſtate." Piſtol *ex dim.* Randal *v.* Riccardſon, Hil. Ter. 24 Geo. 3. B. R. 1 *Hen. Black.* 26. n. (*a*)

The teſtator, *Henry Boſville*, at the time of making his will, was ſeiſed *in fee* of divers freehold meſſuages, lands, and hereditaments, in the counties of Kent, Eſſex, and Surrey; and particularly of 230 acres of land, part of a farm in the pariſh of Buckland and Buckland Dane, in the county of Kent, which farm contained 390 acres, of which the 230 abovementioned were freehold. *And he was alſo poſſeſſed of* 160 *acres, the reſidue of ſuch farm, under a leaſe*, dated the 29th of September, 1759, from the archbiſhop of Canterbury to him, for the term of twenty-one years from the date thereof, at the yearly rent of 21. 6s. 8d. renewable as therein mentioned. *The whole of the farm, as well the leaſehold as the freehold parts thereof, was, at the time of making the will, and of the death of the teſtator, in the occupation of* Ingram Bromly, *as his tenant*; and was held and enjoyed by him, and had been, Thomas Lang *v.* Earl Stanhope, *et al.* Tr. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 345.

been, as far back as could be discovered, held and enjoyed by former tenants as one entire farm, without any distinction as to any part thereof being freehold or leasehold. The testator being so seised and possessed, made his will, which contained the following devise: "I give and devise all my manors, "messuages, or tenements, houses, FARMS, lands, wood-"lands; hereditaments, and real estate, whatsoever and "wheresoever, unto *Richard Bettinson* (afterwards Sir "*Richard Bettinson*, baron) and his assigns," without impeachment of waste, subject to a certain annuity, or rent charge, long since extinguished; with remainder to trustees, to preserve contingent remainders; remainder to the first and other sons of the said Sir *R. Bettinson* successively, in tail general; remainder to *William Lane*, eldest son of *Thomas Lane*, and his assigns for life; remainder to trustees, to support contingent remainders; remainder to the first and other sons of the said *William Lane* successively, in tail general; remainder to the plaintiff *Thomas Lane*, and his assigns for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the plaintiff successively, in tail general; with remainder to *Godfrey Besville*, esquire, since deceased, and his heirs and assigns for ever. And the testator, by his said will, disposed of the residue of his personal estate, after giving certain legacies, in the words following: "All the rest and residue of my ready money, "rents in arrear, stock in any of the public funds, jewels, "AND PERSONAL ESTATE WHATSOEVER, I give and "bequeath unto the said *Richard Bettinson*, whom I do "hereby make and appoint sole executor and residuary "legatee." Sir *R. Bettinson*, on the death of the testator, entered into possession of the whole farm, and always treated the same as one entire farm. He afterwards died intestate, and without issue; and administration was granted to his only sister, *Helen Bettinson*, spinster, who afterward died, having made her will, and appointed the defendants her executors. The defendants *claimed to be entitled to the leasehold part of the farm, as part of the personal estate of Sir* R. Bettinson, deceased; the plaintiff, *Lane*, on the other hand, claimed to be entitled, under the will, to the leasehold as well as the freehold part of the farm. THE QUESTION was, Whether the word FARMS shall or shall not carry the premises in question? FOR THE PLAINTIFF, the principal case cited and relied on was *Addis* v. *Clement*, 2 *Pere Wms.* 455. where Lord *Hardwicke*, in deciding that *the leasehold* as well as freehold lands passed, relied on the particular words of the devise, which were "all his lands which he "then stood seised *or possessed of, or any ways interested in, and which were in the possession of A. B.*" AND FOR THE DEFENDANTS, the case of *Pistol* v. *Riccardson*, B.R. Hil. 1784.

1784 (1), was cited, as the caſe moſt directly in point, where the teſtator being ſeiſed of freehold eſtates, and alſo poſſeſſed of two leaſehold farms, deviſed "all his manors, &c. and all and every his ſeveral meſſuages, lands, tenements, and hereditaments, which he was *ſeiſed of, intereſted in, or entitled to*," to his ſon for life, with ſeveral limitations over. And after the caſe had been before the Court ſeven different times, and undergone great conſideration: the deviſe was finally determined not to paſs the leaſehold property; the queſtion being conſidered as precluded by the determination in *Roſe* v. *Bartlett*, *Cro. Car.* 292. Lord KENYON, Ch. J.—Where certain words have obtained a preciſe technical meaning, we ought not to give them a different meaning; that would be, as Lord *King* and other judges have ſaid, removing land marks: but if there be no ſuch appropriate meaning to the words uſed in a will, if the deviſor's intention be clear, and the words uſed be ſufficient to give effect to it, we ought to conſtrue thoſe words, ſo as to give effect to the intent, and not to doubt on account of other caſes, which tend only to involve the queſtion in obſcurity. On the whole of this will, taking it together, I have no doubt. It appears by the caſe, that a part of a farm, held by leaſe under the archbiſhop of Canterbury, had been, for a long courſe of years, in the teſtator's family, and was conſidered almoſt equivalent to a perpetuity, on account of the covenant to renew, and that, as far as can be traced, it had been let by the teſtator and his family, together with the reſt of the farm, which is an eſtate of inheritance, and which belonged to them, as one entire farm to the ſame tenant, under one integral rent. The teſtator, having this various property, has deviſed "all his manors, meſſuages, or tenements, houſes, *farms*, lands, woodlands, hereditaments, and real eſtate, whatſoever and whereſoever, unto *R. Bettinſon*, &c. In many caſes that might be put, I ſhould not lay much ſtreſs on the word *farm*; for whether it ſhould have much or little weight muſt depend upon the ſubject. The reaſon why the Court determined in *Addis* v. *Clement*, that the leaſehold farms did not paſs by that will, was becauſe they thought that all the words there uſed had received in other caſes a certain technical conſtruction, and therefore that they were bound by thoſe deciſions. But we have not that difficulty to encounter in this caſe, becauſe here we find another word in the will, "farms," which, in its general ſignification, means that which is held by a perſon who ſtands in the relation of tenant to a landlord. GROSE, J.—I have no doubt about the teſtator's intention. From the circumſtance of the leaſe being held of the church, and renewable, the teſtator might conſider himſelf as having a perpetual eſtate, a kind of inheritance. And if we conſider the nature

(1) See this caſe in p. 49. *ſupra*.

of this farm, that the leasehold is so intermixed with the freehold part, that they cannot now well be divided; that also affords a strong proof that the testator intended that they should go together. LAWRENCE, J.—I agree, that when certain words have received a certain technical construction, we must abide by the decisions in construing such words, otherwise we should be removing land marks: but no case has been cited, to shew that such a construction has been put upon the word "farm." I remember the case of *Pistol* v. *Riccardson*, and particularly recollect Lord *Mansfield*'s reluctance in deciding as he did: he considered himself bound by the case in *Cro. Car.* where it was held that freeholds only passed by the word "lands," the testator having both freeholds and leaseholds; and he endeavoured to find out some word in that case applicable to leasehold estates, which was not applicable to a freehold. There were indeed the words "interested in," but it was observed, that a man was interested in his freehold as well as his leasehold estates; and the only other word was "lands," which the Court considered had received a certain construction in former cases. Whether the Court would have decided the other way, if the case of *Addis* v. *Clement* had been cited to them, I do not know: it may be observed, that it is not contrary to, but is reconcileable with, *Addis* v. *Clement*; for the latter contained the words "or possessed of" which are more properly applicable to leaseholds than to freeholds. But in this case we are not bound by any technical meaning of the word "farm;" and, therefore, I think that the leasehold did pass under the first devise in this will. PER CURIAM: We are of opinion, taking the whole of the will together, that the leasehold property in question is not included in the residuary bequest, but passed by the prior devise, which comprehended the real estate, although some of the limitations applied to the real estate are inapplicable to this property.

*Doe ex dim.* Burkitt *et al.* v. Chapman Ea. Ter. 20 Geo. 3 C.B. 1 *Hen. Black* 223.

The testatrix made her will, and thereby (after disposing of certain real estates, and bequeathing several pecuniary and specific legacies) devised as follows: "*All the rest and residue of* MY ESTATE, *of what nature or kind soever*, I give, devise, and bequeath, unto my aunt *Catherine Chapman*, for, and during the term of her natural life, and after her decease, my mind and will is, and I do hereby direct, that the same, and every part thereof, *be equally divided* between my said cousins *Catherine Burkitt*, *Ann Hodgson*, *Elizabeth Hobson*, and *Rebecca Maynard*, *and the child of my late cousin* Sarah Hodgson, *share and share alike*; *and in case either of them*, *my said cousins*, *shall happen to die*, *before he*, *she*, *or they*, *shall be entitled to have and receive*, *his*, *her*, *or their*, *said share*, *the child or children of either of my said cousins so dying*, *shall stand in the place of his*, *her*, *or their parent*, *and have such share as his*, *her*, *or their parent would have*

" *have been entitled to*; *and I direct, that the ſhare which the* " *child of my late couſin*, Sarah Hodgſon, *and alſo the ſhare or* " *ſhares of the children of either of them, my ſaid couſins, ſo dying* " *as aforeſaid*, SHALL BE PAID *to the guardian of ſuch child* " *or children, and the receipt of ſuch guardian ſhall be a ſuffi-* " *cient diſcharge for the ſame.*" The teſtatrix died ſoon after making the ſaid will, ſeiſed of eight acres of freehold, and four of copyhold lands of inheritance, in the pariſh of *Chertſey* (which were *the lands in queſtion:* and not particularly deviſed by the will): the defendant was her heir at law. THE QUESTION was, Whether the leſſors of the plaintiff, who claimed under the reſiduary deviſe, were entitled to recover the abovementioned eight acres of freehold, and four of copyhold lands of inheritance? Which raiſed the conſideration of two points: 1ſt. Whether it was not the intention of the teſtatrix to paſs all her property? 2dly. Whether lands not ſpecifically deviſed ſhould not paſs under the reſiduary clauſe? PER CURIAM: As the teſtatrix had two kinds of eſtates, namely, real and perſonal, to which the words " all the reſt of my eſtate of what kind ſoever" might be applied, the Court cannot reſtrain the meaning of them to perſonal property, and negative the operation of them as to real eſtates, particularly as they are ſo general and comprehenſive.—Poſtea to the plaintiff.

Goodtitle, *ex dim.* Hart, *v.* Knot, Ea. Ter. 14 Geo. 3. B.R. *Comp.* 43.

The teſtator, *Humberton*, being ſeiſed in fee of the premiſes in queſtion, and of other lands partly in poſſeſſion, and partly in reverſion after the death of his wife, by his will, after ſeveral precedent deviſes and bequeſts, gave and deviſed as follows: " *In caſe my perſonal eſtate*, excluſive of ſuch part " thereof as I have before given and bequeathed to my wife, " *ſhall not be ſufficient to pay all my debts, legacies, and funeral* " *expences, I hereby give to* Matthew Kenrick *and* William " Reeve, *and their heirs, all my lands and eſtates at Alder-* " *church, in the county of Lincolnſhire*, UPON TRUST *to ſell* " *and diſpoſe of the ſame as ſoon as conveniently may be after* " *my deceaſe*, and the money ariſing from ſuch ſale I will and " direct, ſhall go and *be applied towards making good any de-* " *ficiency as ſhall happen in my perſonal eſtate; and if, after* " *ſuch ſale, the money ariſing thereby ſhall, in any reſpect, be* " *deficient*, I do then ſubject and make liable the reverſion " of my lands, ſettled in jointure upon my wife, to make " good the ſame." The teſtator concludes thus: " and " laſtly, *all the reſt, reſidue, and remainder of my real and per-* " *ſonal eſtate whatſoever and whereſoever*, I give, deviſe, and " bequeath to my ſaid dear and loving wife, her heirs, exe- " cutors, and adminiſtrators, and I conſtitute her my ſole " executrix." The teſtator died, leaving the leſſor of the plaintiff and *William Blunt* his heirs at law. After his death the will was proved, and *out of his perſonal eſtate* ALL *his debts and legacies were paid, and there was no occaſion to call*

*in the aſſiſtance of the real eſtate.* THE QUESTION was, Whether the plaintiff, as coheir, was entitled to recover the lands and eſtate at Alderchurch? Lord MANSFIELD, Ch. J. In the event that has happened there is no deviſe of the premiſes in queſtion, and, as there is not, they go by the reſiduary clauſe to the widow. But ſuppoſe the perſonal eſtate had been a little deficient, and that there had been occaſion to make uſe of this deviſe to pay part of the debts, and that, in conſequence of it, they had been diſcharged; the deviſe would have once taken effect, and there would have been *a reſulting truſt* for ſomebody, ſubject to the charge ſo brought upon it. The queſtion would then be, Whether in this caſe the heir at law could recover? One objection which has been taken is, that the legal eſtate is in the truſtees, and, therefore, the heir at law cannot recover in this ejectment. But it has often been determined, that an eſtate in truſt, merely for the benefit of the *ceſtui que truſt*, ſhall not be ſet up againſt him: any thing ſhall rather be preſumed; nor ſhall a man defend himſelf by any eſtate which makes part of the title of the leſſor of the plaintiff: now, if the truſtees had paid this charge, they would then have become truſtees for the perſons entitled to the ſurplus after ſuch payment. Therefore, if the heir at law be that perſon, the objection being upon a ground which makes part of his title, it ſhall not be ſet up againſt him. The queſtion, therefore, turns ſingly upon the conſtruction of the will: now it is a truſt originally, and, in ſubſtance, a charge on land; which land is deviſed, ſubject to raiſe by ſale, or mortgage, as much money as is neceſſary for the payment of debts, legacies, and funeral expences. It is, therefore, in ſubſtance and equity, a deviſe of a charge upon the eſtate, which may be diſcharged by payment of the incumbrance upon it; or, if not wanted, will reſt in the ſame ſtate as if it had not been made ſubject to ſuch incumbrance. It is land before deviſed, upon which a perſonal charge is let in, therefore the words "all the reſt of the land," neceſſarily make it come within the reſiduary clauſe. If it had been ſold; after payment of what was wanted, the reſt of the money ariſing from ſuch ſale, of courſe, would go to the perſon to whom, under the reſiduary clauſe, the land itſelf was to go, ſubject to ſuch payment and diſcharge; therefore, in either caſe, the widow is entitled.

Smith *ex dim.* Davis *v.* Saunders, Hil. Ter. 11 Geo. 3. C.B. 2 *Black. Rep.* 736.

A general reſiduary deviſe will not carry a reverſion which is, in the ſame will, deviſed to the teſtator's right heirs, unleſs under ſpecial circumſtances.—*Robert Everden*, ſeiſed in fee of the lands in queſtion, and other lands, on the 14th of September, 1753, deviſed the lands in queſtion "to his ſon, "*Henry Everden*, and his wife *Elizabeth*, for their joint "lives, and the ſurvivor of them; and, after the deceaſe of "the ſurvivor, to their eldeſt ſon, and his heirs for ever, "and,

" and, if they leave no male iſſue, to their daughters, and " their heirs, for ever." Afterwards, he deviſed to his ſon-in-law, *Humphrey Davis* (the leſſor of the plaintiff), " All " his eſtates, lands, tenements, and premiſes thereunto be- " longing, *not therein before deviſed, bequeathed*, &c. to hold " to him, his heirs and aſſigns, for ever;" in truſt to ſell the ſame, and, after payment of ſo much of his debts, funeral expences, and all other neceſſary expences, as his perſonal eſtate could not extend to pay; out of the produce thereof, to pay certain ſpecific and pecuniary legacies to his children; and to divide the reſidue equally among his three ſons and five daughters. And then deviſes " *all the reſidue and re-* " *mainder of his eſtate, both real and perſonal, of what nature* " *or kind ſoever, unto his ſon-in-law, the ſaid* Humphrey " Davis, *his heirs, executors, adminiſtrators, and aſſigns, for* " *ever.*" The teſtator died on the 21ſt of February, 1754, leaving *Henry*, his eldeſt ſon and heir, two other ſons, and five daughters. *Henry* (who ſurvived his wife *Elizabeth*) died on the 17th of September, 1769, and never had any iſſue. THE QUESTION was, Whether the ſaid *Humphrey Davis*, under either of the clauſes in this will, was entitled to recover? DE GREY, Ch. J.—Perſonal eſtate, being of a fluctuating nature, muſt go to a reſiduary legatee, in the ſame ſtate as it happens to be at the death of the teſtator. Not ſo, real eſtates, which are of a more permanent nature; for there, only ſuch will paſs by a reſiduary deviſe, as the teſtator really meant to deviſe, at the time of making his will. Again, it is certain, that a reverſionary intereſt, which the teſtator then has, will (if nothing be mentioned of it) paſs by a reſiduary deviſe. And there may be caſes, where a reverſion of an eſtate, deviſed to a man's own heirs, may paſs to a reſiduary deviſee, under the general clauſe; and others, where it will not.—It is always a queſtion of conſtruction. No argument is to be drawn from the poſition of clauſes in a will, but all are to be taken together; neither is the preſent queſtion upon the *legal operation* of a deviſe to a man's right heirs, but upon the teſtator's *intention* by ſuch deviſe. It is ſaid, that the deviſe to the heir is nugatory, and muſt be rejected; but there is as much reaſon to reject the reſiduary deviſe as nugatory, as the other.—It is ſaid, that the deviſe of the reverſion being a nullity, it falls into the *reſiduum*, as being undeviſed; but it would rather fall under the ſecond clauſe, for all undeviſed eſtates are ſubject to the truſt, which this is not now contended to be.—The whole is merely a queſtion of intention, and you can never infer an intention from a ſweeping reſiduary clauſe. The intention of the teſtator is clearly, that his heir at law ſhould have the land, failing the iſſue of his body.—As for authority, in the caſe of *Ameſbury* and *Brown*, 25th of May, 1750, the teſtatrix, having four ſiſters, deviſes particular eſtates to them, with remainder to her own right heirs; afterwards, a general reſiduary clauſe

to one of the ſiſters; and had no other real eſtate: one of the particular eſtates determines. Lord *Hardwicke* held, that the reverſion did not paſs by this reſiduary clauſe, and that though the deviſe may not operate to make the heir take it by purchaſe, yet it is, in the nature of an exception, out of the reſiduary clauſe. *Gould*, J. agreed. *Blackſtone*, J.—*Reſidue* and *remainder* are relative expreſſions, and muſt refer to what has been before deviſed. Whether the deviſe of the reverſion to his right heirs could, in point of law, take effect or not, it is, in fact, deviſed; and, by ſuch deviſe *de facto*, it is (as Lord *Hardwicke* expreſſes it) excepted out of the general reſiduary clauſe. The reſiduary deviſe would extend to any latent reverſions he might have in him, but not to thoſe which he has expreſsly diſpoſed of otherwiſe, unleſs there be ſpecial circumſtances.—Judgment for the defendant.

Doe *ex d'm.* Davis *v.* Saunders, Ea. Ter. 16 Geo. 3. B R. *Cowp.* 420.

Afterwards the ſame caſe came before the Court of B.R. and was ſtated as follows: "The teſtator, *Robert Everden*, "deviſed the lands in queſtion to his ſon, *Henry Everden*, "and his wife, *Elizabeth*, *for their joint lives*, and "the ſurvivor of them, *and after the deceaſe of the ſur-* "*vivor*, to their eldeſt ſon, and his heirs, for ever; *and, if* "*they have no male iſſue*, then to their daughters, and their "heirs, for ever; *and, if they die without iſſue*, THEN *to his* "*right heirs* for ever." Afterwards, he gave "to his ſon- "in-law, *Humphrey Davis*, his heirs, executors, admini- "ſtrators, and aſſigns, for ever, *all and every his freehold and* "*copyhold eſtate and eſtates*, tenements, and premiſes there- "unto belonging and not therein before deviſed, to have and to "hold to him, his heirs, and aſſigns, for ever, upon truſt to "ſell the ſame, ſo ſoon as conveniently might be after his "deceaſe; and, after payment of ſo much of his debts, "funeral, and other expences, as his perſonal eſtate ſhould "not be ſufficient to diſcharge, to pay certain legacies to his "children; *and the reſt, reſidue, and remainder thereof, equally* "*to divide amongſt his children, ſhare and ſhare alike.*" And then he deviſed "*all the reſidue and remainder of his eſtate,* "*both real and perſonal, to his ſon-in-law, the ſaid* Humphrey "Davis, *his heirs, executors, adminiſtrators, and aſſigns, for* "*ever.*" *Henry Everden*, and his wife, ſurvived the teſtator, and died without iſſue. THE QUESTION was, Whether the leſſor of the plaintiff was entitled to recover under the reſiduary deviſe? PER CUR. The clear intention of the teſtator was not to include the reverſion of the premiſes in queſtion, in the deviſe to his ſon-in-law, *Davis*; for he firſt deviſes them to *Henry Everden* and his wife, for their joint lives, and to the ſurvivor, then to their eldeſt ſon, and his heirs, for ever, which would give him the fee; but that deviſe is followed by other words, which, by implication, ſhew he meant his ſon ſhould only take an eſtate tail, with remainder over to his daughters, and, if they died without

iſſue,

iſſue, then the eſtate was to go to his right heirs; the whole reverſion is, therefore, clearly diſpoſed of. It is true, when a man deviſes lands to his right heirs abſolutely, the heir may take by deſcent, as being the better title; but where the lands ſo deviſed are ſubject to a charge, he muſt take under the will, that he may not defeat the will. After this deviſe he gives all his freehold and copyhold eſtates to *Davis*, the leſſor of the plaintiff, but he gives them for purpoſes, which ſhew, he could not mean to include this eſtate; for he directs, they *ſhall be ſold immediately* for payment of debts and legacies, and the reſidue of the money ariſing from the ſale to be divided equally amongſt his children: that could not be done in reſpect of the eſtate in queſtion, till he knew whether his ſon, *Henry Everden*, would have children or not. As to the ſubſequent deviſe of the reſidue, that cannot go further than the firſt; it would be tautology and unintelligible, unleſs applied to the perſonal eſtate.—Nonſuit entered.

Freeman *v.* Duke of Chandos, Mic. Ter. 16 Geo. 3. B.R. *Cowp.* 363.

The teſtator, *Robert Tracy* (in whom the reverſion in fee of one undivided ſeventh part of certain eſtates in Oxfordſhire and Wiltſhire was veſted, as claiming under one of the coheirs of *Francis Keck*, deceaſed), made his will, and thereby deviſed "all and every his manors, meſſuages, lands, tenements, "hereditaments, and premiſes, with their and every of their "rights, members, and appurtenances, in the counties of "*Glouceſter* and *Worceſter*, and ELSEWHERE IN ENG-"LAND, and all his eſtates, uſe, benefit, and *intereſt in re-"verſion, remainder*, or *expectancy*, TO TRUSTEES, ſubject "to certain charges thereon, and to certain limitations in "his marriage ſettlement, expreſſed, IN TRUST, to ſtand "ſeiſed of the ſaid eſtates in Glouceſter, Worceſter, OR "ELSEWHERE, and the *reverſion and reverſions* of ſuch "eſtates, and of all his eſtate, uſe, benefit, and intereſt in "reverſion and expectancy therein, *to the uſes* therein men-"tioned." THE QUESTION was, Whether the reverſion of the eſtates in Oxfordſhire and Wiltſhire paſſed by the words, *elſewhere in the kingdom of England?* Lord MANSFIELD, Ch. J.—If the words of the will are not ſufficient to carry the premiſes in queſtion, the drag-net of conveyances will never end. PER CURIAM: The reverſion in fee veſted in *Robert Tracy*, the teſtator, did paſs by his will.

Atkyns *v.* Atkyns, Ea. Ter. 18 Geo. 3 B.R. affirmed in the Houſe of Lords, upon a writ of error. *Cowp.* 808, 812.

So, where an eldeſt ſon was provided for under a marriage ſettlement, to the amount of 2000*l. per ann.* independently of the father, and the father being *(inter alia)* ſeiſed of and entitled to *the reverſion in fee*, under a will, of and in the manor of L. S. in the county of Glouceſter, and to divers meſſuages, lands, tenements, and hereditaments, there and in U. S. and alſo S. W. in the ſame county, ſubject to ſeveral eſtates tail in three different perſons, one of whom had a ſon about eighteen years of age, deviſed as follows: "I give, deviſe, "and

" and bequeath, all that the manor or lordſhip of Coates, in " the county of Glouceſter, with the rights, royalties, and " appurtenances, and alſo all and every the meſſuages, farms, " lands, tenements, advowſons, and hereditaments whatſo- " ever, of me the ſaid *Edward Atkins*, ſituate, lying, and being " within, or adjoining to, the ſaid manor or lordſhip, and " alſo all that my capital meſſuage, or tenement, and all and " every my lands, tenements, and hereditaments whatſoever, " whether freehold or leaſehold, ſituate at, in, or near, Pin- " bury park, OR ELSEWHERE IN THE SAID COUNTY OF " GLOUCESTER, with their appurtenances; and all my " eſtate, term of years, and intereſt therein, unto and to the " uſe of my executors, their heirs, executors, and admini- " ſtrators, reſpectively, UPON TRUST to ſell the ſame, and " place out the purchaſe monies on government or real ſecu- " rities, at intereſt, and to ſtand poſſeſſed of the principal " monies *on truſt* for *all and every of his children*, whether " male or female (other than and except his eldeſt ſon only), " *to be equally divided between them* if more than one, ſhare " and ſhare alike, to be paid when he or they ſhould ſeve- " rally attain their reſpective ages of 21 years." THE QUE- STION was, Whether the reverſion in fee of, and in the manor of L. S. and other the premiſes there and in U. S. and S. W. did paſs by the will of the teſtator to and become veſted in the defendants, the truſtees therein named in truſt. LORD MANS- FIELD, Ch. J. The eldeſt ſon was provided for by the ſettle- ment to the amount of 2000l. per ann. independently of the father, who had very little to give his younger children; and the intention of his will went to give them all he had in the world. He is ſtudious to uſe words to paſs away every thing; and if his reverſion is not included, there is nothing for the words to operate upon; for except the eſtates of *Coates* and *Pinbury*, he had nothing but this reverſion in the county of Glouceſter. It is contended that the word ELSEWHERE, means nothing; now confining it to the county of Glouceſter ſhews he had ſome imperfect idea at leaſt of this reverſion, or he would have ſaid *elſewhere in the kingdom of England*, or uſed ſome ſuch general expreſſion. The intention is to be collected from the whole of the will taken together, and from thence the Court is to determine, whether his words mean a *local* deſcription or a *general* deſcription—If the teſtator had had any other lands in the county of Glouceſter there might have been ſome doubts. WILLIS J. and ASHHURST J. were of the ſame opinion. BULLER J. alſo agreed, and mentioned the caſe of *Freeman*, *v.* the *Duke* of *Chandos* as in point.— PER CUR. We are of opinion that this reverſion in fee did paſs by the expreſs words of the will of the teſtator, to the truſtees in the will named, in truſt for the ſaid teſtator's youngeſt children.

The

The teſtator, *Jonathan Phillips*, being ſeiſed in fee in POSSESSION *of one undivided moiety* of three of the vill of Henſon, which conſiſted of four tenements, being the premiſes in queſtion, *and alſo being ſeiſed of the reverſion in fee expectant on the death of* Mary Trefry *of the other moiety thereof*, by his will deviſed (amongſt other things) as follows: "All that my "part, purpart, and portion, of and in the tenement called "and known by the name of *Henſon*, within the pariſh of "St. Minver aforeſaid, where I lately dwelt, and alſo all my "other lands in fee ſimple, ſituate, lying, and being, in "Bodmin, in the ſaid county of Cornwall, and the reverſion "and reverſions, remainder and remainders, rents, iſſues, "and profits thereof, I give, deviſe, and bequeath, unto my "kinſman *Nicholas Phillips*, his heirs and aſſigns for ever." THE QUESTION was, Whether the words "All that my part, "purpart, and portion, of and in the tenement known by "the name of *Henſon*," were ſufficient to paſs the moiety in *reverſion*, as well as that in *poſſeſſion*. PER CURIAM: There is no doubt in this caſe. The teſtator meant to give all the intereſt he had in Henſon, whether in poſſeſſion or reverſion; and with that view he deviſed all that his part, purpart, and portion of and in the *tenement* of *Henſon*. So that here he uſed the word "*tenement*" inſtead of "*vill*." But the latter words are ſtill clearer; the "reverſion and remainder, &c." refer to that eſtate where he had a reverſion.

Doe. *ex. dim.* Phillips, *et. al.* *v.* Phillips, *et. al.* Hil. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 105.

The teſtator, *Charles Stutfield*, "gave and bequeathed unto "his ſon *Robert* the ſum of 150l. when of age; and unto his "daughter *Elizabeth* the ſum of 150l. to be paid her when of "age; then he gave to his wife *Elizabeth all the remaining* "*part of his eſtate, effects, &c.* of all kinds whatſoever, with "all caſh, ſum and ſums of money, &c. for her ſole uſe and "benefit, to enjoy it freely during her natural life." The will then proceeded thus, "likewiſe it is my will and pleaſure, "and hereby I ordain it, that at the deceaſe of my wife "*Elizabeth*, the copyhold eſtate of mine, ſituate at Cockhill, "Ratcliffe Highway *(the eſtate in queſtion)*, ſhall fall unto "my ſon *Robert* for his ſole uſe and benefit; likewiſe a free-"hold ſituate at Poplar, &c. at the deceaſe of my wife *Eli-*"*zabeth*, ſhall be given unto my ſon *Robert* as aforeſaid; "likewiſe I ordain, that after the deceaſe of my wife, that "copyhold meſſuage or tenement ſituate at Poplar, &c. "(another houſe) ſhall be given unto my daughter *Elizabeth* "for her own uſe and benefit as aforeſaid; *but in caſe either* "*or both of my children ſhould die before the deceaſe of my wife*, "*then* THOSE LEGACIES, *which are here left them, ſhall return* "*unto my wife* Elizabeth *for her ſole uſe and benefit, and for her* "*to diſpoſe of freely as ſhe might think fit;*" *and he appointed his wife executrix.* Robert the ſon died in the lifetime of the widow, leaving his ſiſter *Elizabeth* his heir at law—the widow was living and ſeiſed—AND THE QUESTION WAS, Whether *Elizabeth Stutfield*, the daughter, could make a good title

Hardacre, *et. al.* *v.* Naſh, *et. al.* Tr. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 717.

title to the reverſion, expectant on the death of the mother?——PER CURIAM: The queſtion ariſes on the laſt clauſe of the will; *but in caſe either or both of my children ſhould die before the deceaſe of my wife, then thoſe legacies which are here left them, ſhall return unto my wife* Elizabeth, *for her ſole uſe and benefit, and for her to diſpoſe of freely as ſhe might think fit.*" And the queſtion is, Whether thoſe words of remainder operate on the real eſtates before given to the ſon, or only refer to the pecuniary legacies? We have conſidered the whole of this will, and are of opinion that thoſe words act upon the real eſtates before given to the ſon in the event of his ſurviving the widow. That ſome part of the deviſor's property was intended to go over to the widow on her ſurviving her ſon is extremely clear, and the only queſtion is, whether the deviſor meant that the pecuniary legacies or the real eſtates ſhould go to her in that event? It is to be obſerved, that before any thing is given to the widow, theſe legacies of 150l. are given to the ſon and daughter when of the age of 21. The father meant that thoſe ſums ſhould be paid abſolutely to his children when of age, for the purpoſe of ſetting them out in the world. Conſiderable ſtreſs was laid on the word "LEGACIES;" and it was argued by the counſel for the defendants, that that word was an appropriate term, applicable to perſonal eſtate only: but the ſame technical and correct expreſſions are not to be expected, from unlettered perſons, as are uſually found in wills drawn by profeſſional men. Even if there were no deciſion to warrant us in ſaying, that the word "LEGACY" may be applied to a real eſtate, if the context required it, we ſhould have had no difficulty in making ſuch a determination for the firſt time. In this will, after the legacies of 150l. each were given to the children, there is one compendious clauſe giving every thing to the widow for life; out of that general fund proviſion was made for the two children in the event of their ſurviving their mother; but looking forward to another event, namely, that of the mother ſurviving her children, the deviſor provided for that event by the laſt clauſe; "but in caſe EITHER or both of my children ſhould die before the deceaſe of my wife, then thoſe legacies, &c. ſhall return unto my wife, &c." The word "return" is not indeed a very correct word: but it is not too much to ſay, that in this will it refers to part of that general maſs before given to the wife. Upon the whole this ſeems to be the fair conſtruction of the will; and it is a more natural conſtruction than to apply the word "LEGACIES" only to the ſmall pecuniary legacies before given to the children, and which would perhaps be ſpent by them. Therefore, the daughter cannot convey a legal title to the copyhold eſtate in queſtion.

Doe, *ex dim.* Spearing *v.* Buckner, Eaſ. Ter. 30 Geo. 3. B. R. 6 *Ter. Rep.* 610.

The teſtator, the Rev. *J. Spearing*, being ſeiſed of a freehold houſe at Wincheſter, and of a conſiderable perſonal but no other real eſtate, by will, after giving directions for his funeral,

funeral, said, "As to my estate and effects BOTH REAL AND "PERSONAL, I give and dispose thereof in manner follow- "ing; that is to say, first, I give to *C. Buckner*, one of my "trustees and executors hereinafter named, 100l. and to *G.* "*Spearing* (not the lessor of the plaintiff) the sum of 500l." Then after giving some other small pecuniary legacies, the testator gave to his servant, *J. Lemon*, an annuity of 40l. to be paid him yearly by his trustees and executors, for his life, directing that *J. Lemon*'s receipt only should be a sufficient discharge to his trustees and executors; and charging his freehold messuage in Winchester with the payment of the annuity. "The testator then gave to his trustees and executors, *C.* "*Buckner* and *J. Robinson*, their executors and administrators, "the sum of 4000l. upon trust, to pay the interest at 4l. *per* "*cent.* by half yearly payments *to his sister* Jane, *then the wife* "*of* B. Middleton, *for her life*, *&c.* remainder to her children, "&c.; and for want of children then upon trust, that the "trustees should pay over the said 4000l. unto *M.* and *R.* "*Buckner*, children of *C. Buckner*, equally share and share "alike." The will then proceeded in these words: "And "my further will is, that if my trustees shall make a greater "interest than 4l. *per cent.* for the sum of 4000l. then I de- "sire that such increase of interest shall sink into and become "part of the residue of my estate. *And also, all the rest, re-* "*sidue, and remainder of my estate and effects, of any and what* "*nature or kind soever, or wheresoever, I give and bequeath the* "*same unto* C. Buckner *and* J. Robinson, THEIR EXECUTORS "OR ADMINISTRATORS *in trust, that they shall from time to* "*time add the* INTEREST *thereof to the* PRINCIPAL, *so as to* "*accumulate the same, as* it is my will that the said residue "shall not be paid or payable but at the time and in the man- "ner and to the several persons as the said principal sum of "4000l. is hereinbefore directed to be paid." The testator's sister, Mrs. *Middleton*, is dead, without leaving any children, so that *M.* and *R. Buckner*, the two children of the defendant, were become entitled to the whole residue of the testator's estate. *The question was, Whether the house at Winchester, charged with the* 40l. *a-year to* J. Lemon *for his life, there being no specific devise of it in the will, passed subject thereto to the defendant* C. Buckner, *the surviving trustee and executor upon the trusts mentioned in the will, or whether the same descends as being undevised and undisposed of by the will to* G. Spearing, *the lessor of the plaintiff, as the testator's heir at law?* Lord KENYON, Ch. J.—I do not see any words in the will to disinherit the heir at law. One of the trustees takes a beneficial interest in a former part of the will; and there is nothing in the will from which it can be collected that the testator meant to confer any other beneficial interest on either of them. The testator set out in the beginning of his will as if he had intended to dispose of all his property.

But

But though thoſe general words would have ſhewn his intention if there had been ſubſequent words in the will, to carry that intent into execution, as was held by Lord *Talbot* in *Ibbetſon* v. *Beckwith*, *Caſ. temp. Talb.* 157, it has been held in a variety of caſes (1) that alone they are not ſufficient to diſpoſe of a fee; and by adverting to the reſiduary clauſe there are no words to paſs the eſtate in queſtion. The teſtator only meant that that ſhould extend to his perſonal eſtate. It is given to truſtees, *their executors, and adminiſtrators*, technical terms applicable to perſonalty. But I rely on the following words of the clauſe, "To add the *intereſt* to the *principal*, ſo as to accumulate the ſame." The intereſt and principal were to make one conſolidated ſum of the ſame nature: but theſe are terms wholly inapplicable to a real eſtate. Seeing, therefore, that there is nothing in the reſiduary clauſe to paſs this eſtate, and that there is nothing in the will to make it neceſſary for the truſtees to take it to perform any truſt in them, the heir at law ſtands entrenched in his right as heir, and cannot be removed from it.—Poſtea to the plaintiff.

Roe, *ex. dim.* George Reade v. W. Reade, H. l. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 118.

A Naked Truſt does not paſs under a General Deviſe.—The teſtator, *P. Rooke*, being ſeiſed in fee of the premiſes in queſtion, deviſed them to his wife for life, and after her deceaſe to his brother-in-law, *G. Reade*, and his heirs, upon the following truſts: "That he, the ſaid *George Reade*, or "his heirs or aſſigns, do and ſhall ſell, give, deviſe, or other-"wiſe diſpoſe of all that my ſaid meſſuage, &c. [deſcribing "the premiſes], unto and amongſt his four children, *G. G.* "*Reade*, *W. Reade*, *B. Reade*, and *J. Reade*, in ſuch man-"ner and in ſuch ſhares and proportions, and with and under "ſuch directions and reſtrictions as the ſaid *G. Reade* ſhall, "by any deed, or laſt will and teſtament, duly executed, &c. "give, direct, limit, or appoint the ſame." After the death of *P. Rooke*, namely, on the 25th of April, 1769, *G. Reade*, the deviſee, by deed (after reciting the will and death of *P. Rooke* and the death of *G. G. Reade*) appointed THREE full and equal undivided four parts of the premiſes in queſtion *to his three ſurviving children*, *W. Reade*, *Jane Willis*, formerly *Reade*, and *B. Reade*, and their heirs, equally to be divided between them ſhare and ſhare alike as tenants in common, making no appointment of one fourth part. *G. Reade*, the deviſee and truſtee under *P. Rooke*'s will, afterwards made his will, and after limiting an eſtate in Dorſetſhire to the uſe of his ſon *William Reade* in fee, and alſo deviſing ſome other lands in Wiltſhire to his ſaid ſon *W. Reade* in fee, concluded thus; "and all the reſt and reſidue of my ready money and ſecurities

(1) *Vid.* § *what will be ſufficient to paſs a fee, infra.*

for

for money, ſtocks in the public funds, goods, chattels, *real and perſonal eſtates*, and effects whatſoever and whereſoever, and of what nature or kind ſoever, as well copyhold eſtates, as all other ſituate in Damerham, South Martin, and Tidpitt, in the ſaid county of Wilts, and Alderbolt in the ſaid county of Dorſet, *or elſewhere in the kingdom* of *England*, *after payment of my debts, legacies, and funeral expences*, I give, deviſe, and bequeath unto my ſaid ſon *W. Reade*, his heirs, executors, &c." THE QUESTION was, Whether the fourth part paſſed unto *W. Reade* the defendant, under the reſiduary deviſe, in the will of *G. Reade* the father?—The plaintiff claimed the fourth part of the premiſes in queſtion, left unappointed by the deed of April 25, 1769, as heir at law of *G. Reade*, the deviſee and truſtee thereof under the will of *P. Rooke*. Lord KENYON, Ch. J. The leſſor of the plaintiff claims the diſputed fourth part as the heir at law of *G. Reade*, and he is entitled to it by deſcent unleſs it were given away from him by the reſiduary clauſe in *G. Read*'s will. That clauſe is relied upon for this purpoſe by the defendant; and, undoubtedly, the words are ſufficiently comprehenſive to paſs this fourth, if it can be collected from the will that the deviſor intended that it ſhould thereby paſs. In *Cheſter* v. *Cheſter* (1) it was holden that a remote reverſion paſſed by a general reſiduary clauſe, it appearing to be the teſtator's intention that it ſhould paſs. But all this doctrine was fully conſidered by this Court, and afterwards in the Houſe of Lords, in the caſe of *Strong* v. *Teate* (2), where it was determined that the general words in a will may be reſtrained in caſes where it appears that the deviſor did not intend to uſe them in their general ſenſe. *Now, in this caſe, the truſtee* (the deviſor) *had no beneficial intereſt in himſelf; he was a mere naked truſtee, though the uſe was executed in him.* And when he ſet about to make a diſpoſition of his property by his will he uſed general words in the reſiduary clauſe, giving all his eſtates "after payment of his debts, legacies and funeral expences." Now theſe latter govern and reſtrain the general effect of the former words, and ſhew that he only meant to give that in which he had a beneficial intereſt, and which he had a power of charging with the payment of his own debts. But it is clear that he could not ſubject the eſtate in queſtion to his own debts; this ſatisfies me that he had no idea of diſpoſing of the truſt eſtate; and therefore I think, that the eſtate in queſtion did not paſs by the reſiduary clauſe in this will.

Upon the trial of this ejectment, a caſe was reſerved for the opinion of the Court, and the ſingle queſtion was, "Whether certain woodlands *paſſed* by the *will* of the late

Goodtitle ex *dim.* Paul, Eſq. *v.* Paul, Spinſter, Mic. Ter 1 Geo. 3. B R. 2 *Burr.* 1089. 1 *Black. Rep.* 255.

(1) 3 *P. Wms.* 55. (2) 2 *Burr.* 912.

"Dr.

" Dr. *Paul*, to his widow; or *deſcended* to his ſon and heir, " as *undeviſed*." The caſe was, that Dr. *Paul*, being ſeiſed of divers freehold and copyhold eſtates, and (amongſt others) of the premiſes in queſtion, by his will *(inter alia)* gave and deviſed as follows:—" I GIVE AND DEVISE *to my* " *dear wife my farm at Bovington in the tenure of* John " Smith, *ſubject to her diſpoſal in as full and abſolute a manner* " *as I could diſpoſe of the ſame if living*."—In the year 1718, *Jonathan Hammond*, as heir to his father, was admitted to the *farm at Bovington* in the above will mentioned. The ſaid *Jonathan Hammond* kept the WHOLE of the eſtate to which he was ſo admitted, in his *own hands*, till the 19th of *March*, 1719; and then, by leaſe of that date, *demiſed* the ſame to *William Smith* and *John Smith* his ſon; EXCEPT and always reſerved out of the ſaid demiſe, unto the ſaid *Jonathan Hammond*, his heirs and aſſigns, *all and all manner of* WOOD, WOOD-GROUND, HEDGE-ROWS, TIMBER, *and* TREES whatſoever, with the *lops*, *tops*, and *ſhrowds* of the ſame (other than the lops of pollard-trees, and other than fruit-trees for their fruit only), to hold the ſaid farm, EXCEPT as *before excepted*, for three years, at 85*l. per annum*. In the year 1721, Dr. *Paul* purchaſed from the ſaid *Jonathan Hammond*, all the premiſes to which the ſaid *Jonathan Hammond* had been admitted as aforeſaid. *William Smith* the father, and *John Smith* the ſon, without any new leaſe, enjoyed what had been ſo demiſed by the ſaid *Jonathan Hammond:* and *Dr. Paul* kept in his OWN HANDS, *till the time of his death, the premiſes* EXCEPTED: which conſiſted of *hedge-rows*, which, in ſome places, are three poles thick, and in others leſs, and only two; and of *chalk-dells* where wood has grown up after the chalk has been taken away, entirely ſurrounded by the lands in the tenure of the tenant; and alſo of ONE ENTIRE WOOD of *ſix* acres, entirely incloſed by the lands in the tenure of the tenant, or by the lands of other perſons. The queſtion was, " Whether the *premiſes* " *ſo* EXCEPTED in the leaſe to *Smith*, and ſo *occupied by* " Dr. PAUL HIMSELF at the time of making his will, " were by ſuch will DEVISED *to his widow*." PER CURIAM: The queſtion turns only upon the DESCRIPTION of the thing meant to be here given. The words " IN THE " TENURE OF JOHN SMITH" cannot be underſtood as a *reſtriction*: they are an *additional* deſcription; which will *not vitiate* any thing that is ſufficiently deſcribed before. Indeed the *ſoil* is excepted out of *Smith*'s leaſe, as well as the *trees*. But Dr. *Paul* gives his wife a power to diſpoſe of the *farm* in as full and abſolute a manner *as he himſelf* could diſpoſe of the ſame, if living: and he himſelf might certainly diſpoſe of the ſoil of theſe ſix acres. It is manifeſtly intended, that the *whole* farm ſhould paſs by this will: and the teſtator

teſtator never thought of any *reſtriction* of his deviſe, but meant theſe words "in the tenure of *J. S.*"—only as an *additional* and fuller deſcription of a thing ſufficiently aſcertained before.

By a deviſe *of all the advowſons for the purchaſe of which I have contracted*, with directions for completing ſuch contracts (the teſtator being then under contract for the purchaſe of one advowſon), it does not appear clearly ſettled, whether an advowſon formerly purchaſed before the making of the will, ſhall paſs.—On the 13th of June, 1763, Sir *Thomas Gatehouſe*, in conſideration of 10,000*l.* articled to convey to Sir *Brian Broughton* and his heirs, on or before the 25th of March, 1764, the manor of Upper Clatford, with the lands, tenements, hereditaments, and appurtenances, and certain other lands, all in the county of Hants. On the 30th of October, 1763, the honourable *Thomas Pitt*, in conſideration of 7000*l.* paid, and 17,000*l.* to be paid, covenanted to convey to the ſaid Sir *Brian Broughton* and his heirs, on or before the 25th of March, 1764, the manor of Abbots Ann, &c. in the county of Hants. AND THE ADVOWSON OF THE RECTORY OF ABBOTS ANN AFORESAID. On the 10th of February, 1764, *Thomas Fuller*, and others, in conſideration of 2500*l.* conveyed to the ſaid Sir *Brian* and his heirs, THE ADVOWSON OF MOTTISFONT (now in queſtion) in the county of Hants. Sir *Brian*, being *thus ſeiſed in fee* of THIS ADVOWSON OF MOTTISFONT, and entitled in equity to the eſtates of Upper Clatford and Abbots Ann, (WITH THE ADVOWSON THEREOF), the articles not being then carried into execution;—and being ſeiſed of other eſtates in the counties of Stafford, Suffolk, Salop, and Cheſter (on ſome of which a rent-charge of 1000*l.* per annum was ſettled on Dame *Mary* his wife for her jointure), and being alſo ſeiſed of a real eſtate in *Lincolnſhire*, which on the 10th of November, 1763, he had articled to ſell to *George F. Tuffnell*, Eſq. for 27,000*l.*—He on the 21ſt of *May*, 1764, by his laſt will duly executed, "deviſed to his "wife and her heirs, *&c.* his houſe in Brook-ſtreet, and all "his ſtock in the public funds, jewels, linen, pictures, china, "plate, and furniture. *He alſo gave to his ſaid wife and her* "*heirs*, ALL *the manors, meſſuages*, ADVOWSONS, *farms*, "*&c. in the county of Hants*, FOR THE PURCHASE OF "WHICH HE HAD ALREADY CONTRACTED AND "AGREED; OR, IN LIEU THEREOF, *the whole money* "*ariſing from the ſale of his eſtates in Lincolnſhire, and ſuch* "*further ſum as might be neceſſary to complete the ſaid contracts:* "*in truſt nevertheleſs to complete ſuch purchaſes, and to take* "*conveyances to her and their own uſe and benefit.* He alſo "gave to truſtees and their heirs, all his manors, meſſuages, "ADVOWSONS, farms, &c. in the counties of Stafford and "Cheſter, to the uſe of his brother *Thomas Delves* for life,

Goodyer St. John, Eſq *v.* Lord Biſhop of Wincheſter, and Robert Hill, Clerk, Mic. Ter. 14 Geo. 3. C. B. 2 *Black. Rep.* 930.

" with remainder to his iſſue in ſtrict ſettlement, and divers " remainders over. And after ſeveral pecuniary legacies, " made his ſaid brother reſiduary legatee of all his perſonal " eſtate."—THE WHOLE COURT were unanimouſly of opinion, that this advowſon of Mottiſfont did *not* paſs by Sir *Brian*'s will, but deſcended to his heir at law. The teſtator ſpeaks only of thoſe eſtates in Hants which were under contract, not thoſe of which the ſale was completed. He gives directions for finiſhing thoſe contracts; and, if never finiſhed, he gives IN LIEU of them the money to ariſe from the ſale of his Lincolnſhire eſtate, 27,000l. which exactly tallies with the ſums which remained to be paid for completing his Hampſhire contracts, viz. 10,000l. and 17,000l. and though it is objected, that in order to ſatisfy the word ADVOWSONS (in the plural number) *this advowſon muſt paſs, for otherwiſe the teſtator had only one advowſon in Hants*, theſe ſeem to be general words thrown in by the drawer of the will, and can only convey what the teſtator confines it to, thoſe which he was then under contract for. And the Court added, that they were clearly of this opinion, becauſe the ſame expreſſion was uſed by him, with regard to his other eſtates in Cheſhire and Staffordſhire, where he had only one advowſon, and hardly ſo much, being only a nomination to a chapel.—Judgment *for the defendant*.

St. John *v.* Biſhop of Winton, Tr. Ter. 14 Geo. 3. B R. Coaſ. 94.

But on a writ of error in the King's Bench, that Court in Trin. Ter. 14 *Geo.* 3. unanimouſly reverſed the judgment in the Common Pleas. The opinions of the judges of B.R. were delivered in the following manner:—*Lord Mansfield*, Ch. J. An heir at law cannot be diſinherited by conjecture; it can only be done by expreſs words, or by an implication which manifeſtly indicates the clear intention of the teſtator upon a fair conſtruction of the whole contents of the will, to give the eſtate from him.—Here the teſtator has made uſe of the word *advowſons*, and the whole diſpute is, *Whether the word advowſon* ſhall be underſtood to mean *advowſons*, ſo as to convey an idea that the teſtator underſtood the real force of the expreſſion at the time; or whether it is to be rejected, as being merely inſerted by him among *other general words*, without any particular meaning or intention annexed to it? If it is to be underſtood as applied to theſe two, there is no doubt but it will include the recent purchaſe, and in that caſe there is an end of the queſtion. It is manifeſt from the facts, that the teſtator's object was to buy eſtates in Hampſhire, which he was carrying into execution, and wiſhed to complete in as little an interval as circumſtances would admit of. The dates of the tranſactions are material.—On the 13th of June, 1763, he contracts for lands in Hampſhire, *to be conveyed on or before* the 25th of March, 1764. On the 30th of October, 1763, he contracts for other eſtates in Hampſhire, *including* an advowſon, and pays 7000l. in part; the

the reſidue to be paid, and a *conveyance executed*, on the 25th of March, 1764. And in the intermediate time, that is, on the 10th of February, 1764, he purchaſes the *advowſon in queſtion*, and has an immediate conveyance made to him, ſo that there were three ſpecies of eſtates which he had to diſpoſe of; *one* by articles that reſted *wholly executory*; *another* by articles *not wholly executory*, nearly a third part of the purchaſe-money having been paid; and *a third*, that had been carried into execution by a very recent conveyance; whoever drew the will thought to include the whole under one deſcription; therefore, to ſhew ſuch general intention of the teſtator, he ſays *for the purchaſe whereof I have* ALREADY *contracted and agreed:* not for the purchaſe whereof I have ONLY *contracted and agreed.* He did not intend any future purchaſe ſhould paſs; but only thoſe he had recently entered into. If he had ſaid ONLY *contracted and agreed*, the purchaſe of the 30th of October, 1763, of which great part of the purchaſe-money had been advanced, would not have paſſed, becauſe that contract and agreement was more than made, it was partly carried into execution. He puts in the word *advowſons:* ſhall the meaning of this be excluded becauſe he has uſed the expreſſion *for the purchaſe whereof I have already contracted and agreed?* Has he in fact leſs agreed for a recent purchaſe becauſe he has actually completed it? In point of intention, I think it is impoſſible to conceive that he meant to except the particular advowſon. It has been argued, that he could mean only to include the *executory contracts*, becauſe he has given IN LIEU thereof, the money to ariſe from the ſale of the Lincolnſhire eſtates; now every equivalent muſt be ſuppoſed to be co-extenſive with the thing for which it is intended as an equivalent, but though the words are *in lieu thereof*, which implies an alternative, yet he could not mean to ſubſtitute the one for the other, becauſe 7,000l. had been paid in part of one of the eſtates, and the 27,000l. to ariſe from the ſale of the Lincolnſhire eſtates, was juſt ſufficient to complete the ſeveral purchaſes.—The ſum of 27,000l. was therefore, in fact, 7,000l. ſhort of the real value, and purchaſe-money of the eſtates under contract, conſequently, *it could not be intended as an equivalent for them, but only as a fund to complete the purchaſe.* The whole queſtion depends upon this ſingle point, WHETHER *there are words in the will ſufficient to paſs the advowſon in queſtion?* If there are not, the heir cannot be diſinherited. But here the word *advowſons* is uſed, and in order to decide for the heir, we muſt entirely reject it; but I do not think we are at liberty to do ſo, becauſe I think the teſtator meant the word *advowſons* ſhould have its full force and effect: and no argument ariſes from his having inſerted the ſame word in the deviſe of his other eſtates, where in point of fact, there were no advowſons, becauſe his object was to

disposé of all he was possessed of. Therefore, I am of opinion, that by the word *advowsons*, *both* the advowsons pass. *Aston J.* agreed with his lordship, that by the clear intention of the testator, and upon the plain and manifest meaning of the words, both the *advowsons* passed. *Willes, J.* and *Ashhurst J.* also concurred.

2 *Black. Rep.* 933. *Upon the above judgment of the court of* B.R. *a writ of error was brought in parliament*, and L. CH. BARON SMYTHE concurred with the court of King's-Bench:—the other barons with the court of common pleas; which latter opinion (of the court of common pleas) was also strongly supported in argument by Lord *Apsley*, chancellor, and Lord *Camden*, the only law lords in the house; *however, the question was carried without a division, the* 11*th of May*, 1775, *to affirm the judgment of the court of King's Bench.* A day or two after which, a motion was made to re-hear the cause, it being alleged that the majority of the lords present were clearly for reversing that judgment, though, by a surprise, they did not divide the house. *But the fact being not clearly ascertained, and also for the danger of such a precedent, the motion was withdrawn by consent.*

Holdfast, *ex dim.* Hitchcock, *v.* Pardoe, esquire, Hil. Ter. 15 Geo. 3. C.B. 2 *Black. Rep.* 975.

A devise to *H. of an entire farm in the occupation of B.* which included a small parcel of *marsh* land, was held not to be dismembered by a subsequent devise in the same will of all *the testatrix's marsh lands* to *M.* she having a large estate in marsh lands besides, which was let to a separate tenant.—On the 1st of May, 1753, *Martha Wakelin* demised to *Charles Bocock*, a messuage and certain closes in Lowlayton, all formerly in the occupation of one *Ferril*, and then of the said *Charles Bocock*. *And also four half acres of common marsh lands in* Shortlands, *and a rood of common marsh lands in Layton Marsh in Lowlayton aforesaid*, containing together thirty-three acres and one rood, to hold for twenty-one years from Lady-day then past, at 50*l.* per ann. On the 1st of April, 1761, *Martha Wakelin* devised all her estates to her sister *Ann Moore*, and died in 1763.——And on the 22d of February, 1766, *Ann Moore*, devised to *Mary Pannel* and her heirs, all her other messuages, lands and tenements in Lowlayton (*except the farm now in the possession of my tenant* Bocock, *and the* PREMISES IN THE POSSESSION OF MR. BRISTOW *and the marsh lands*). And to *Elizabeth Hitchcock* and her heirs certain lands in Monmouthshire, and the premises in the possession of Mr. *Bristow* in Lowlayton, AND HER FARM IN THE POSSESSION OF CHARLES BOCOCK;——*and to the children of her late uncle* Henry Moore, *as joint-tenants in fee*, "ALL HER LANDS LYING IN LOWLAYTON MARSH."—And the testatrix died in August, 1766, seised of all the premises in lease to *Bocock*; and also of certain other marsh lands in Lowlayton Marsh, viz. 35 *acr.* 3 *ro.* 11 *p.* then in the occupation of *William*

*William Warren.* THE QUESTION was, Whether the ſaid 4 *a.* 1 *r.* were included in the deviſe to *Elizabeth Hitchcock*, the leſſor of the plaintiff? And, if ſo, whether the ſubſequent deviſe of all the teſtatrix's lands in Lowlayton Marſh to the children of *Henry Moore*, be not a revocation of the preceding deviſe *pro tanto*, ſo as to veſt the ſame in the children of the ſaid *H. Moore?*——PER CURIAM: There is no doubt of the intention of the teſtatrix. She never meant to diſmember her *farm* in the occupation of *Bocock*, and expreſsly deviſes it by that name to *Elizabeth Hitchcock*; ſo that it is clear theſe parcels of marſh land are included in that deviſe. Nor is there any reaſon to think ſhe intended to revoke it in part, by her ſubſequent deviſe of *all her marſh lands* to the children of *Moore*. The four acres and a quarter were probably neceſſary to make *Bocock*'s farm complete, and if divided from it might do it a material injury.—Poſtea to the plaintiff.

A deviſe of *all my eſtates in A.* to my niece and her heirs (the teſtator having only a copyhold in fee, and a long term of years in that pariſh) will carry both thoſe intereſts to the niece, if ſo intended by the teſtator, though there is a bequeſt of all his goods and perſonal eſtate to *B.*—*John Gotts*, the teſtator, being poſſeſſed of an old 1000-years' term in a tenement, and half an acre of land in Barney (the premiſes in queſtion), and alſo of a copyhold meſſuage and ſeven acres and a quarter of land under an old mortgage ſecurity. And having been for a number of years in the receipt of the rents of both the leaſehold and copyhold eſtates aforeſaid, which had been occupied together for upwards of 23 years, he a little time before his death, by his will, "deviſed all his meſ- "ſuages, lands, tenements, and hereditaments in Little Wal- "ſingham and Barney to *Margery* his wife for her life; and "after her deceaſe, *all that his eſtate in Barney aforeſaid to his* "*niece* Mary Bowman *and her heirs*, and all that his eſtate in "Little Walſingham aforeſaid to his nephew *John Hudſon* "and his heirs; and bequeathed to the ſaid *Margery* his wife, "*all his goods, chattels, houſehold ſtuff, and implements of houſe-* "*hold, ready money, bills, bonds, and other ſecurities for money,* "*and all other his perſonal eſtate*, ſhe paying his debts, funeral "expences, and the charges of proving his will, and ap- "pointed her his ſole executrix." THE QUESTION was, Whether the leaſehold premiſes in Barney, paſſed under the will of *John Gotts* to his niece *Mary Bowman*, the wife of the defendant, *Joſeph Bird?* And it was contended, that the leaſehold paſſed to the wife under the general reſiduary bequeſt of the perſonal eſtate. DE GREY, CH. J.—The queſtion is, What eſtates were meant to be deviſed to the wife? The words of the will are, all his meſſuages, lands, tenements, and hereditaments. Now by the ſtrict rule of law, as he had no eſtates but copyhold and leaſehold, none of them could paſs by theſe words. But by recurring to the intention of the teſtator, they are all capable

Roe, *ex dim.* Pye, *v* Bird, Tr. Ter. 19 Geo 3. C.B. 2 *Black.* 1301.

of paſſing, if all were intended to paſs. The ſame rule muſt apply to both. And though the premiſes in queſtion were only a mortgage for years, and then redeemable, as between the mortgagor and mortgagee, yet undoubtedly a mortgagee in poſſeſſion may, if he pleaſe, treat the mortgaged eſtate as land, and deviſe it as ſuch; though it ſtill remains redeemable in the hands of the deviſee. And the circumſtance of long unity of poſſeſſion favours the conſtruction, that he meant to deviſe both copyhold and leaſehold together. The objection that he intended this leaſe ſhould go to his executors, by the words "ſecurities for money" proves too much. It would carry the copyhold as well as leaſehold, for both were redeemable mortgages, and nothing is left to ſatisfy the deviſe to the niece. Beſides it is preceded by other words of a leſs import, bonds, bills, &c.—GOULD, J. of the ſame opinion. BLACKSTONE, J. The words here are (as in *Martin* and *Mowlin*, 2 Burr. 969), ſufficient to carry the premiſes either as land or money, according to the intent of the teſtator. "*All my eſtate*" is ſufficient to comprize a leaſehold, though in *Davis* and *Gibbs*, 3 *Peere Wms.* 26. "ALL MY REAL ESTATE" was held not to extend to mortgages or ſtatutes. "*My goods, chattels, ſecurities for money, and perſonal eſtate*," will as clearly comprehend a mortgage term, if ſuch was the intent of the teſtator. He certainly conſidered both the copyhold and leaſehold at Barney, as one conſolidated eſtate. They had been occupied together for at leaſt twenty-three years, and either meant both to go to his niece, or neither. His title both to the term and the copyhold was abſolute at law; and I think was conſidered by him as abſolute in equity alſo. NARES, J. of the ſame opinion.——Judgment of nonſuit.

Sir John Sheffield, bart *v.* Lord Mulgrave, *et al.* Eaſ. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 571.

The teſtator Sir *Charles Sheffield*, being ſeiſed in fee ſimple of divers manors, meſſuages, lands, and hereditaments in the counties of Lincoln and York, *and being alſo ſeiſed of the rectory or parſonage of Lyth, in the ſaid county of York*, under a leaſe granted to him, his heirs and aſſigns, by the Archbiſhop of York, for the lives of himſelf, his ſon, *John* (now Sir *John Sheffield*), and his ſiſter *Charlotte Griffith*, and the lives and life of the ſurvivor of them, "by will, dated the 16th of May, "1766, deviſed to *Edward le Grand, John Crookſhanks*, and "*Samuel Salt*, their heirs and aſſigns, *all his manors, meſ-* "*ſuages, lands, tenements, tythes and hereditaments, and all his* "*real eſtate whatſoever, ſituate, lying, and being in the ſeveral* "*counties of Lincoln and York, or elſewhere in the kingdom of* "*Great Britain* (except what is therein after mentioned and "deviſed), upon truſt, and for the intent and purpoſes, and "ſubject to the proviſoes thereinafter limited, expreſſed, and "declared of and concerning the ſame, that is to ſay, to the "uſe of his ſon *J. Sheffield* (now Sir *J. Sheffield*) for life, "without

" without impeachment of waſte; remainder to the ſaid truſ-
" tees, to preſerve contingent remainders; remainder to the
" firſt and other ſons of his ſaid ſon, in tail; with ſimilar
" remainders to his other ſons and daughter; and the rever-
" ſion in fee to the preſent Sir *J. Sheffield*; provided that if
" any of his daughters, or any of the female deſcendants of
" his ſons, ſhould come into poſſeſſion of all or any part of
" his ſaid real eſtates under the limitations aforeſaid, and
" marry, the huſband or huſbands ſhould take the name of
" *Sheffield*. Sir *C. Sheffield*, after giving ſeveral rent charges,
" deviſed the annual rent or ſum of 100l. to his daughter,
" *M. S. Sheffield*, and another annual rent of 100l. to his ſon,
" *R. Sheffield, and charged all that the rectory or parſonage of*
" *Lyth within the north riding of Yorkſhire, which he held by*
" *leaſe granted by the Archbiſhop of York, for the lives of the ſaid*
" *Sir* Charles Sheffield, *his ſon* John Sheffield, *and the ſaid*
" *Sir* Charles Sheffield's *ſiſter*, Charlotte Griffith (*late* Walker),
" *with the payment of the two annual rents or yearly ſums laſt*
" *mentioned; and the deviſor declared his will to be, that in caſe*
" *his ſaid ſon and daughter* Robert Sheffield, *and* M. S. Shef-
" field, *or either of them, ſhould happen to be living at the time*
" *of his deceaſe, then the leaſe by which the rectory or parſonage of*
" *Lyth might be then held ſhould be renewed, and a new leaſe*
" *obtained thereof as* ſoon as conveniently might be, and that
" the fine or fines, and all coſts of ſuch renewal ſhould be paid
" out of his the ſaid Sir *Charles Sheffield*'s perſonal eſtate, and
" that in ſuch renewed leaſe or leaſes the lives of his ſon and
" daughter *Robert Sheffield* and *M. S. Sheffield*, of whom
" *Robert* was to have the preference, ſhould be added to the
" lives then ſubſiſting. Sir *J. Sheffield* afterwards by a teſta-
" mentary paper, revoked ſo much of his will as reſpected
" the diſpoſition of his perſonal eſtate, and appointed his ſon
" Sir *J. Sheffield* executor of that teſtamentary paper; and
" afterwards died, leaving Sir *J. Sheffield* his heir at law.
THE QUESTION was, What intereſt in the leaſehold for lives in queſtion the plaintiff Sir *J. Sheffield* took upon the death of his father Sir *C. Sheffield?* AND IT WAS CONTENDED for the plaintiff, that the plaintiff Sir *J. Sheffield*, being the heir at law of Sir *C. Sheffield*, took the rectory as a ſpecial occupant, ſubject to the two rent charges ſpecifically given. FOR THE DEFENDANT it was inſiſted, that Sir *John Sheffield* was only entitled to a life eſtate in the rectory, it being included in the general deviſe to the truſtees.—Lord KENYON, Ch. J. The general words of the deviſe in queſtion may or may not comprize this property, according to the intention of the deviſor; it being merely a queſtion of intention. In a caſe (1) brought here many years ago from Ireland, the queſtion was, Whether a diſtant reverſion paſſed by the general words of a

(1) 2 *Burr.* 912.

deviſe? It was admitted that the words were comprehenſive enough to paſs the reverſion, if the deviſor had intended that it ſhould ſo paſs; but becauſe the purpoſes of the deviſe, which required an eſtate in poſſeſſion, were not applicable to the reverſion, it was determined that the reverſion did not paſs. In this reſpect that caſe differed from that of *Cheſter* v. *Cheſter* (1), where the deviſor's intention could not be collected negatively not to include a reverſion in the general words of the deviſe. *In the preſent caſe, if Sir* C. Sheffield *had intended to deviſe the rectory, theſe general words would undoubtedly have been ſufficient: but all the limitations are inapplicable to ſuch an intent; and the laſt clauſe in the will is deciſive to ſhew that he did not mean to include the rectory in the general deviſe.* For having given two rent charges of 100l. a year each to his daughter *M. S. Sheffield*, and his ſon *R. Sheffield*, and having charged the rectory with the payment of them, he directed that if thoſe two children, or either of them, ſhould be living at the time of his deceaſe, the leaſe of the rectory ſhould be renewed, and the fine paid out of his perſonal eſtate, and the lives of thoſe two children, of whom *Robert* was to have the preference, added to the lives then ſubſiſting. Moſt probably the deviſor knew that though in ordinary caſes, where one man takes a leaſe during the lives of others, ſtrangers to him, the others are conſidered as truſtees for him, according to the caſe of *Benger* v. *Drew* (2), the caſe is different when a father puts in the names of his children; in ſuch caſe it is conſidered as a proviſion for the children (3). Now I think that Sir *C. Sheffield* intended this as a proviſion for theſe two children, though he has done it in a bungling manner: but it ſufficiently ſhews that he did not intend that the rectory ſhould go to the truſtees in ſettlement. I am therefore of opinion that *the plaintiff took this eſtate as a ſpecial occupant.* Though whether or not this laſt clauſe in the will, will qualify his eſtate, and whether the Court of Chancery will not ſo mould it in his hands as to make him a truſtee for the benefit of the two other children, are queſtions fit for the conſideration of that court. It is ſufficient for us in this court to ſay that taking the whole will together, the deviſor did not intend to include the rectory in the general words of the deviſe to the truſtees; the purpoſes of that deviſe being applicable to eſtates of a different kind. Per Curiam: We are of opinion that the leaſehold property for lives is not comprehended in the hereditaments and real eſtate deviſed in ſtrict ſettlement; but that it devolved upon the death of Sir *Charles Sheffield* on his ſon and heir, now Sir *John Sheffield*, as ſpecial occupant, and that as ſuch he took the abſolute intereſt at law in the then exiſting leaſe.

(1) 3 *P. Wms.* 56. (2) 1 *P. Wms.* 781.

(3) *Vide Scroope* v. *Scroope*, 1. *Caſ. in Ch.* 27. Lord *Grey* v. Lady *Grey*, 2 *Caſ. in Ch.* 296. *Pole* v. *Pole*, 1 *Ves.* 76. *Mumma* v. *Mumma*, 2 *Vern.* 19. *Duck* v. *Andrews*, *ib.* 120. and *Dyer* v. *Dyer*, *Exch. Hil.* 1786.

Roe, *ex dim.* W. Hale *v.* Wegg, *et al.* Tr. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 708.

Lands purchaſed ſubſequent to a general deviſe, may, under particular circumſtances, paſs thereby.—The teſtator, *Paggen Hale*, being ſeiſed in fee of the manor of King's Walden, deviſed (among other things) "the ſaid manor, "with the appurtenances, and all his meſſuages, lands, tene- "ments, and hereditaments, ſituate in the pariſh of King's "Walden aforeſaid, to *W. Hale* for life; remainder to truſ- "tees, to preſerve contingent remainders; remainder to the "firſt ſon of *W. Hale* in tail male, with divers remainders "over." The teſtator, after making his will, purchaſed the premiſes in queſtion, being ſituate within the pariſh of King's Walden, and copyhold, parcel of the ſaid manor, and held of the ſaid teſtator, as lord of the manor, by one *S. Bowyer*, who ſurrendered the ſame to the uſe of the ſaid *P. Hale* and his heirs. The teſtator immediately after demiſed the premiſes to one *J. Lawrence*, from year to year, at a certain yearly rent, and afterwards died. Upon his, the teſtator's, death, on the 8th of April, 1755, Lord *Melbourne* being his heir at law, entered into the premiſes in queſtion, claiming the ſame as ſuch heir, and continued in poſſeſſion thereof, and held the ſame under the ſaid claim until the year 1767; when by indentures of leaſe and releaſe, dated the 6th and 7th of February, 1767, he ſold and conveyed the ſame to ſir *R. Goodere*, knight, and *S. Wegg*, eſq. and their heirs, to the uſe of *R. Heighway* for his life; and the ſaid *R. Heighway*, and the other defendants who reſpectively claim under him, have been in poſſeſſion of the premiſes ever ſince, and ſtill are in poſſeſſion thereof. In Michaelmas term, 1770, a common recovery was ſuffered of the ſaid manor with the appurtenances, in which *Robert Fry*, gentleman, was demandant, *Henry Wilmot*, eſq. was defendant, *and the ſaid* William Hale, *the tenant for life, and the leſſor of the plaintiff, were vouchees*, amongſt other things, of the manor of King's Walden, with the appurtenances. *W. Hale*, the tenant for life, died in September, 1793, upon whoſe death the leſſor of the plaintiff, being the firſt ſon of the body of the ſaid *W. Hale*, the tenant for life, brought this action. FOR THE PLAINTIFF it was contended, that the copyhold premiſes in queſtion paſſed by the will of *P. Hale*, notwithſtanding they were purchaſed by him ſubſequent to the making of ſuch will; and that the right of the leſſor of the plaintiff claiming as tenant in tail under that will, was not affected either by the demiſe of the premiſes from year to year by the deviſor, or by the recovery ſuffered by *W. Hale* the father, who was the firſt taker under the will of *P. Hale*, becauſe the tenant to the *præcipe* muſt have a freehold in poſſeſſion; and here *W. Hale*, the father, had only a right of action, and the ſon had only a remainder after the determination of the father's life eſtate.—Lord KENYON, Ch. J. Nothing can be clearer than

than this caſe. In the eye of the law the tenants of the manor are only *quà* tenants at will to the lord. The lord is ſeiſed in fee of the whole. When the lord in this caſe made his will, it operated on the whole manor, including the demeſnes and the ſervices; and when the copyhold in queſtion was purchaſed by him, it was ſtill part of the manor, and paſſed by the will of the manor. Suppoſe the lord had been ſeiſed of the manor *ex parte materná*, this newly acquired copyhold, when purchaſed by the lord, would not have gone to his heirs *ex parte paternâ*. If then this copyhold, when purchaſed, fell into and became part of the manor, there is no pretence to ſay that the circumſtance of the lord's demiſing it for a year, can vary the caſe. If a man, being ſeiſed in fee of a freehold, make his will, that will is not revoked by his afterwards granting a leaſe of his eſtate. And with regard to the recovery which has been ſuffered, that cannot affect this caſe. PER CUR. We are clearly of opinion, that the copyhold in queſtion paſſed under the will of *P. Hale*, and that Lord *Melbourne*, his heir at law, who has ſince ſold it, could not make a good title of it to the purchaſer, the defendant.

The Counteſs of Strathmore *v.* A. Robinſon Bowes *et al.* and A. Robinſon Bowes *et al. v.* the Counteſs of Strathmore *et al.* Hil. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 482.

The teſtator, *George Bowes*, by his will, dated the 7th of February, 1749, "gave and deviſed *all his freehold and copy-*
"*hold manors, meſſuages, lands, tenements, and hereditaments*
"*whatſoever*, not held in mortgage or in truſt for any other
"perſons, nor held by any leaſe or leaſes for lives, to his
"wife *Mary Bowes*, *Edward Gilbert*, eſq. *Elizabeth Bowes*,
"*Jane Bowes*, and his friends the honourable ſir *H. Smith-*
*ſon*, bart. and *T. Rudd*, their heirs and aſſigns, to the uſe
"of them, their heirs, and aſſigns, *upon certain truſts.*"
After making the ſaid will, and before making the codicil after mentioned, *the deviſor purchaſed ſeveral eſtates, and particularly*, in 1754, *he purchaſed an undivided third part of a certain freehold eſtate in the county of Durham, and was ſeiſed in fee thereof at the time of his death.* The deviſor afterwards made a codicil to his ſaid will, dated 20th October, 1758. After reciting that "by his laſt will and teſtament, dated the
"7th of February, 1749, he had given and deviſed *all his*
"*freehold and copyhold manors*, &c. to his wife *Mary Bowes*,
"her father *E. Gilbert*, his ſiſter *E. Bowes*, and his ſiſter
"*Jane Bowes*, and his friends the honourable ſir *H. Smith-*
"*ſon*, bart. and *T. Rudd*, their heirs and aſſigns, and to the
"uſe of them, their heirs, and aſſigns, upon the truſts, in-
"tents and purpoſes therein mentioned, *he revoked all his*
"*above deviſe, ſo far as it related to the above ſir* H. Smith-
"ſon (then earl of Northumberland) *and* T. Rudd *and their*
"*heirs*; and then he gave and deviſed HIS SAID LANDS,
"TENEMENTS, AND HEREDITAMENTS, unto the above-
"named *Mary Bowes*, his ſaid wife, *E. Gilbert*, and his
"ſiſters

" ſiſters *E. Bowes* and *J. Bowes*, their heirs and aſſigns, " upon the ſame truſts:" concluding thus, " and I do here- " by make and declare this codicil to be part of my laſt will " and teſtament, as witneſs," &c. THE QUESTION there- upon was, Whether the codicil, dated the 20th day of Octo- ber, 1758, made by the teſtator *George Bowes*, was a repub- lication of his will, dated the 7th day of February, 1749, ſo as to paſs the after-purchaſed lands?—Lord KENYON, Ch. J. It is clear that a codicil, confirming a will of lands in general words, will paſs lands purchaſed between the making of the will and the codicil. But here the queſtion is, Whe- ther it was the intention of the deviſor to paſs by the codicil any thing more than would have paſſed by the will itſelf? Now this caſe is this: The teſtator gave all his real and copyhold eſtates to ſeveral truſtees by his will, in words ſuf- ficiently comprehenſive to carry all the eſtates of which he was then ſeiſed. Then he made a codicil, *not to extend his will, but only to revoke ſo much of it as veſted the eſtates in ſome of the truſtees*, whom he had named in his will, and then he gave HIS SAID LANDS, &c. that is, thoſe lands which he had before given by his will, to the reſt of the truſtees.— GROSE, J. agreed.—LAWRENCE, J. In the caſe of *Heylin* v. *Heylin*, *Cowp.* 132. [*vide* title WILLS], Lord *Mansfield* ſaid, " If one deviſe lands by the names of *B*, *C*, and *D*, and purchaſe new lands, and republiſh his will, the republication does not concern ſuch new lands, becauſe the will ſpeaks only of the particular lands *B*, *C*, and *D*." So here the teſtator, by his codicil, gave the ſaid lands that he had before given by his will: and that has the ſame operation as the enumeration of particular lands in the caſe put by Lord *Mansfield*. PER CURIAM: We are of opinion that the codicil was not a republication of the will, ſo as to extend the operation of the will to the real eſtates purchaſed after the will was executed. It extends to the eſtates deviſed by the will, and no further.

Premiſes will not paſs under a falſe recital.—The teſtator, by his will, dated the 19th of October, 1795, after giving to his wife 700l. to be paid to her and her execu- tors, &c. out of his perſonal eſtate not thereinbefore parti- cularly bequeathed, and the yearly intereſt of the ſum of 1200l. for her life, " gave and deviſed to her *for her life*, certain premiſes in " Northwood, which he held for lives " under *T. Blantern*; and as for his leaſehold eſtate at " Wentnall, which he held under *R. Smythe*, and alſo his " eſtate at Northwood, after his wife's deceaſe, and all the " reſidue and remainder of his real and perſonal eſtate, and " alſo the ſum of 1200l. after his wife's death, he gave and " deviſed one moiety to *G. Walmſley*, his heirs, executors, " &c. and one moiety of the other moiety to *J. Gough*, his " heirs, executors, &c. and the other part of the other " moiety

Mary Skerratt v. Oakley. Hil. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 493.

" moiety to *E. Gough*, for her life, remainder to *J. Gough*, " his heirs, executors, &c." On the same day he made a codicil, by which he directed that " the 700l. bequeathed to " his wife, and other bequests made to her by his will, should " be in full of all demands to which she should be entitled, in " or out of his real or personal estate, except the estate for " life of his wife and her assigns in the premises at Wrent- " nall aforesaid, any thing in his foregoing will to the con- " trary thereof contained in any wise notwithstanding." It was contended, on the part of the defendant, that the testator did not intend to give any thing to the wife by the codicil, in addition to what she took under the will, but made the codicil for the purpose of limiting the claims of the wife: for that his exception of the premises at Wrentnall was, at the most, merely a false recital, the testator not having given her the estate at Wrentnall, though he had given her the estate at Northwood. And a false recital cannot give her any thing; *Bamfield* v. *Popham*, 1 *P. Wms.* 54; *Right* v. *Hammond*, 1 *Str.* 427; and *Holder* v. *Holder*, 2 *Eq. Cas. Abr.* 359. On the other hand, it was contended that the plaintiff took the estate at Wrentnall, under her husband's codicil. That it did not appear that the testator had made any mistake in using the word Wrentnall in the codicil; and that if there were any such mistake, the Court could not rectify it. *Smith* v. *Mailland*, 1 *Vez.* jun. 364.—Lord KENYON, Ch. J. The word Wrentnall was written in the codicil instead of the word " Northwood:" in reciting in the codicil what he had given by his will, the testator made that evident mistake.—GROSE, J. The testator did not mean to give his wife any thing by the codicil: his intention was to prevent her claiming dower or thirds, as he supposed she would be entitled to them without some such restriction; and in effecting this he used the word " Wrentnall" for " Northwood," in the recital in the codicil.

## *What Words will pass an Estate in Fee.*

Doe *ex dim.* Long v. Laming, Mic. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1100 1 Black. Rep. 265.

On a special case, which arose upon an ejectment brought for gavel-kind lands in Kent, tried before Lord *Mansfield*, it was stated, That *Martin Long*, being seised in fee, &c. made his will, &c. and thereby, after devising three-fourths of the premises to *A. B.* and *C.* with special limitations, devised thus: " Also I give and devise one other equal undi- " vided fourth part, &c. unto my niece *Anne*, now wife of " *William Cornish*, and to the heirs of her body lawfully be- " gotten or to be begotten, as well females as males, *and to* " *their heirs and assigns for ever*, to be divided equally share " and share alike, as tenants in common, and not as joint- " tenants."

" tenants." The teſtator lived two years after making this will: he died in May, 1751. At the time of making the ſaid will, the teſtator's ſaid niece *Anne Corniſh*, wife of *Thomas Corniſh*, had two daughters (by her ſaid huſband), then living; viz. *Elizabeth* and *Anne*. *Anne Corniſh*, the teſtator's niece, DIED AFTER THE TIME OF MAKING THE WILL, BUT IN THE LIFE-TIME OF THE TESTATOR: and her two daughters, *Elizabeth* and *Anne*, ſurvived both their ſaid mother and alſo the teſtator, *Martin Long*. The queſtion ſubmitted to the Court was, " WHETHER *by* the death of " *Anne Corniſh* (the mother), in the life-time of the teſtator, " the deviſe, as to her one-fourth part, was void or lapſed? " or, Whether the ſaid one-fourth part, deviſed as above, or " any and what part thereof on the teſtator's death, deſcend- " ed to the leſſor of the plaintiff, as heir at law to the teſta- " tor?"—Lord MANSFIELD: The words are—" to my " niece *A. C.* and to the heirs of her body, lawfully begot- " ten, or to be begotten, as well females as males, and *to* " *their heirs and aſſigns for ever*; to be divided equally, " ſhare and ſhare alike, as tenants in common, and not as " joint-tenants." The queſtion is, " Whether it be con- " trary to the rules of law to underſtand, in this caſe, 'heirs " of the body of *A. C.*' as a deſcription of children:" for that ſuch was the intention of the teſtator, there can be little doubt. It is clear, that where an eſtate is given to the anceſtor " and his heirs" (either general or ſpecial), the term denotes the quantity of the eſtate which the anceſtor takes, viz. either fee ſimple or fee tail. It is clear too, that *a perſon to take as a purchaſer, may be deſcribed from every courſe of deſcent; as heir at law, heir in borough-Engliſh, heir or heir-male of the body.* By an ancient maxim of law, although the eſtate be limited to the anceſtor, expreſsly " for life, and " after his death to his heirs" (general or ſpecial), the heir ſhall take by deſcent, and the fee ſhall veſt in the anceſtor. This maxim was originally introduced in favour of the lord, to prevent his being deprived of the fruits of the tenure; and likewiſe for the ſake of ſpecialty-creditors. The anceſtor, had the limitation been conſtrued a contingent remainder, might have deſtroyed it for his own benefit. If he did not deſtroy it, the lord would have loſt the fruits of his tenure; and the ſpecialty-creditors, their debts. Therefore the law ſaid, " Be the intention as it may, where an eſtate is given " to the anceſtor and his heirs, the fee ſhall veſt in him." The reaſon of this maxim has long ceaſed; becauſe tenures are now aboliſhed, and contingent remainders may be preſerved from being defeated before they come *in eſſe*: yet, having become a rule of property, it is adhered to in all caſes literally within it, although the reaſon has ceaſed. But where there are circumſtances which take the caſe out of the letter

letter of this rule, it is departed from, in favour of intention; becauſe the reaſon of the rule has ceaſed [here his Lordſhip cited ſeveral caſes (1)]. To take off the authority of the deciſions, it was contended at the bar, "that *although the* "*intention be clear and plain*, YET there is a diſtinction "between a truſt and a legal eſtate; and that even in Chan- "cery, there was a diſtinction upon this point, between "what they call a truſt executed, and a truſt executory." It is true, theſe diſtinctions are to be met with, and have often been mentioned: but there does not ſeem to be much ſolidity in either. All truſts are executory: they are to be executed by a conveyance; and the parties have a right to apply to a court of equity for ſuch conveyance. In *Bagſhaw* and *Spencer*, cited 2 *Burr.* 1105. the truſt was executed, in the ſenſe of the diſtinction, and as contraſted with a truſt executory. There ſeems to be as little ground, in reſpect of this point, for the other diſtinction between a truſt and a legal eſtate. A court of equity is as much bound by poſitive rules and general maxims concerning property (though the reaſon of them may now have ceaſed), as a court of law is. *Whatever is ſufficient, upon a deviſe, to make an exception out of the rule, holds in the caſe of a legal eſtate, as well as in the caſe of a truſt.* If the intention of the teſtator be contrary *to the rules of law*, it can no more take place in a court of equity, than in a court of law: if the intention be illegal, it is equally void in both. A court of equity cannot ſupport an intention in the teſtator to create a perpetuity, or to limit a fee upon a fee, or to make a chattel deſcend to heirs, or land to executors. On the other hand, *if the intention be not contrary to law, a court of common law is as much bound to conſtrue and effectuate the will according to that intention of the teſtator, as a court of equity can be.* Upon the very point now in queſtion, the determinations have been agreeable to this reaſoning. Therefore where the truſt of a real eſtate was deviſed "to *A.* for life, "and after his death, to the heirs of his body," Lord *Hardwicke* decreed a conveyance to *A.* in tail; although the eſtate deviſed to *A.* expreſsly "for life," left no room to doubt of the teſtator's intention: but the rule of law ſaid, "The heir "of the body ſhall take by deſcent, and not by purchaſe;" and he thought the rule bound a truſt, as well as a legal eſtate (2). Where there are circumſtances which take a caſe out of the rule, the exception holds upon a legal eſtate as much as upon a truſt. It appears, therefore, that there is no ſuch fixed invariable rule as has been ſuppoſed; "*that*

(1) *King* v. *Melling*, 1 *Vent.* 231. *Backhouſe* v. *Wells*, *Lucas's Rep.* 181 to 184. *Forteſcue's Rep.* 139. and Abr. of Caſes in Equity 184. pl. 27. *Robinſon* v. *Robinſon*, 1 *Burr.* 38. *Liſle* v. *Gray*, ſir *Thomas Jones*, 124. 2 *Lev.* 223. *Pollexf.* 582. *Rym.* 2 *R.* 302. 315. *Allgood* v. *Withers*, in Chancery, 4th July, 1735. *Bagſhaw* and *Spencer*, cited 2 *Burr.* 1105.

(2) *Garth* v. *Baldwin*, in Chancery, 18th July, 1755.

"*words*

" *words of limitation ſhall never, in any caſe, be conſtrued as* " *words of purchaſe.*" And the preſent caſe is the ſtrongeſt that I can form any imagination of, to juſtify a conſtruction, " that the heirs of the body of *Anne Corniſh* ſhall here take " as purchaſers." *The deviſe cannot take effect at all, but muſt be abſolutely void, unleſs the heirs of her body take as purchaſers.* It is agreed, that where words of limitation are grafted upon the word " heir," in the ſingular number, ſuch heir ſhall take by purchaſe (1). The diſtinction is, that where it appears to be the intention of the teſtator, that there ſhould be a ſucceſſion in tail, it would totally defeat that intention, if all were to veſt in the firſt ſon: but where it does not appear that the teſtator intended a ſucceſſion in tail, there indeed the uſing the word " heir" in the ſingular number, may be a circumſtance of great weight. Now the term " heirs" (in the plural), in the caſe of gavel-kind lands, anſwers to the term " heir" (in the ſingular), in the common caſe of lands which are not gavel-kind: for the word " heir" (in the ſingular), would not ſerve for gavel-kind lands; it muſt be " heirs" (in the plural). Therefore, all the arguments and reaſonings that are applicable to the word " heir" (in the ſingular), in the common caſe of lands not being gavel-kind, hold with equal ſtrength and propriety, when applied to the plural termination " heirs," when the lands are gavel-kind. And it is manifeſt, that the teſtator does not here mean, that this one-fourth ſhould go in a courſe of deſcent in gavel-kind; for he gives it to the heirs of her body, as well females as males; and mentions females, not only expreſsly and particularly, but even prior to males; *therefore they cannot take otherwiſe than as purchaſers.* It would be a void deviſe; if the words were to be conſtrued as words of limitation: for he breaks the gavel-kind deſcent, by giving it to females as well as males. It cannot deſcend to females as well as males, by the rules of gavel-kind: and yet he ſeems to lay the chief ſtreſs upon the word " females." He adds, likewiſe, " and to their heirs and aſſigns for ever, to be " divided equally ſhare and ſhare alike:" nay, he goes further—" as tenants in common, and not as joint-tenants." But this could not be, if they were to take in the courſe of gavel-kind deſcent: for in ſuch caſe, they muſt take as coparceners. As to *Anne Corniſh*'s taking a fee jointly with her two daughters, in thirds, as tenants in common; there can be no ground for ſuch a conſtruction: for it is clearly the teſtator's intention, that the heirs of *Anne Corniſh*'s body ſhould not take till after her death: and *as the deviſe to her has no words of limitation added to it, it is of courſe a deviſe to her*

(1) *Archer*'s caſe, 1 Co. 66.

for

*for her life; and what ſhe would have taken, if ſhe had ſurvived the teſtator, would have been an eſtate for life.* Upon the whole, as no man can doubt of this teſtator's intention; and as this is the only method of effectuating it; and as there is no rule of law that prevents heirs taking as purchaſers, where the intention of the teſtator requires that they ſhould do ſo; I am of opinion, that judgment ought to be given for the defendant.—DENISON, J. concurred with his Lordſhip in opinion, "that courts of law (as well as courts "of equity), will always conſtrue wills agreeably to the in-"tention of the teſtator, if ſuch intention be not contrary "to, and inconſiſtent with, the rules of law:" and he ſhewed that the intention of the teſtator, in the preſent caſe, muſt have been, "that the heirs of the body of his niece "*Anne Corniſh*, ſhould take as purchaſers;" making the like obſervations as his Lordſhip had done, upon the land being gavel-kind, and their being deviſed to the heirs female as well as male. And he held, that it is not diſagreeable to, or inconſiſtent with, the rules of law, that "heirs of the body" ſhould, in ſome caſes, be conſtrued as *deſignatio perſonæ:* (a poſition, not to be diſputed, at this time, after ſo many concurring reſolutions). And this caſe now before the Court is one of the caſes where they muſt be ſo conſtrued. Therefore the heirs of the body of *A. C.* muſt here take by purchaſe: they can take no other way. And there is no foundation for ſuppoſing that *Anne Corniſh*, if ſhe had ſurvived her uncle, could have taken any eſtate jointly with her daughters, as tenants in common.—WILMOT, J. The principle that muſt govern all caſes of this kind, is the intention of the teſtator, provided it be not inconſiſtent with the rules of law. And all caſes which depend upon the intention of the teſtator (which is the pole-ſtar for the direction of deviſes) are beſt determined upon comparing all the parts of the deviſe itſelf, without looking into a multitude of other caſes: for each ſtands pretty much upon its own circumſtances; and one is no rule for another, or very ſeldom, at leaſt. *Here the teſtator intended, beyond all doubt, that the children of his nephews and nieces ſhould take the inheritance in fee ſimple, both males and females,* per capita, *as tenants in common.* And this is a legal intention. But this intention can not take effect by giving an eſtate in tail or in fee to the firſt taker: for the intention of the teſtator muſt be ſubſervient to the law; and not the law to the intention of the teſtator. *Now a teſtator, be his intention what it will, cannot make an eſtate deſcend to males and females all together; nor gavel-kind lands to deſcend to them as tenants in common.* The teſtator's intention cannot, therefore, take place, by giving *Anne Corniſh* an eſtate tail.—Now, according to my Lord *Coke*, you are to mould the barbarous

barous words and expressions of the testator, so as to effectuate his intention; if you can do so, without going contrary to the rules of law: but you cannot do this, contrary to the rules of law. The question, therefore, in the present case, comes to this; "Whether it be absolutely necessary, "that the words heirs, or heirs male, or heirs of the body, "must be, in all cases, and under all circumstances, words "of limitation." Now it is certain, that in some cases, and under some circumstances, they may be construed words of purchase; either upon a will, or upon a deed (1). And they are not to be construed as words of limitation, either upon a will, or upon a deed, when the manifest intention of the testator, or of the parties, is declared to be, or clearly appears to be, "that they shall not be so construed." And in the present case, he was of opinion, that the testator did not mean to use the words "heirs of the body," as words of limitation.—Judgment for the defendant.

Baddeley v. Leppingwell. Tr Ter. 4 Geo. 3. B R. 3 *Burr.* 1533.

The devising of an estate, and charging it with the payment of a sum of money, will create a fee simple, though there be no words of limitation.—The testator, *Thomas Ives*, being seised in fee of a close, called the hop-ground, surrendered it to the use of his will, and then made his will, and died: which will (after giving an estate to *Clement Boreham*, *for and during the term of his natural life*, he paying thereout 40s. a year to *R. B.* remainder over) contained (*inter alia*) the following words: "Item, *I give and bequeath my two copy-*"*hold tenements now in the tenure or occupation of* Edward "Twogood *and* Elizabeth Savill, *widow*, *being in* Castle-"Hedingham *aforesaid*, *to* Sarah Boreham, *the daughter of* "Elizabeth Boreham, *widow*; *she paying thereout forty shil-*"*lings a year to her sister* Elizabeth Boreham." The estate devised by the will of the said *Thomas Ives* to *Sarah Boreham*, consisted of two cottages and the hop-ground in question; and was, at the time of his death, of the yearly value of five pounds and six shillings.—At a court-baron holden for the manor of *Hedingham* borough on the 4th of April, 1743, *Sarah Boreham* was admitted to the said premises, and made a surrender to the use of her will; and afterwards devised the same to her sister *Elizabeth Boreham*, in fee, and died. At a court-baron holden for the said manor, on the 17th of June, 1747, *Elizabeth Boreham* was admitted. She married *Baddeley*, and had two daughters by him, viz. the plaintiff and her sister *Ellen*, who took as coparceners. At a court-baron holden for the said manor on the 3d of July, 1754, the plaintiff and her sister *Ellen* were admitted to the premises in question accordingly, and on *Ellen*'s death, her moiety descended to the

(1) But where words similar to those in the above devise were qualified by subsequent words, *in case he should die without leaving issue*, it was held to be an estate tail.—See *Den* ex dim. *Geering* v. *Shenton*, infra.

plaintiff, and ſhe was admitted to it, and ſo became ſole ſeiſed. But the defendant claimed under *Thomas Ives*, the ſon of *John Ives*, who was brother and heir (according to the cuſtom) to *Thomas Ives*, the teſtator, inſiſting that *Thomas Ive*'s deviſe to *Sarah Boreham* gave her nothing more than an eſtate for life, and conſequently that ſhe had no power to deviſe; and at a court holden on the 10th of *December*, 1761, he was admitted to the premiſes in queſtion. THE QUESTIONS were, 1ſt, WHETHER *Sarah Boreham took an eſtate in* FEE, *or for* LIFE *only, under the will of* Thomas Ives? 2dly, If ſhe took an eſtate for life only, then whether the defendant could take advantage thereof, on the iſſue joined under theſe pleadings? (1)—WILMOT, J. delivered the opinion of the Court: We are of opinion, "That *Sarah Boreham* took an eſtate of "inheritance."—"*The intention of a teſtator is to be collected* "*from the whole of his will*, ex viſceribus teſtamenti, *ſo as to* "*leave the mind quite ſatisfied about what the teſtator meant:* "*and as a will of lands muſt be in writing, ſuch collection of* "*the teſtator's intention muſt be founded upon the writing it-*"*ſelf.*" This is the principle. The only difficulty is upon the application. Particular caſes ſerve rather to obſcure and confound, than to illuminate queſtions of this kind: and no caſe in the books exactly tallies with the preſent. It, therefore, ſtands upon the intention of the teſtator. Now I collect that intention firſt, from a deviſe to *Clement Boreham*, in the firſt part of the will; and then, from the deviſe to *Sarah Boreham*. In the firſt part of his will he has deviſed an eſtate to *Clement*, expreſsly, "for and during the term "of his natural life; and, after his deceaſe, to *Robert* "*Sabill*, and *Jeremiah Boreham*." But in the deviſe to *Sarah*, he omits the words "for and during her life:" which words it muſt be ſuppoſed he would have inſerted, in caſe he had intended to give her only an eſtate for life. It is plain, that by giving it to her generally, without having any ſuch reſtrictive words, as he had before added to his deviſe to *Clement*, that he meant to give her the abſolute property: he meant to deviſe it *ut bona et catalla*; as a man unacquainted with the law might very naturally do. And his making no limitation over, in this deviſe to *Sarah*, is an additional and auxiliary proof of his intention to give it to her abſolutely. *But the material circumſtance is the condition he has annexed to*

(1) It was an action of treſpaſs, for breaking and entering the plaintiff's cloſe, called the hop-ground. The defendant pleaded "not guilty;" and alſo a juſtification, under a grant in fee, from the lord of the manor. The plaintiff replied, that the lord had made a prior grant of it to her and one *Ellen Baddeley*, her ſiſter, &c.; that *Ellen* died, and the lord granted her moiety to the plaintiff in fee. The defendant REJOINED, that the lord had made a former grant to *Thomas Ives*, in fee, who died, and the premiſes thereupon deſcended to *Thomas Ives*, his nephew and heir, who conveyed the ſame to him, the defendant, traverſing the grant to the plaintiff and her ſiſter; and upon this traverſe *iſſue* was joined.

*her*

*her eſtate, of paying an annuity to her ſiſter* Elizabeth Boreham: this is equivalent to making it payable out of the rents and profits; therefore it is not to be conſidered as a charge of a payment of a ſum of money in groſs. He muſt have intended, that the annuity which *Sarah* was to pay to her ſiſter *Elizabeth* ſhould be an annuity during the life of *Elizabeth*. And if ſo, then it follows, that this charge of 40s. a year to *Elizabeth* is juſt the ſame thing as deviſing an annuity to her; though it is put in the form of a condition. And if this be an annuity for life to *Elizabeth*, it will make it a deviſe in fee to *Sarah*. At all events, the plaintiff ſeems entitled to the eſtate. On the 2d point—The caſe is extremely clear. It depends upon the nature of copyhold eſtates. Formerly, copyhold eſtates were mere tenancies at will; a middle eſtate between freeholders and villeins: at length they acquired ſtability by cuſtom. The lord is not entitled to his fine till admittance: but the admittance is merely form; *Noden* v. *Griffits*, (*ante*, vol. ii. p. 623.) On a ſurrender of a copyhold, the eſtate remains in the ſurrenderor, till admittance. The lord, by the cuſtom, has only a cuſtomary power to make admittance *ſecundum formam et effectum ſurſum-reddidionis*: and, therefore, it is not like the caſe of feoffees to uſes at common law. And although the lord grant the land over by copy to another, this is all without any warrant: for, notwithſtanding this, the lord may make admittance according to the ſurrender; and this ſhall be good; and he who is admitted ſhall be in, by him who made the ſurrender. The eſtate muſt be according to the ſurrender, and not according to the admittance. This is a known and common doctrine; and is laid down fully in *Coke*'s *Copyhold Caſes*, 4 *Co.* 28. b. The preſent admittance was upon a deſcent: for the plaintiff and her ſiſter *Ellen* held in coparcenary. The defendant could traverſe nothing here, but the grant which the plaintiff had alleged in her replication. And if ſhe was not heir, the admittance of her, as ſuch, is void. There is a material difference between a feoffment and a grant, *Humberton* v. *Howgill*, Hob. 72. In a feoffment, the livery is the material part, and transfers the poſſeſſion. If another perſon was in poſſeſſion, both the feoffment and livery would be void; even though the feoffment was by deed. And where a feoffment is totally void, it may "be given in evidence upon a plea of "*non feoffavit*." *Bro. Abr.* general iſſue 73. "*Non conceſſit*" puts the operation of the grant in queſtion. If a man pleads a grant from the crown under the great ſeal, and the other pleads "*non conceſſit*," in this caſe the letters patent are confeſſed, but the effect and operation of them is denied: the effect of that iſſue of "*non conceſſit*" is, that the crown had nothing in the land; or, that the tenements did not paſs by the letters patent. So is *Hynde*'s caſe in 4 *Co.* 71. b. and *Eden*'s caſe in 6 *Co.* 15. b. expreſsly. A grant without right is abſolutely void. If *Sarah* took a

ſee under the will, then the admiſſion of the plaintiff in fee is good, and all is right: but if *Sarah* took only an eſtate for life under the will, then the grant to the plaintiff was void, and the grant to the defendant *Leppingwell* would be ſubſtantiated; he claiming under the heir at law of the teſtator; and *Leppingwell* would not, in that caſe, be a wrong-doer. Therefore if it had reſted on that, I ſhould think that the validity and operation of the grant would have come in queſtion upon this iſſue. On the other hand, if ſhe took an eſtate of inheritance (as we hold that ſhe did), this totally varies the caſe. For then the plaintiff had a good title under her deviſe and the ſubſequent deſcent; and *Leppingwell* could have none under the heir at law: and poſſeſſion alone would be ſufficient for her to maintain this action againſt *Leppingwell*; though it would not have been ſo, in caſe the real title had been in *Leppingwell*.—Poſtea delivered to the plaintiff.

Frogmorton *ex dim.* Bramſtone *v.* Holyday *et al.* Hil. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1618. 1 *Black. Rep.* 535.

*Margaret Haſſelwood*, being ſeiſed in fee of the premiſes in queſtion, by her will, dated the 28th of October, 1719, amongſt other things deviſed as follows—"I give, deviſe, "and bequeath, unto my ſon *David Haſſelwood* and his "heirs for ever, my malt-kiln ſtanding and being in *Black* "*Friar* gate—Item, I GIVE, DEVISE, AND BEQUEATH, "*unto my ſon* John Haſſelwood, *all that houſe and garden now* "*in the tenure and occupation of* Edward Gibſon, *mariner*; "CHARGED AND CHARGEABLE, nevertheleſs, with the "payment of the ſum of 50l. of lawful Britiſh money: "which ſaid ſum of 50l. I give, deviſe, and bequeath, unto "my daughter *Margaret Holyday*, payable and to be paid to "her, out of the yearly rents, iſſues, and profits, of the ſaid "houſe; to be paid unto and received by my ſaid daughter "*Margaret Holyday*, yearly and every year, until the ſaid "ſum of 50l. be fully paid and ſatisfied. And if the ſaid "*John Haſſelwood* ſhall happen to die in his minority, or "before he comes to age, then I give, deviſe, and bequeath, "the ſaid houſe and garden unto my three daughters *Eliza-*"*beth Locking*, *Margaret Holyday*, and *Hannah Haſſelwood*, "equally ſhare and ſhare alike." The teſtatrix ſoon afterwards died; leaving iſſue *David* her eldeſt ſon, and *John* her youngeſt ſon, and the three daughters abovementioned. At the time of making and executing the ſaid will, her ſon *David* was of the age of twenty-three years, and her ſon *John* of the age of ſeven years. Her ſon *David* had been ſet up in buſineſs by his father, who gave him at times upwards of 500l. and two meſſuages, value 32l. per annum. And the father alſo deviſed an eſtate of 40l. per annum to his wife *Margaret* for life, remainder to his ſon *John*, in fee. *The premiſes in queſtion, which were deviſed to* John, *were of the annual value of* 10l. *John* entered and died ſeiſed in 1762, and *David*, his brother, died before him, leaving *David*, his

ſon

ſon and heir, *who, on the 20th of September*, 1758, *conveyed the premiſes in queſtion to* Stephen Bramſtone, *the leſſor of the plaintiff, in fee-ſimple*. The queſtion was, "Whether an "eſtate for *life*, or in *fee*, in the premiſes in queſtion, paſſed "to the abovenamed *John Haſſelwood* by the ſaid will of "*Margaret* his mother." Lord MANSFIELD: — The teſtator's intention muſt be taken and collected from the *whole* will; and it muſt prevail, if conſiſtent with law: the caſe of *Coryton* v. *Hellier* (1), was a conſtruction taken from *all* the parts of the will conſidered together, to imply the uſual qualification, "*if he live ſo long*," after the limitation of a term for ninety-nine years, which had been omitted by the negligence and inaccuracy of the writer, contrary to the manifeſt intent. The queſtion is, "Whether *John* "*Haſſelwood* took an eſtate for *life*, or in *fee*, under this "will." There are *no* words of *limitation* added to the deviſe to him. Many people do not know that words of limitation are neceſſary to be added to deviſes of land, any more than to bequeſts of perſonal eſtate. If nothing elſe appears, the deviſe muſt be conſtrued according to law; and the deviſee, *without* words of limitation, can take an eſtate for life only. Here are many other clauſes in this will, from which, taken altogether, the intention of the teſtatrix may be collected.— She charges this deviſe with 50l. *Let the ſum charged upon a deviſe be ever ſo ſmall, it ſhall give a fee*; but if it be made payable *out of the annual profits*, 'tis otherwiſe: this, therefore, is a *middle* caſe; for here, *John* was but ſeven years old, and ſhe appoints him guardians during his minority, therefore he did not want the *whole* profits. "*If he ſhould die under twenty-one*," there is a deviſe over to the three daughters of the teſtatrix. This ſhews her intention to give a fee, for, if he lived to twenty-one, he might then diſpoſe of it himſelf; if he died before, he could not; and then *ſhe* diſpoſes of it. If *John* was barely to take an eſtate for life, the time of his death muſt be *immaterial* to the deviſe over: but limiting it over, *only* upon the contingency of his dying in his *minority*, ſhews that ſhe intended to give him an *abſolute* eſtate in fee, which he might diſpoſe of if he came of age; and unleſs he lived to be of age (when he might diſpoſe of it), ſhe meant it ſhould go to her daughters.—A queſtion, applicable to this part of the argument, was pleaded in the days of ancient Rome, by *Scævola* and *Craſſus* (2), in the famous cauſe between *Curius* and *Coponious*; and much agitated, in *modern* times, in the courts of Weſtminſter-hall, in the caſe of *Jones* and *Weſtcombe*.—A man, taking for granted that his

(1) 10th of Auguſt, 1745, before Lord *Hardwicke*, in Chancery.
(2) *Tully de Orature*, 1 fo. 1.

wife was with child, deviſed his eſtate to the child his wife was *enſient* of; and *if* ſuch child died under age, then he deviſed it over. The woman was *not* with child. The queſtion was, "Whether the deviſee over ſhould take?" The (1) Roman tribunals at once, and the Engliſh at laſt (2), finally determined, that the intent, though not expreſſed, muſt be conſtrued to give the eſtate to the ſubſtitute, *unleſs* a poſthumous child lived to be of age to diſpoſe of it; conſequently, no poſthumous child having ever exiſted, the ſubſtitute was entitled. The argument holds equally, from a limitation over, "if the firſt taker dies in his minority," to infer that he was intended to have the abſolute property, *if* he attained his majority. Therefore, ſufficient appears upon the face of the will, to ſhew that the intention of the maker of it was, "that *John* ſhould have the eſtate, UNLESS he ſhould die in "his minority." WILMOT, J.—If by *ſound* (not, indeed, arbitrary) conſtruction, it appears that the *intention* was "to deviſe a fee," it is immaterial what *words* are made uſe of; and all the circumſtances and clauſes are to be united and taken together, in order to *collect* this intention; and he was of opinion, that in this caſe the intention ſufficiently appeared.—Nonſuit to be entered.

Oates, *ex dim.* Markham, *v.* Cooke, Ea. Ter. 5 Geo. 3. B R. 3 *Burr.* 1684. 1 *Black.* 543.

*George Beaumont*, the teſtator, duly made a will, the ſubſtance of which was as follows: he gives ſeveral ſums of 3l. a year to divers perſons; ſome for life; ſome in fee; one of which annuities for life he expreſsly directs to be paid by his truſtee, or executor, and afterwards adds:—"theſe legacies to "be faithfully paid *by my truſtee, John Cooke*, every year, "and yearly, a month after Martinmas." He then gives ſeveral ſmall legacies. He wills and deſires, "that *William* "*Frith* ſhall not be removed from his farm, upon any ac- "count whatſoever, during his natural life, he paying the "ſame rent as uſual; he leaving the farm, whoever come "into it, to pay after the yearly rent of 9l.; and his deceaſe "the ſame." Then immediately follows: "*I do alſo leave* "*unto my truſtee and executor, out of the yearly rents of the* "*farm*, 11. 10s. *a year, and yearly, for repairs and other uſes* "*of the farm.*" He afterwards leaves to his truſtee and executor, 3l. for ſawing out the roughing, and 5l. to build a tomb for him in Tankerſly church-yard, "*he and his heirs* "always to ſee that it be kept in order." Then he gives ſeveral directions, and ſeveral more legacies: "*And I do* "*hereby conſtitute* John Cooke, *beforementioned, ſole executor* "*and truſtee of this my laſt will and teſtament, he paying all*

(1) *Oratio pro Cæcina.*

(2) *Jones* v. *Weſtcomb*, Prec. in Chan. 316, Eq. Caſ. Abr. 245. *Gilbert's* Rep. 74. 3 *Burr.* 1624.

"*my*

" *my juſt debts, legacies, and funeral charges.*" The teſtator died, leaving *John Smith*, *John Parkin*, *Thomas Beaumont*, and the *leſſor of the plaintiff*, his nephews, and *coheirs at law*. THE QUESTION was, " WHETHER *any* eſtate, and *what*, paſſed " to *John Cooke*, the truſtee?" THE COURT were all clear, " that both the freehold and copyhold paſſed to *John Cooke*, the truſtee, in fee." *Per* Lord MANSFIELD:—The *intention* is to be collected from *all* the parts of the will, and it muſt be clear, or elſe the heir at law ſhall not be diſinherited: but here the teſtator's intention is moſt clear, " that he *meant* to deviſe his real eſtate in truſt." WILMOT, J.—*Cooke*, the truſtee, took the legal eſtate by this deviſe. The intention of the teſtator is to be collected from *all* the parts of the will taken together; and if it be thereupon *neceſſary* to imply it, 'tis the ſame thing as if it was particularly expreſſed. Now here are truſts to be executed, which the truſtee could not execute and effectuate, *without* having an eſtate in fee deviſed to him. No particular technical terms are requiſite; 'tis ſufficient, if the implication be ſtrong, violent, and neceſſary: and here it *is* ſo. YATES, J. and ASTON, J. concurred.

Doe, *ex dim.* Willey. *et al. v.* Holmes, Mic. Ter. 39 Geo. 3. B R. 8 *Ter. Rep.* 1.

The teſtator, *T. Randall*, by his will, deviſed thus: " I " give and bequeath *my freehold houſe, with the appurtenances* " &c. (the premiſes in queſtion), *and all the furniture thereto* " *belonging, to Elizabeth Gibſon*, whom I make executrix of " this my laſt will, *ſhe paying all my juſt debts and funeral ex-* " *pences, and the legacies* beforementioned, twelve months after " my death; I likewiſe leave to the ſaid *E. Gibſon* all the reſt " and reſidue of my perſonal eſtate, &c." THE QUESTION was, Whether the deviſee, *E. Gibſon*, took only an eſtate *for life*, or in fee, under the above deviſe? PER CURIAM: In caſes of this kind, the queſtion has always been, whether the charge is to be paid only out of the rents and profits of the eſtate, or whether it is to be paid by the deviſee at all events; in the former caſe the deviſee only takes an eſtate for life, but in the latter he takes a fee, otherwiſe he might be a loſer by the deviſe. Here the deviſee is bound to pay the debts and legacies at all events, and the charge is thrown on her, in reſpect of the real eſtate. The perſonalty is given to her by the next clauſe in the will.—Rule refuſed.

Smith, *et al.* Aſſ. of Euſtace, *v.* Coffin, *et ux.* Ea. Ter. 35 Geo. 3. C B. 2 *Hen. Black.* 444.

The teſtator, *Thomas Euſtace*, being ſeiſed in fee of a meſſuage in Saint *Sidwell*'s, and alſo having an intereſt in a houſe in another pariſh, in which he then lived, made his will, bearing date the 3d day of May, 1763, in the following words: " *As to ſuch worldly eſtate, as God, in his kind provi-* " *dence, has been pleaſed to bleſs and favour me with*, I give " and diſpoſe of the ſame in manner and form following, " that is to ſay: FIRST, I give and bequeath unto my ſon, " *Thomas Euſtace*, 200l. out of my reſiduary eſtates and

" effects. *Also all that my messuage, tenement, or dwelling-house,* " *wherein I now live* (subject, nevertheless, with my personal " estate, to the payment of the said legacy of 200l. to my " son), I hereby give and devise unto my dear wife, *Hannah* " *Eustace, her heirs and assigns, for ever. Also all the rest and* " *residue of my goods, chattels, rights, credits, personal and* " TESTAMENTARY ESTATE WHATSOEVER, *wheresoever,* " *and in whose hands soever, not hereinbefore particularly given* " *and bequeathed* (subject, nevertheless, to the payment of " the said legacy of two hundred pounds to my said son, and " to such provision for binding out, maintaining, and edu- " cating him as aforesaid, and also to the payment of all my " just debts and funeral expences, to and with the payment " whereof, I hereby subject and charge the same), *I hereby* " *give and bequeath unto my said dear wife,* Hannah Eustace, " *for her own use, benefit, and disposal.* Lastly, I hereby " make, ordain, nominate, and appoint, my said wife, *Han-* " *nah Eustace,* whole and sole executrix of my last will and " testament." THE QUESTION was, Whether the widow took any, and what, estate in the said messuage in St. *Sidwell's*, under the will? BULLER, J.—Cases of this kind depend on niceties of expression, and sometimes even on a single word, and, as it has been frequently said, the nonsense of one man cannot be a guide for that of another. But the question always must be, what was the intention of the testator? that is the polar star by which we must be guided. Where it is apparent in the introductory part of the will, that the testator meant to dispose of the whole of his property, and the expressions in the residuary clause *may* include a real estate, that clearly is to be taken in the largest sense, in order to correspond with the introductory part. This case is different both from *Denn* v. *Gaskin* (infra), and *Shaw* v. *Russell*, cited in that case, for in neither of those cases did the introductory clause profess to dispose of all the property of the testator. That circumstance distinguishes this case, and brings it within the authority of that of *Grayson* v. *Atkinson*, before Lord *Hardwicke*, 1 *Wils.* 133. where the introductory clause was, " As to all " my temporal estate, wherewith it hath pleased God to " bless me, I give and devise the same as follows." Here the testator meant to devise all his property; the word TESTAMENTARY is as well applicable to real as to personal estate; and, if it be not applied in this case to the real property, it is merely tautologous; and in construing wills, the Court will, if possible, give a meaning to every word. I am, therefore, of opinion, that there should be judgment for the defendant. HEATH, J.—I am of the same opinion, and my reasons are these; 1st. The testator sets out with declaring his intention to dispose of all his property; secondly, he leaves 200l. to his heir at law; and thirdly, the residuary clause

clauſe is ſufficient to paſs the eſtate in queſtion; for the word *teſtamentary* is a moſt comprehenſive term, and we ſhould interpret it in much too narrow a ſenſe, if we were to confine it to perſonal property. And there are no circumſtances in the will to controul this body of evidence, if it may be ſo called. Wills are frequently made *in extremis*, ſometimes when the agonies of death are approaching, and it would be unfair to conſtrue ſtrictly the words uſed by an ignorant teſtator, in that ſituation. Here, after the deviſe of the perſonal eſtate, he might have changed his mind, and deſigned to give alſo his real eſtate, by the reſiduary clauſe. The word *teſtamentary* may, therefore, be conſidered as declaratory of a ſubſequent intention to that effect. ROOKE, J. of the ſame opinion.—Poſtea to the defendant.

A deviſe of a life annuity to *A. to be paid by my executor after named*, with a general deviſe of a copyhold to *B.* whom he alſo makes executor and reſiduary legatee of his perſonal eſtate, charged with debts and legacies, gives *B.* a fee ſimple in the copyhold.—*John Cleaveley*, being ſeiſed in fee of the premiſes, being copyhold, and having ſurrendered them to the uſe of his will, on the 27th of Auguſt, 1750, on the ſame day made his will, thereby *diſpoſing of his temporal eſtate* as followeth, viz. After ſeveral pecuniary legacies to be paid by his executor, he gives to *Mary Ramſey the juſt ſum of* 20s. *a year, to be paid by two equal payments after his deceaſe, for and during her natural life, to be paid by my executor afternamed.* He alſo gives to his kinſman, *Thomas Allin* (the father of the defendant) *all his two yard-lands, with his houſe and homeſtead*, with the appurtenances. And *all the reſidue and remainder of his goods, chattels, debts, mortgages, leaſes, and perſonal eſtate*, he gives to the ſaid *Thomas Allin, he paying his debts, legacies, and funeral expences.* THE QUESTION was, Whether the deviſe to *Thomas Allin* was a deviſe for life, or in fee? PER CURIAM: The real eſtate deviſed to *Allin* is in fee ſimple, and that upon two grounds: 1ſt, By implication, not indeed a *neceſſary* implication, ſtrictly and mathematically ſpeaking, but ſo far neceſſary, as it clearly ariſes from the reaſonable conſtruction of the will. The annuity is given to *Ramſey* for her natural life, to be paid by the executor, which being of an uncertain duration, muſt have an eſtate in fee to ſupport it; 2dly, All the ſeveral deviſes to *Allin* follow each other immediately, and muſt, therefore, be conſtrued as one clauſe: ſo that the payment of the debts and legacies is charged on the real as well as perſonal eſtate.

Goodright, *ex dim.* Philips, *v.* Allin, Mic. Ter. 16 Geo. 3. C B. 2 *Black.* 1041.

The teſtator, the Rev. *George Jackſon*, being ſeiſed of the towns and lands of C. and G. *in fee*, and of the lands of E. and T. for *lives renewable for ever*, without impeachment of waſte; and of other lands, under leaſes for three lives, *with reverſionary terms for twenty-one years*, from the death of the ſurviving

Hogan, Leſſee of Wallis, *v.* Jackſon, Tr. Ter 15 Geo. 3. B R. affirmed upon a writ of error in

the Houſe of Lords, 2 Dec. 1776. *Cowp.* 299, 309.

ſurviving life named in each leaſe; of one of which, viz. of a houſe called H. and ſome burgeſs lands, the ſaid *George Jackſon* was the ſurviving life; and being alſo poſſeſſed of perſonal aſſets, to the amount of 1300l. duly made his will as follows: "AND AS TO MY WORLDLY SUBSTANCE, I "give and bequeath to my dearly-beloved mother, *M. J.* "my houſe and lands at G. and all their appurtenances, "for and during the term of *her natural life*, clear and free "of any deduction or charge whatſoever; and alſo the "lands of T. ſubject to the rent only payable thereout, for "the term of *her natural life, without liberty of committing "waſte thereon.*" He then gives ſeveral legacies and annuities to different relations, to his heir at law, and to the natural children of his brother, and then deviſed as follows: "*I alſo give and bequeath unto my dearly-beloved mother*, "Mary Jackſon, ALL THE REMAINDER AND RESIDUE "OF ALL THE EFFECTS, BOTH REAL AND PERSONAL, "*which I ſhall die poſſeſſed of.*" THE QUESTION was, "Whether, by this laſt clauſe, any real property at all paſſed "to *Mary Jackſon*, the mother of the teſtator; and, if any "did, whether any thing paſſed except the covenant for the "term of twenty-one years in the houſe called H. and the "burgeſs lands thereto belonging, being a title to a chattel "real; and if the reſt of the real property of the teſtator, or "a remainder therein paſſed, whether it could paſs for a "longer time than during the life of *Mary Jackſon*, becauſe "there are no words of limitation?" Lord MANSFIELD, Ch. J.—By the Roman law, a will conſtituted the *hæres*, or heir, and was the appointment of him; he was the ſame perſon as, in our law, is termed the executor: but the nomination of an heir was ſo eſſential an ingredient of the Roman teſtament, that there could be no complete will without him: and, from his name and office, he was conſidered, at the death of the teſtator, as univerſal ſucceſſor to all the goods, rights, and property of the deceaſed, *without any regard* or diſtinction as to property acquired by him, *prior* or *ſubſequent* to the time of making his will.—But that is different from the nature of a deviſe of land by the law of England, which formerly admitted of no teſtamentary diſpoſition in caſes of *real property*. This reſtriction took place upon the introduction of military tenures, and was a branch of the feodal doctrine of non-alienation, without the conſent of the lord: but when the rigour of the reſtriction came, by degrees, to be relaxed, and tenants were permitted to make diſpoſitions by teſtament, a deviſe of lands operated as an appointment to uſes, in nature of a legal conveyance: as ſuch, the courts of law, in the conſtruction of them, held that a deviſe, affecting lands, could operate only upon ſuch real eſtates as the teſtator had, at the time of executing and publiſhing his will, and not

not upon any after-purchaſed or acquired lands, becauſe there could be no legal conveyance, at common law, of what a man ſhould acquire in future —Another diſtinction, founded upon the notion that a will, affecting lands, is merely a ſpecies of conveyance, and derived from the ſame ſource, is this: the law of England, in the conveyance of real eſtates, requires words of limitation in the donation or grant, to the creation of a fee: without the word *heirs*, general or ſpecial, no man can create a fee at common law by conveyance: when wills, therefore, were introduced, and deviſes of real property began to prevail, being conſidered as a ſpecies of conveyance, they were to be governed by the ſame rule;—therefore, by analogy to that rule, in the conſtruction of deviſes, if there be no words of limitation added, nor words of perpetuity annexed, which have been held tantamount, ſo as to denote the intention of the teſtator to convey the inheritance to the deviſee, he can only take an eſtate for life: for inſtance, if a teſtator, by his will, ſays, "I give my lands, or ſuch and ſuch lands, "to *A.*;" if no words of limitation are added, *A.* has only an eſtate for life;—generally ſpeaking, no common perſon has the ſmalleſt idea of any difference between giving a perſon a horſe and a quantity of land: common ſenſe alone would never teach a man the difference; but the diſtinction which is now clearly eſtabliſhed is this: if the words of the teſtator denote only *a deſcription of the ſpecific eſtate or lands deviſed*; in that caſe, if no words of limitation are added, the deviſee has only an eſtate for life; but, if the words denote *the quantum of intereſt, or property*, that the teſtator has in the lands deviſed, there the whole extent of ſuch his intereſt paſſes by the gift to the deviſee. *The queſtion, therefore, is always a queſtion of conſtruction upon the words and terms* uſed by the teſtator. It is now clearly ſettled, that the words ALL HIS ESTATE will paſs *every thing* a man has; but, if the word *all* is coupled with the word *perſonal*, or a *local deſcription*, there the gift will paſs only perſonalty, or the ſpecific eſtate particularly deſcribed.—All theſe principles being clearly ſetiled and certain, the queſtion, in this caſe, comes to a queſtion of conſtruction upon the will itſelf. Now, in this will there are ſeveral things which it is material to obſerve, and firſt, *the introduction* is very material:—introductory words cannot vary the conſtruction of a deviſe, ſo as to enlarge the eſtate of a deviſee, unleſs there are words in the deviſe itſelf ſufficient to carry the degree of intereſt contended for: but, wherever they aſſiſt to ſhew the intention of the teſtator, the courts have laid hold of them, as they do of every other circumſtance in a will, which may help to guide their judgment to the right and true conſtruction of it. The introductory words uſed by the teſtator in the preſent caſe, are not ſtrict legal terms; he ſays, *as to all my worldly ſubſtance,*

*ſubſtance, I give*, &c. What is *ſubſtance?* It is *every property* a man has; and means worldly wealth. Thus the teſtator ſets out: he then proceeds to diſpoſe of his property, and, in the courſe of his will, provides for every body; for his mother, his uncle, his miſtreſs, his natural children, his couſins, and makes a particular proviſion for his heir at law, which proviſion is to continue *during his life*; but that circumſtance alone would not exclude the heir from taking any thing not diſpoſed of, however, it furniſhes an argument in favour of the conſtruction contended for by the repreſentatives of the mother, namely, that he intended the remainder of every thing to go to her by the ſubſequent reſiduary deviſe, and that he did not mean to die inteſtate, as to any part of his property: he adds the ſweeping clauſe after all the proviſions beforementioned; and for what purpoſe, unleſs it was to diſpoſe of all his worldly ſubſtance, agreeable to his declaration in the introductory part of the will? the words are, "I alſo "give to my mother, all *the remainder* and *reſidue of all the* "*effects*, both *real* and *perſonal*, which I ſhall die poſſeſſed "of." Now, the true conſtruction of theſe words cannot be confined to a gift of *perſonalty* only, becauſe the teſtator has added the word *real* to the word *effects*. Do the words *real effects*, in law, mean *real chattels only?* No authority has been produced, to ſhew that they do; and the natural and true meaning of real effects, in common language and ſpeech, is real property, and *real* and *perſonal effects* are *ſynonymous* to *ſubſtance*, which includes every thing that can be turned into money. If this be the true conſtruction, there can be no doubt but that the words, *remainder* of *real effects*, include the reverſion of every thing not diſpoſed of; in which caſe, no words of limitation are neceſſary. But an objection has been made from the teſtator's giving his mother *a ſpecific eſtate for life*, and making that eſtate liable to *impeachment of waſte*, which, it has been ſtrongly contended, is totally repugnant to, and inconſiſtent with, an intention to give her the abſolute property in a ſubſequent part of the ſame will; but the objection, of *itſelf*, is not ſufficiently ſtrong to controul the manifeſt operation of the ſubſequent words uſed by the teſtator, in the reſiduary deviſe. It would be going a great way, to lay it down as a general rule, that, where a particular eſtate is given to a perſon in one part of a will, and the teſtator afterwards deviſes to him in more general words, that he ſhall not reap any benefit of ſuch reſiduary deviſe: indeed, as to this objection, the caſe of *Ridout* v. *Paine*, 3 *Atk.* 486, is exactly in point: there the teſtator, in the firſt inſtance, gave his wife only an eſtate *for life*, in part of his real eſtate, and afterwards bequeathed her the reſidue, &c. The objection of inconſiſtency now relied on, was there made; but Lord *Hardwicke* overruled it, and held, that the reſiduary clauſe

clause carried the inheritance notwithstanding. The only difference between the sweeping clause in that case and this, is, that the word *estate* is used instead of *effects*; but all the terms he makes use of, except the word *effects*, are technical terms, for *remainder* is applicable to *real* estate, and *residue* to personal; therefore, the same rule of determination that was held in the case of *Ridout* v. *Paine*, ought to be held in this case.—*Aston* J. *Willes* J. and *Ashhurst* J. were of the same opinion. PER TOT. CUR. The testator meant that his mother should take the whole of his property under the residuary devise, and the words used are sufficient to effectuate that intention; consequently, she took a fee in the fee-simple estates, and the whole of the testator's interest in the rest of his real property, subject to the charges thereon.

Loveacres *ex dem.* Mudge *v.* Blight *et al.* Mic. Ter. 16 Geo. 3. B.R. *Cowp.* 352.

The testator being seised in fee, devised as follows: "As "TOUCHING SUCH WORLDLY ESTATE, wherewith it "hath pleased God to bless me in this life, I give, *demise*, "and dispose of the same in the following manner and "form; first of all, I give and bequeath to *E. M.* my dearly-"beloved wife, the sum of 5l. *to be paid yearly out of my* "*estate called G.* and also one part of the dwelling-house, "being the west side, with as much *woodcroft home at her*(1), "as she shall have need of; by my executors hereafter "named. I give and bequeath unto my son, *Thomas Mudge*, "(the heir at law) the sum of 5l. to be paid twelve months after "my decease; I give unto my granddaughter, *Elizabeth*, the "sum of 5l. to be paid twelve months after my decease. "ITEM, *I give unto* John Mudge *and* Robert Mudge, *my two* "*sons, whom I make my and ordain my sole* "*executors of this, my last will and testament*, ALL AND "SINGULAR, *my lands and messuages, by them freely to be* "*possessed and enjoyed alike.*" THE QUESTION was, Whether *John Mudge* and *Robert Mudge* took an estate in fee? PER CURIAM: The rule of law is, that if a man gives lands *generally, without words of limitation*, the donee has only an estate for *life*; but as this rule has the effect of defeating the intention of the testator in almost every case that occurs, the Court has laid hold of the generality of other expressions in a will, where any such can be formed to take the devise out of this rule. — Therefore, if a man says, *I give all my estate* that has been construed to pass a fee, or even if words of locality are added, *as, all my estate* in A. it has been held, that the whole of the testator's interest in such particular lands will pass, though no words of limitation are added, 2 *Vern. Wms.* 524, because the law says, that the word estate comprehends not only the lands or property which a man

(1) The word *request* seems to have been omitted.

has,

has, *but alſo the intereſt* he has in it. In general, whenever there are words and expreſſions, either general or particular, or clauſes in a will which the Court can lay hold of, to enlarge the eſtate of a deviſee, they will do ſo to effectuate the intention; but if the intention of the teſtator is doubtful, the rule of law muſt take place: ſo if the Court cannot find words in the will ſufficient to carry a fee, though they ſhould themſelves be ſatisfied beyond the poſſibility of a doubt, as to what the intention of the party was, they muſt adhere to the rule of law. Now, though the introduction of a will, declaring that a man meant to make a diſpoſition of *all his worldly eſtate*, is a ſtrong circumſtance, connected with other words, to explain the teſtator's intention of enlarging a particular eſtate, or of paſſing a fee where he has uſed no words of limitation, it will not do *alone*. The queſtion is always a queſtion of conſtructions, and depends upon obſervations naturally ariſing out of the will itſelf. Now if a man deviſe lands to another, *paying thereout* 100l. (*Wellock* v. *Hammond*, 2 Leo. 114), or any other groſs ſum, though he add no words of limitation, yet the deviſee ſhall have a fee: becauſe unleſs he were to take a fee, he cannot be ſure of paying the 100l. So if an eſtate be given to A. *to be ſold for payment of debts and legacies* (1 *Chan. Caſ.* 196.) the purpoſe to be anſwered makes it a fee, without words of limitation. In ſhort, wherever any thing is directed to be done, which ſtrictly ſpeaking, an eſtate for life only, may not be ſufficient to anſwer, the Court will imply a fee. Now here the bequeſt of the annuity of 5l. to the wife is directed to be paid by the executors out of the eſtate, and the wood is to be provided at all events; it therefore muſt be ſuppoſed to be brought home from off the eſtate: but if the executors were to take only an eſtate *for life*, they would not be able to pay the annuity during her life out of the profits only, or to furniſh all the wood ſhe might want; becauſe the ſtock on the eſtate might fall ſhort.—The laſt obſervation is drawn from the words *freely to be poſſeſſed and enjoyed by them alike*. Now the word *freely* (as the teſtator had charged the eſtate with the payment of an annuity to the wife) cannot mean *free of incumbrances*: but the free enjoyment muſt mean *free from all limitations*; that is the abſolute property of the eſtate. UPON THESE OBSERVATIONS, it is clear that the teſtator's intention was to give his ſons, *John* and *Robert*, a fee: and if ſo it is equally clear, that this is *a tenancy in commons*. The word *alike* is the ſame as the word equally.

Holdfaſt *ex dim.* Cowper, v. Marten *et al.* Mic. Ter. 27 Geo. 3. B. R. 1 *Term. Rep.* 411.

The teſtator, *Thomas Spooner*, by his will, deviſed in the words following: "I GIVE AND BEQUEATH *to Mrs.* "Marten, *daughter of my late uncle, Dr.* Benjamin, MY "ESTATE AT BRAYWICK, BERKS." And after giving ſeveral legacies, the will proceeded thus: "After theſe "legacies,

"legacies, I give and bequeath all the rest of my effects, "furniture, estates real and personal, or all the rest that I "may have and leave at the time of my blessed departure, to "my nephew, Mr. *Joseph Cowper*." The same Mr. *Joseph Cowper* is appointed one of the executors of the will, and was the lessor of the plaintiff. THE QUESTION WAS, Whether Mrs. *Marten* took an estate for *life only*, or in *fee?* PER CURIAM: *The word estate is the most general word that can be used. For so far from its being necessary to add words of inheritance in order to make it pass a fee, words of restraint must be added in order to carry a less estate;* for it is *genus generalissimum.* If the word "estate" in the residuary clause carries a fee to the nephew, it must also have the same effect in the first devise. The intention of the devisor is clear: he meant to give his whole estate in *Braywick* to Mrs. *Marten*, and the rest to his nephew, *Cowper*.—Postea to the Defendant.

Doe *ex dim.* Palmer, Skinner, and Brutton *v.* Richards, Tr. Ter. 29 Geo 3. B R. 3 *Ter. Rep.* 356.

The testator, being seised in fee of the premises in question, by his will, devised as follows: "All the rest, residue, and "remainder of my messuages, lands, tenements, HEREDITA "MENTS, goods, chattels, and personal estate whatsoever, "MY LEGACIES AND FUNERAL EXPENCES BEING THERE- "OUT PAID, I give, devise, and bequeath unto my said sister "*Jane Dewdney*; and I do hereby constitute and appoint her "whole and sole executrix and *residuary legatee* of this my "will." The question was, Whether the devisee, *Jane Dewdney* took only an estate *for life* or *in fee* under her brother's will?—Lord KENYON, Ch. J. The words "all "the rest, residue, and remainder, of his messuages, lands, "tenements, *hereditaments*, goods, and personal estate what- "soever," alone are not sufficient *in law* to carry a fee; but the words which immediately follow, "my legacies and "funeral expences being *thereout* paid," are sufficient for that purpose. For the fund which is to answer those demands ought to be as ample as possible. Those charges extend to and are to be taken out of the property which was before given to the residuary legatee: and if that devise did not comprise the whole of the devisor's estate, the *interest* as well as the land, the legacies and funeral expences might not be paid (1). ASHHURST, J.—If the words had been "paying all my "funeral expences and legacies *out of the rents and profits*," they would not necessarily have carried the fee; because as the devisee would only have been liable to pay them out of that particular fund, she could not have been injured by it: but, according to the words of this devise, all the legatees may call on this devisee for their demands. Therefore it must be taken to have been the devisor's intention to give her

(1) *Baddeley* v. *Leppingwill*, 3 *Burr.* 1533. and p. 81, *supra*; and *Frogmorton* v. *Holyday*, 3 *Burr.* 1618. and p. 84, *supra.*

where-

wherewithal to pay them. BULLER, J. The rule of law is, that unleſs ſome words are uſed which the law conſiders ſufficient to carry a fee, the deviſee can only take an eſtate for life; though indeed ſlight expreſſions are ſufficient to paſs the inheritance, where the Court think that ſuch is the deviſor's intention. No technical words are neceſſary in a will to give a fee: but if any words are inſerted, to effectuate which, it is neceſſary that a fee ſhould paſs, that is ſufficient. The words "my legacies and funeral expences being "*thereout paid*," of themſelves are ſufficient to paſs the fee. And I think that if the deviſe had been to his ſiſter "paying "the legacies, *&c.* out of the rents and profits," that alſo would have carried the inheritance. For there is a diſtinction between a deviſe to truſtees to pay "out of the rents and profits," and out of the *annual* rents: in the former caſe they have a power of ſelling the eſtate, but not ſo in the latter (1). The latter part of this will, is an additional reaſon for ſuppoſing that the deviſor intended that his ſiſter ſhould take the fee, becauſe after the above deviſe he makes her ſole executrix *and reſiduary legatee*. With regard to the operation of the word "HEREDITAMENTS (2);" there have been different conſtructions in different caſes: in ſome caſes it has been held to paſs a fee, in others not. If I were obliged to give an opinion on the legal import of that word here, I ſhould not heſitate about it: but it is not neceſſary to the determination of this caſe; in this caſe it is not neceſſary to give any opinion upon it.—GROSE, J. agreed.

Goodright *ex dim.* John Baker *v.* Stocker, Mic. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 13.

The teſtator, *J. Johnſon*, being ſeiſed in fee by his will, in which was this introductory clauſe, "*As touching all* "*ſuch temporal eſtate of lands, goods, and chattels as God* "*hath endowed me with, I give, deviſe, and bequeath thereof* "*as followeth:*" deviſed to his grandſon, *John Baker*, his higher dwelling-houſe, lying near the market-place in this town (*Sidmouth*), "*paying yearly and every year out* "*of the ſaid higher dwelling-houſe, the ſum of* 15s. unto "his grand-daughter, *A. Halſtaff.*" The queſtion was, Whether *John Baker*, the deviſee, took an eſtate in fee, or for life only?—PERCURIAM: Though the general introductory words uſed in this will would have ſome effect in the conſtruction of the ſubſequent deviſes, as was ſaid by Lord *Talbot* (3) in a caſe before him; they would not of themſelves have carried the fee. But it has been very properly admitted

(1) 1 *Eq. Caſ. Abr.* 199. *pl.* 7, 8.

(2) See the Caſe of *Doe* ex dim. *Moor*, v. *Mellor*, infra, where it was held that this word only paſſed an eſtate *for life*.

(3) Vid. *Johnſon* v. *Beckwith*, *Caſ. Temp. Talb.* 160. See alſo *Maudy* v. *Maudy*, *Caſ. Temp.* Lord *Hardw.* 143. 2 *Str.* 1021. S. C.

that

that the words, "paying yearly and every year, &c." are sufficient for that purpose. That annuity was intended to continue during the grand-daughter's life (though it is not so expressly mentioned); and therefore, of necessity, *J. Baker*, the devisee, must take an estate in fee.—Postea to the plaintiff.

Andrew *v.* Southouse, Tr. Ter. 33 Geo 3. B. R. 5 *Ter. Rep.* 292.

The testatrix, *E. Woodward*, being seised in fee, by will *(inter alia)*, gave and devised in manner following: "Item, "I give, devise, and bequeath, all those, my messuages, lands, "tenements, and hereditaments, at Pearsmarch, in the county "of Sussex (being my jointure estate), and also all other "messuages, lands, tenements, and hereditaments, settled in "jointure upon me, on my marriage with my said late "husband, unto my sister *Lois Andrew*, and her assigns, "during the term of her natural life; and from and after "her decease, I give and devise the same unto my nephew, "*W. Andrew*, his heirs and assigns for ever. *Item*, I give, "devise, and bequeath all those my messuages, lands, tene-"ments, and hereditaments at Whitehill, late the estate of "*T. Christie*, Esquire, deceased, and all other my part, "share and interest of, and in, the estates of the said *T.* "*Christie*, unto my sister, *Lois Andrew*, and her assigns "during the term of her natural life, *and from and after her* "*decease, I give and devise the same unto* E. Southouse, *grand-*"*nephew of my late husband, charged and chargeable nevertheless* "*to and with the payment of one annuity or yearly rent-charge of* "20*l. per annum to* James Tooth, *grand-nephew to* Christie "Southouse, *Esquire, and his assigns, for and during the term of* "*his natural life, to commence from and immediately after my* "*decease, and payable quarterly by even and equal portions.*" THE QUESTION WAS, What estate the abovementioned *E. Southouse* took in the tenements at Whitehill, under the said will? viz. Whether he took only an estate for life, or in fee? Lord KENYON, Ch. J. One argument urged on behalf of the plaintiff is, that the testatrix did not intend to give a fee to *E. Southouse*, because it appears in a former part of the will that she knew what technical words were necessary to be used to give such an estate: but the same argument may also operate against the plaintiff, because in the prior part of the will, it appears that she also knew how to give an estate for life, for there she used technical words for that purpose. Generally speaking, where there are no words of inheritance annexed to the devise of lands, only an estate for life will pass, unless there be something in the will, to shew that the devisor intended to give a greater estate. But in the will in question, there are in more places than one words to shew that the devisor intended to give an estate in fee. First she gave all her messuages, lands, tenements, and hereditaments at Whitehill, late the estate of *T. Christie*, and all other her

part, ſhare and *intereſt* of, and in, the eſtates of the ſaid *T. Chriſtie*, to *L. Andrew* for her life: now I do not think that it is forcing the expreſſion "intereſt" too much to apply it as well to Whitehill as to the other eſtates; and there is no doubt but that that word will paſs a fee. Then the words engrafted on the deviſe to *E. Southouſe*, are "charged and chargeable nevertheleſs with the payment of an annuity of 20l. to *J. Tooth*, for life:" but out of what eſtate could that annuity be paid, if *E. Southouſe* did not take an eſtate in fee? for the annuity was intended to be for *J. Tooth's* life, and he might ſurvive *E. Southouſe*; therefore, it is clear an eſtate in fee-ſimple paſſed to *E. Southouſe*. In one part of the deviſe, the words "all other my intereſt of, and in, the eſtates of *T. Chriſtie*," are uſed, which are clearly ſufficient to carry a fee; and it would be extraordinary, that ſome part of the eſtates ſhould be given in fee, and the reſt for life, when all is charged with the ſame payment of the annuity.—BULLER, J. and GROSE, J. of the ſame opinion.

Doe ex *dim.* Beezley *v.* Woodhouſe *et al.* Mic. Ter. 31 Geo. 3. B.R. *Te Rep.* 89.

The teſtator, *Thomas Heys*, deviſed as follows: "I will "that my debts and funeral expences be paid out of MY "WHOLE ESTATE, by my executors. And whereas, I am "now poſſeſſed of one half of a leaſehold eſtate lying and "being in K. held for three lives, one whereof is now in "being: the ſame, together with ALL MY OTHER REAL "ESTATE, I give, deviſe, and bequeath, unto my loving "wife, *Catherine Heys*, *during her natural life*; and likewiſe, I "give unto my loving wife, *Catherine Heys*, all my *perſonalty* "during her natural life; and I further likewiſe give her a "power of diſpoſing and giving, either by will, or other-"wiſe, all my linen, *&c.* [enumerating certain articles of "furniture]; and all the remainder of my goods and furni-"ture I give to be ſold by my executors, and the money "ariſing from the ſale thereof I give to be divided amongſt "my nephews and nieces hereafter named, ſhare and ſhare "alike (that is to ſay) [naming them]. I give unto my "brother, *William Heys*, 40l. yearly, *to be paid him by four "quarterly payments, during his natural life, by my executors "hereafter named*, OUT OF MY WHOLE ESTATE. I give "unto my couſin, *John Heys*, 6l. yearly, to be paid him by "four quarterly payments, during his natural life, *by my "executors* hereafter named, OUT OF MY WHOLE ESTATE: "*the aforeſaid dividend of the money* ariſing from the ſale of "my goods, *and the yearly payments out of my eſtates*, to my "brother, *William Heys*, and to my couſin, *John Heys*, are "not to commence till after the death of my loving wife, "*Catherine Heys*. *The remainder of the profits, after the death "of my loving wife*, Catherine Heys, *after the yearly payments "made to my brother*, William Heys, *and my couſin*, John "Heys, OUT OF MY WHOLE ESTATE, *I give to be divided*

"*amongſt*

" *amongſt* Thomas Heys, George Heys, *and* Jane Heys, ſons " and daughter of *W. Heys*, equally ſhare and ſhare alike." It was CONTENDED for the plaintiff, who claimed as heir at law (and who, it was obſerved, could not be diſinherited but by expreſs words or neceſſary implication), FIRST, that the words " WHOLE ESTATE" in this will, meant *perſonal* eſtate only, and could not be extended to the *real* eſtate. BUT SECONDLY, that if the words "whole eſtate" muſt neceſſarily be conſtrued to extend to *real* property, and that the executors took an eſtate by implication, to enable them to receive the rents, and to pay the annuitants, ſtill the executors only took an eſtate during the lives of thoſe annuitants; and the deviſe in favour of the defendants of *the remainder of the profits*, cannot be extended beyond that time; after the determination of which, the heir at law is entitled, there being no diſpoſition of the ultimate remainder. PER CURIAM: The words " whole eſtate" occur ſeveral times in this will, and in all the places in which they are uſed, they mean *all the property* which the deviſor had. In the firſt place, the debts are to be paid out of his *whole eſtate*, which muſt charge the real as well as the perſonal eſtate. Then, after giving the reſidue of his perſonalty, he gave ſpecific annuities, which are to be paid out of his *whole eſtate*; theſe, therefore, muſt be paid out of his *real* eſtate. Now if we once know the meaning of the words " whole eſtate", as uſed by the deviſor, there is an end of the queſtion. And if by " whole eſtate" the deviſor meant his *real* eſtate, the deviſe of *the remainder of the profits out of his whole eſtate* muſt paſs the fee. Though a deviſe of " all my eſtate" will paſs an eſtate of inheritance, a deviſe of " all the deviſor's lands laying in ſuch a place" is not ſufficient. But here " eſtate" is uſed, which in its natural import will carry a fee-ſimple, unleſs there be words to control it; and as there are no words in this will to that effect, the executors muſt take a fee, in order to anſwer the charges made upon them, as has been determined in a variety of caſes; for if the executors were to take an eſtate for life only, the annuitants might have ſurvived them. How far the whole of this property is exhauſted by theſe means, it is not neceſſary for us to decide here: it is ſufficient for the determination of this caſe, that there is an outſtanding term in the executors; if there be any reſulting truſt for the heir at law, he muſt apply to the Court of Chancery. But it is clear that in this caſe, the whole eſtate neceſſarily veſted in the executors by way of an uſe executed, becauſe that which they were required to do, could not be anſwered by a leſs quantum of eſtate.—Judgment for the defendant.

The land in queſtion was the only real eſtate the teſtator had. And he deviſed " all the reſt and reſidue of his *eſtate*, " whatſoever

Roe *ex dim.* Thomas Urry and Elizabeth

Haldane, *v.* Harvey, Tr. Ter. 10 Geo. 3. 5 *Burr.* 2638.

" whatſoever and whereſoever, to his dear and loving wife " *Elizabeth*, her heirs, executors, and adminiſtrators." It was endeavoured to be ſhewn that the term " eſtate" does not neceſſarily mean *real* eſtate. But Lord MANSFIELD ſaid that the word " eſtate" carries every thing; unleſs tied down by particular expreſſions.

Fletcher *v.* Smiton, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 656.

The teſtator, *Mathew Woodward*, by his will, deviſed *(inter alia)* as follow: " And alſo I give the ſaid *Mary Woodward* " the profit of my four ſhares in the *Corn-market during her* " *life*; alſo the income and profits of MY ESTATES, as follows, " during her life: my lands lying (here follows a particular " enumeration of his ſeveral eſtates), as alſo the reſidue of my " perſonal eſtates, to be laid out in bank annuities; and " *Mary Woodward* my wife, to have the income *during her* " *life only*, of this, and the eſtates before mentioned, *and* " *after her deceaſe*, as follows; I give to *Matthew Weatherley*, " my nephew, the income of my four ſhares in the *Corn-* " *market for his natural life*; AND ALL THE REST OF MY " ESTATES, with all monies in ſtocks, and in *William* " *Morley*'s hands, or any other ſecurities, to be divided in " equal ſhares to *Elizabeth Snow*, *Elizabeth Mailard*, *Judith* " *Weatherley*, *Joſeph Weatherley*, and *William Weatherley*, *ſhare* " *and ſhare alike*; and out of my wife's income ſhe to pay " *Ann Audain* 30*l.* yearly during her life." The teſtator died without iſſue, leaving his widow *Mary Woodward*, and *Matthew Weatherley*, and *Ann Audain* (the ſiſter of the teſtator), his co-heirs, alive at the time of his death. The widow afterwards died; on which *Matthew Weatherley* became ſeiſed of, and enjoyed the ſaid four ſhares during his life, till the 5th day of October, 1787, when he died, having deviſed *his real and perſonal eſtates* to the plaintiff. This action was brought by the conſent of all parties, to try WHETHER the reverſionary intereſt in the four ſhares paſſed under the deviſe to *Elizabeth Snow*, and the four other deviſees, *Elizabeth Mailard*, *Judith Weatherley*, *Joſeph Weatherley*, and *William Weatherley?* Lord KENYON, Ch. J. There are caſes in which nice diſtinctions have been taken between a deviſe of an eſtate *at ſuch a place*, and a deviſe of an eſtate *in a particular place*; and Lord *Hardwicke* alluded to it in the caſe in 1. *Vezey*, 228; but he added, that there is no caſe in which it was held, that a fee paſſed by the deviſe of an *eſtate*, if the teſtator added to it, " in the occupation of " any particular tenant." And it is true that the word " eſtate" may be ſo coupled with other words, as to explain the general ſenſe in which it would otherwiſe be taken, and to confine it to mean *farms* and *tenements*. But that is not the preſent caſe; no ſuch words are here ſuperadded to " eſtates." It is admitted, that if the word " eſtate" had been uſed, there could have been no doubt but that the reverſionary

verſionary intereſt in the ſhares in the *Corn-market* would have paſſed; and that certainly muſt have been the teſtator's intention. For his firſt object was, that all his debts ſhould be paid; now that intention might be defeated, unleſs the will were to operate on the whole inheritance, for the debts could not perhaps be paid out of the particular eſtate carved out of it. However, this caſe does not depend on general obſervation. For the word "eſtates" has been held equivalent to "eſtate," unleſs other words be added to expreſs a different intention. In the caſe of *Tilley* v. *Simpſon* (1), in the court of Chancery, *E.* 1746, the queſtion was, Whether by the words there uſed, the fee ſhould paſs? Lord *Hardwicke* ſaid, it would be productive of bad conſequences to confine the deviſe to a chattel intereſt, unleſs there were other words to ſhew that it was intended to be ſo reſtrained: and he put this caſe; "If a teſtator deviſe all "his perſonal eſtate and ESTATES WHATSOEVER, the in-"heritance ſhall paſs by the latter words." That is ſtrong to ſhew that the word "eſtates" would of itſelf carry a fee. PER CURIAM: This deviſe conveyed the abſolute inheritance in the ſhares in the *Corn-market*. *Poſtea* to the defendant.

On a devise to *A.* for the uſe of *B.* till *B.* attains the age of twenty-one, and then to *B.* in fee; held that the fee veſted immediately in *B.*—Old Clement Satterthwaite *deviſed certain premiſes to* William Satterthwaite, *his fourth ſon, for the uſe of*

Denn, *ex. dim.* Edward Satterthwaite, *v* Charles Satterthwaite, Mic. Ter. 5 Geo. 3. B R. 1 *Black. Rep.* 519.

(1) TILLEY V. SIMPSON. In Chancery, *Eaſter*, 1746. The teſtator, after declaring that he intended to diſpoſe of *all his worldly eſtate*, and making ſeveral deviſes to different perſons, gave and bequeathed *all the reſt and reſidue of his money, goods, chattels*, AND ESATE WHATSOEVER, to his nephew *A. B.* The queſtion was, Whether a beneficial intereſt in a real eſtate, not before diſpoſed of, would paſs to the nephew by this deviſe? Lord *Hardwicke*, Chancellor, was of opinion that it would. He ſaid; that where the Court had reſtrained the word *eſtate* to carry perſonal eſtate only, it hath been where it hath appeared that it was the intention of the teſtator, it ſhould be ſo underſtood: as where it hath ſtood coupled with particular deſcriptions of part of the perſonal eſtate, as a bequeſt of all my mortgages, houſehold goods, and *eſtate*, in which the preceding words are not a full deſcription of the perſonal eſtate: he did not know any of thoſe caſes where the preceding words were ſufficient to paſs the whole perſonal eſtate. If the teſtator had ſaid, "*all the reſt and reſidue of my perſonal eſtate and eſtates whatſoever*," a real eſtate would have paſſed. This bequeſt amounts to the ſame, for the word *chattels* is as full a deſcription of the perſonal eſtate as the word *perſonal*. Therefore when he hath uſed words comprehending all his perſonal eſtate, and then makes uſe of the word *eſtate*, that word will carry a real eſtate. The word *whatſoever* is uſed here, which is the ſame as if he had ſaid, of whatſoever kind it be; and if that had been the caſe, it would moſt certainly have carried the real eſtate. The caſe of *Tirrel* v. *Page*, 1 *Ch. Caſ.* 262. is very material to the preſent queſtion, and I think cannot be diſtinguiſhed; there the gift was "all the reſt and reſidue of my money, goods, and chattels, and other eſtates whatſoever, I give to *J. L.*" The only difference in the caſe is, that there is the word *other*, which I do not think can diſtinguiſh it. If it had been all the reſt and reſidue of my houſehold goods and mortgages, and all other eſtate, I do not think that would have carried the real.

William Satterthwaite, *ſon of the ſaid* William, *for his maintenance and education, till he attained the age of twenty-one years; after which, he deviſed the ſame to* William Satterthwaite, *the grandſon, and his heirs. William*, the ſon of *Clement*, entered, and was admitted; *William*, the grand-ſon, died before twenty-one, unmarried; and the defendant is his brother, and heir at law. *Clement*, the eldeſt ſon and heir of the deviſor, died after *William*, the grand-ſon, leaving *Edward* his next brother, and heir at law, who, on the 14th of May, 1761, deviſed all his cuſtomary eſtates to his nephew, *Edward Satterthwaite*, the leſſor of the plaintiff, in fee. THE QUESTION was, Whether, as *William* the grand-ſon died before twenty-one, the premiſes deſcended to his heir at law? And THE COURT held, that *William*, the father, was only in the nature of a guardian to his ſon, and that the fee ſimple veſted inſtantly in *William*, the ſon.—Judgment for the defendant.

Stiles, *ex dim.* Rayment and Wife, *v.* John and Mary Walford, Hil. Ter. 14 Geo. 3. C.B. 2 *Black. Rep.* 938.

A deviſe, after an eſtate tail in *A.* is ſpent, of the teſtator's lands, eſtate, and premiſes, to *A.* if he ſurvives *B.* his wife, and his heirs; but if *B.* ſurvives *A.* then (ſubject to an annuity for *B.*) to *C. D. E.* and *F.* is a fee-ſimple to *C.* &c.—*Henry Sheward*, the teſtator, made his will, and thereby (*inter alia*) "*gave to his youngeſt ſon*, William Sheward, *all that eſtate* "*at* Barnſley, *which he purchaſed of* Henry Sheward, *to him* "*and his lawful iſſue; and in default of ſuch iſſue, he gave* "*the abovementioned eſtate and premiſes to his four grand-*"*daughters*, Anna Maria Sheward, Elizabeth Sheward, "Mary Walford, *and* Anne Walford: *theſe four to be equal* "*ſharers in the ſaid lands, eſtate, and premiſes*, with proviſo, "that if his ſon, *William Sheward*, left his wife *Elizabeth* a "widow, then ſhe to be allowed an annuity of 10l. *per annum*, "as a rent charged upon the ſaid eſtate and premiſes. But if "my ſon, *William Sheward*, ſurvive his wife *Elizabeth*, then "my will is, that he ſhall have the ſaid premiſes to him and "his heirs for ever, any thing in theſe bequeathings to the "contrary notwithſtanding." THE QUESTION was, What eſtate the four grand-daughters took under the will? And for the plaintiff it was argued, that the grand-daughters took only eſtates for life. SED PER DE GREY, Ch. J. AND TOT. CUR. There is no doubt but they took a fee-ſimple. It is a deviſe of the teſtator's *eſtate*, as well as of the *premiſes*; one denoting the quantity of the intereſt, the other the locality. He is diſpoſing of a reverſionary intereſt after failure of an eſtate tail, and that only upon a contingency. If *William* ſurvived his wife, he was to have the eſtate in fee by expreſs words. If the wife ſurvived him, ſhe was to have an annuity, and, charged therewith, he gave the ſaid lands, eſtate, and premiſes, to his four grand-daughters, to be equally ſhared among them, intending moſt clearly to diſpoſe of all his

his intereſt, whichever event might happen.—Judgment for the defendant.

Beachcroft, *et al.* *v.* Broome, Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 441.

The teſtator, *M. Wymondſold*, deviſed his eſtates in Berkſhire "to his ſon, *Francis Wymondſold*, and his heirs, &c. "and the reſt of his eſtates *(of which the premiſes in queſtion* "*are part)* to his ſon *Charles*, and his heirs, &c.;" *and, if either* Francis *or* Charles *ſhould die without having ſettled, or otherwiſe diſpoſed of the eſtates ſo deviſed, or without leaving iſſue of his or their reſpective body or bodies lawfully begotten*, or having ſuch iſſue, ſuch iſſue ſhould die before his or their age or ages of twenty-one, and without leaving lawful iſſue, then over. After the teſtator's death, *Charles Wymondſold*, by indentures of leaſe and releaſe, and bargain and ſale enrolled, and a recovery ſuffered, conveyed the premiſes in queſtion to *J. Shephard Clerk*, in fee. THE QUESTION was, Whether, under the deviſe to *Charles Wymondſold*, and the deeds of leaſe and releaſe, and bargain and ſale, and the recovery ſuffered in purſuance thereof, *J. Shephard*, the purchaſer, took an abſolute and indefeaſible eſtate of inheritance, in fee-ſimple, in the premiſes in queſtion? PER CURIAM: It ſeemed as if the parties had conſidered that a queſtion would be made, whether this were or were not an eſtate tail? If it had turned on that queſtion, we ſhould have thought it extremely clear, that, on failure of the firſt limitation, the ſecond might have taken effect as an executory deviſe. In truth, the real queſtion is, What was the intention of the deviſor? And, if that can be collected from the words of the will, it muſt be carried into execution, provided it be not contrary to the rules of law. Now he has ſaid, in expreſs terms, "I give one eſtate to one ſon, and his heirs, and another to another ſon, and his heirs, and if either of them die without having ſettled or diſpoſed of the eſtates, or without iſſue, then that it ſhould go over." But the ſon, *Charles*, has ſettled and diſpoſed of the eſtate given to him, and there is no doubt but that the deviſor intended that he ſhould have the power ſo to do.

## *What Words will create an Eſtate-Tail.*

Perrin, *et al.* *v.* Blake, Hil. Ter. 10 Geo. 3. B.R. 4 *Burr.* 2579. 1 *Black. Rep.* 672. 1 *Doug.* 342 (n, i, k, l), 343 [n. 3], *Harg.* Law Tracts, 490.

This was a demurrer to a replication, in an action of treſpaſs, and the queſtion was, "WHETHER *John Williams* "TOOK AN ESTATE FOR LIFE, OR an eſtate *tail*, UNDER "HIS FATHER'S WILL?"—The teſtator, *William Williams*, who was ſeiſed in fee of a plantation in Jamaica, at the time when he made his will, had only this one ſon, *John*, and two daughters, but he thought his wife to be then with child; however, there never was any other child, and one of the daughters was ſince dead without iſſue. By his will, he deviſed

vised in the following words: "should my wife be *enseint* "with child, and it be a female, I give her 2000l. and if a "male, I give and bequeath my estate, real and personal, "equally to be divided between the said infant and my son, "*John Williams*, when the said infant shall attain his age of "twenty-one years. *Item*, it is my intent and meaning, "that *none of my children shall sell or dispose of my estate for "longer time than his life and to that intent, I give, devise, "and bequeath all the rest and residue of my estate to my said son*, "John Williams, *and the said infant, for and during the term "of their natural lives*, the remainder to my brother-in-law, "*J. G.* and his heirs, for and during the natural lives of my "said son, *John Williams*, and the said infant, and the remain-"er to the *heirs of the bodies* of my said sons, *John Williams*, "and the said infant, lawfully begotten, or to be begotten;" remainder to his daughters, for their lives; remainder to *J. G.* and his heirs to preserve contingent remainders &c.; remainder to the heirs of the bodies of his daughters; and he declared that the share and part of his said daughters, if either of them should die, should immediately vest in the heirs of their bodies. The defendant claimed under the remainder to the daughters, *John being dead.*—The short history of the proceedings is this: an ejectment was brought in Jamaica, and a special verdict found, which came over for the opinion of the privy-council upon an appeal, in the nature of a writ of error. It was agreed, that an immediate judgment should not be given in the cock-pit, but that the appeal should be adjourned, and, in the mean time, a solemn opinion taken in Westminster-hall: at first, it was agreed to state a case for the opinion of the court of B.R. which might have been adjourned, on account of difficulty, into the exchequer chamber; but a case from the king, in his judicial capacity, being new, it was afterwards thought better, that the point should be brought before the Court, upon the pleadings in a feigned action of trespass; accordingly, to *a declaration in trespass* (laid in Middlesex, under a *videlicet*) the defendant *pleaded* the will. The plaintiff *replied* a recovery (on the ground that the son took an estate tail), and to this replication the defendant demurred. No doubt was made of the rule in *Shelley*'s case, in *Coke Littleton*, and other books (1), "that when the ancestor, by "any gift, devise, or conveyance, takes an estate for life, "with remainder mediately or immediately to his *heirs*, in "fee, or in tail; the word *heirs* is a word of LIMITATION, "and the estate of inheritance shall *vest in the ancestor*, and "the express limitation for life is of no effect."

The counsel for the plaintiff did not dispute, but that upon this will there were words which shewed the testator's intent

(1) 1 Co. 104 b. *Co. Lit.* 22. & 319. b.

to deviſe his eſtate in ſtrict ſettlement. The teſtator expreſsly declared, "that he meant that none of his children "ſhould ſell for *longer than his life*;" and *to that intent*, deviſed to truſtees, to preſerve *contingent remainders*, which ſeems equivalent to his ſaying, "they ſhould *not* have an "eſtate tail;" "and that the heir ſhould take a contingent "remainder by ſuch deſcription, *as a purchaſer*, which his "anceſtor had no power to alien." If the heir was to take the inheritance by *ſucceſſion*, there could be no contingent remainder to preſerve, and his anceſtor might alien therefore, the counſel for the plaintiff did not diſpute the intent: but they contended, that be the *intent ever ſo plain* from other parts of the will, the *rule holds*, "that the inheritance *muſt* "veſt in the anceſtor."

The counſel for the defendant contended, that *if* the teſtator's *intent was manifeſt* from other parts of the will, "*heirs*" might be conſtrued a word of *deſcription*, and the heir ſhould take the inheritance as a *purchaſer*: that ſuch a deviſe was contrary to no rule of law; that a teſtator might limit in this manner by apt words; and *if* the teſtator's intent be *clear*, and what he intends be *agreeable to the rules of law*, it ſhall be *executed*, in what manner ſoever he may have expreſſed himſelf.

THE COURT not being able, after the moſt mature deliberation, to concur in opinion, the judges delivered their ſentiments *ſeriatim*; and Mr. Juſtice YATES holding it to be an eſtate *tail*, and Lord MANSFIELD, and the other two judges, holding it to be an eſtate only for *life*, there was—Judgment for the defendant.

THE PLAINTIFFS brought a writ of error in the exchequer chamber, and it was ſeveral times argued there; and, on the 29th of January, 1772, the Judges who compoſed that Court gave their opinions *ſeriatim*. Sir THOMAS PARKER (then Lord Chief Baron), Mr. Baron ADAMS, Mr. Juſtice GOULD, Mr. Baron PERROTT, Mr. Juſtice BLACKSTONE, and Mr. Juſtice NARES, were of opinion for the plaintiffs. Mr. Juſtice BLACKSTONE (who made a very able and elaborate argument) agreed with the majority of the court of King's Bench, "that *if* the intent of the teſta"tor manifeſtly and certainly appeared (by plain expreſſion, "or neceſſary implication from other parts of the will), "that the heirs of the body of *A.* ſhould take by purchaſe, "and not by deſcent, then a deviſe to *A.* for life, and, after "his deceaſe, to the heirs of his body, not only *might* but "*muſt* be conſtrued an eſtate in ſtrict ſettlement:" but he thought, it *did not* manifeſtly and certainly appear, from the mere intended reſtraint of the power of alienation in *A.* that the teſtator *had* meant that the heirs of *A.*'s body ſhould take by purchaſe, and not by deſcent; or even that he *knew* the difference

difference between the two methods of taking. The Lord Chief Justice of the Common Pleas (Sir *William De Grey*), and the present Lord Chief Baron, were for affirming the judgment of the court of King's Bench.

The defendant afterwards brought a writ of error in the House of Lords, to reverse the judgment of the exchequer chamber; but the parties, at length, compromised the dispute, and, on the 7th of May, 1777, the writ was nonprossed upon the petition of the plaintiff, 1 *Doug.* 344.

Roe. *ex dim.* Geo. Dodson, esq. *v.* Grew, *et al.* Hil. Ter. 7 Geo 3. C.B. 2 *Wils.* 322.

A devise to *G. G.* for life, and, after his death, to the issue of his body, and the heirs of the body of such issue, is an estate-tail in *G. G.*—The testator, *Daniel Dodson*, being seised in fee of the lands in question, by his will devised the same in these words, viz. "I give, devise, and bequeath, unto my nephew, "*George Grew*, all my lands (naming and describing them "particularly), to hold the same, with their appurtenances, "unto him the said *George Grew*, *for and during the term of* "*his natural life, and from and after his decease, to the use of* "*the* issue *male of his body, lawfully to be begotten, and the* "*heirs male of the body of such issue male*; and for want of such "issue male, then I give all and every the aforesaid premises "unto my nephew, *George Dodson*, his heirs and assigns for "ever." *George Grew*, the devisee, had no child, but entered on the premises in question, and suffered a common recovery thereof, and died without issue male. The question was, Whether *George Grew* took an estate-tail, or for life only, under the said will? Wilmot, Ld Ch. J.—The statute of wills gives a man power to devise his lands, but *he cannot, by his will, create a perpetuity, nor restrain tenant in tail from suffering a recovery*, &c. &c. these being contrary to the rules of law. The intention of the testator clearly was, to give *George Grew* an estate for life only; but his intention also clearly was, that all the sons of *George Grew* should take in succession; both these intentions cannot take place, for if the devisee, *George Grew*, took only an estate for life, his sons could never have taken, and although it eventually happened that he had no sons, yet we must consider this case as if he had had issue; therefore, to enable them to take, *George Grew* must be adjudged to have been tenant in tail, for the testator's great intention most clearly was, that the lands should never go over to *Dodson*, the lessor of the plaintiff in remainder, but upon a failure of issue of *George Grew*.—The word *issue*, in a will, is either a word of purchase or of limitation, as will best effectuate the intention of the testator; it is a plural word, and takes *in* all the sons of *George Grew*; and the words "*issue male of his body, and the* "*heirs male of his body of such issue*," mean only that they were not all to take at a time but in succession, as if he had said *to his first, and every other son*, &c. Cases upon wills have

have no great weight, unless they are exactly in the very point; the intention is the great thing which governs. CLIVE, J.—The word *issue* is one of the most vexed words in the books, sometimes it is *nomen singulare*, sometimes *plural*, sometimes a word of *limitation*, sometimes of *purchase*, but it must always be construed according to the intent of the will, or deed, wherein it is used: *if one grants to a man and his issue* (who has issue at the time of the grant), *the issue shall take jointly with him.* In the present case, the great intention is to give, in succession, to all the sons of *George Grew*, which cannot be without construing it an estate-tail in him. BATHURST, J.—It is a rule, that *where an ancestor takes an estate of freehold, if the word* issue *in a will comes after, it is a word of limitation*; where there appears a particular intent, and a general intent, the general must take place. And he agreed, that the general intent could not take effect, unless *Grew* was considered to be tenant in tail. GOULD, J.—The word *issue* is used in the statute *de donis* promiscuously with the word *heirs*: the word *issue* comprehends the whole generation, as well as the word *heirs*, and, in my judgment, the word *issue* is more properly, in its natural signification, a word of *limitation* than of *purchase*.—Judgment for the defendant.

By a devise of *the fee simple and inheritance to* A. *and his child or children for ever when he shall be* 21 *years of age*, BUT *if he die before that time, then the fee simple and inheritance to B. A.* takes only an estate tail.—The testator, *Christopher Stevens*, being seised in fee simple, devised in the following manner:—"I also give and bequeath to my son *William Stevens*, "when he shall accomplish the full age of twenty-one years, "*the fee-simple and inheritance of Lower Shelstone*, TO HIM "AND HIS CHILD OR CHILDREN FOR EVER. *But if my son*, "William Stevens, *shall happen to die before he shall accom-* "*plish the full age of twenty-one, then* I give and bequeath *the* "*fee-simple, and inheritance* of *Lower Shelstone* to my wife *Eli-* "*zabeth Stevens for ever.*"—THE QUESTION was, What estate William Stevens took under the will? Lord MANSFIELD:—If the testator had used the words, "all his estate," "inheritance," or "for ever," and had stopped there, the fee-simple would have passed. But the words, "*child or children*," are to the full as restrictive as if he had said, "if my son die without heirs of his body." To give the father an estate in fee, would be to strike those words out of the will. They must operate to give him an estate-tail; for there were no children born at the time, to take an immediate estate by purchase. The meaning is the same, as if the expression had been, "to "*William and his heirs, that is to say, his children or his issue.*" The words, "for ever," make no difference, for *William*'s issue might last for ever.—PER CURIAM: We are of opinion, that *William Stevens* took (under the above will of *Christopher*

Davie, *et al. v.* Stevens, *et al.* Hil. Ter. 20 Geo. 3. B.R. 1 *Doug.* 320.

*Chriſtopher Stevens*) an eſtate-tail to him and the heirs of his body, with reverſion to himſelf in fee, by deſcent.

Evans, *ex dim.* Brooke, bart. *v.* Aſtley, eſq. *et al.* Mic. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1570. 1 *Black. Reſp.* 499, 521.

Sir *Samuel Daniel* was, on the 19th of February, 1762, ſeiſed of the premiſes in queſtion; and being ſo ſeiſed, he on that day made his will, duly atteſted, and written with his own hand, in which will were theſe words: "I do give, grant, "limit, deviſe, and appoint all my ſaid manors, lands, and te- "nements, with their appurtenances, in Over-Tabley, &c. "with their ſeveral and reſpective rights, members, and ap- "purtenances in the ſaid county of Cheſter, and all other "manors, &c. &c. and hereditaments whatſoever, of what "kind or nature ſoever, wherein I have any manner of eſtate, "ſituate, lying, and being in the county palatine of Cheſter, "unto *Samuel Duckenfield*, my godſon, and ſon of *Charles* "*Duckenfield*, of Mobberley, in the county of Cheſter, eſq. "*during his natural life, and the heirs male of his body, lawfully* "*to be begotten*; and for want of ſuch iſſue, to *Charles Ducken-* "*field*, another of the ſons of the ſaid *Charles Duckenfield*, "eſq; *during his natural life, and to the heirs male of his* "*body lawfully to be begotten*; and for want of ſuch iſſue, to "*John Duckenfield*, another of the ſons of the ſaid *Charles* "*Duckenfield*, eſq; *during his natural life, and to the heirs* "*male of his body, lawfully to be begotten*; AND FOR WANT "OF SUCH ISSUE, THEN TO EVERY SON AND SONS OF THE "SAID CHARLES DUCKENFIELD, ESQ; WHICH SHALL BE "BEGOTTEN ON THE BODY OF SARAH HIS NOW WIFE: AND "FOR WANT OF SUCH ISSUE, then to *William Hulton*, of the "city of Cheſter, *during his natural life, and the heirs male of* "*his body lawfully to be begotten*; and for want of ſuch iſſue, "then to *Samuel Goldſton*, of Eaſt Ham in the county of "Eſſex, my godſon, for and *during his natural life, and the* "*heirs male of his body lawfully to be begotten*; and for want of "ſuch iſſue, then to *James Goldſton*, brother of the ſaid "*Samuel Goldſton, during his natural life, and the heirs male* "*of his body lawfully to be begotten*; and for want of ſuch iſſue, "to the right heirs of the ſaid Sir *Samuel Daniel*, for ever."— With a proviſo, that the eſtates ſo limited to the ſaid *Samuel Duckenfield*, and others, ſhould be on condition that he and they, and their deſcendants, to whom the premiſes ſhould come, ſhould procure an act of Parliament to take and uſe the name and arms of *Daniel*—And by the ſaid will he gives power to every perſon in poſſeſſion, to let leaſes for three lives on certain terms therein mentioned, and to make a jointure not exceeding 200l. per ann.—*Samuel*, *John*, and *Charles Duckenfield*, the three ſons of *Charles Duckenfield* of Mobberley, all died without iſſue. But *Charles Duckenfield* of Mobberley had a fourth ſon, named *William*, born *after* the date of the will; who became ſeiſed, and took the name and arms of *Daniel*, according to the directions of the will; and *ſuffered a recovery*, and then made his will; (under which will

will the *defendants* claim).—*William Hulton*, and *Samuel* and *James Goldſton*, (the other remainder-men), died without iſſue male.—The leſſor of the plaintiff claims as one of the right heirs of the teſtator, Sir *Samuel Daniel*; *viz.* one moiety of the eſtate under a co-heireſs, all the prior remainder-men being dead without iſſue. The queſtion was "WHAT *eſtate* "Sir *William Duckenfield Daniel* (the fourth ſon of *Charles* "*Duckenfield* of Mobberley, eſq.) took, under this will of "Sir *William Daniel*, viz. whether an *eſtate tail*, or *for* "*life?*"—Lord *Mansfield*, CHIEF J. The reaſon of the multiplicity and ſeeming diſagreement of the caſes in the old books, concerning what words ſhall create an eſtate tail, and what an eſtate for life, in a will, has ariſen, not ſo much from endeavouring to follow the intent of the teſtator, as from adhering to an old rule of law; that the anceſtor cannot take a mere eſtate for life, if in the ſame deed, an eſtate be given to his heirs as purchaſors. The reaſon of this rule was founded in feodal tenure. For otherwiſe the lord, on the death of the anceſtor, would be defrauded of his feodal profits. But ſince theſe tenures have been taken away, the Courts have indeed followed the rule of law, where the caſe was plainly and directly within it; but have departed out of it, wherever the intent of the teſtator was clearly againſt it. This has occaſioned the variety.—The true conſtruction of the teſtator's intent, is to be collected from his will, taking in the nature of the thing deviſed, and the relations the perſons ſtand in to him. The plaintiff claims as right heir to the teſtator, to whom the laſt remainder is limited by the will. He therefore claims under the will: and the ſame conſtruction muſt now be uſed, as if *William Hulton*, or any other intermediate remainder-man had been living, and had brought this action. Now nothing is ſo clear as that the conſtruction muſt be agreeable to the intention of the teſtator, collected from his will; and no-body can doubt of the *intention* of the teſtator. 'Tis too ſtrong, to ſuppoſe that he meant *nothing* to the after-born ſons.—The *words* of the will make them indeed *joint-tenants*; but 'tis impoſſible that *that* could be his *intention*: for, this teſtator deſires leaſes to be renewed for the benefit of *the family*. They are to have power to make leaſes and *jointures*. And can there be ſix or ſeven jointures, *all at once?* It muſt therefore be admitted, that they are to take in *ſucceſſion*. If ſo, the *other* circumſtances muſt be taken in, to ſhew what eſtate he *meant* to give them. And there can be no doubt, but that he meant them an eſtate in *tail male*. Though the will is *written* with the teſtator's own hand, he probably *copied* it from a draught; and he ſeems, by miſtake, to have *omitted* ſome words which were inſerted in the original draught. In the proviſo, he recites enough to ſhew that he meant to give it to the after-born ſons in tail male, *as* he had done to the other ſons. It is clear that the teſtator *intended* the ſame eſtate to theſe after-born ſons, *by analogy*, as he had given to the prior-

prior-born. WILMOT, J. alſo declared, that he had not the leaſt doubt. He conjectured, that the cauſe of the variation between the deviſes to the born and unborn ſons of *Charles Duckenfield* was, that the drawer of the will conceived he could not give *to an after-born ſon for his life, and graft a limitation upon it to another perſon not in being*, for life. If the teſtator had intended the latter to be *for life*, he would have ſaid ſo: but he left it to the general diſpoſition. But whatever the *words* are, is it poſſible to imagine that he *intended* to diſinherit his *own nephews*, for the ſake of ſtrangers; after he had *adopted* theſe nephews, as his own ſons, for the ſupport of his *family?* All the proviſions tend to prove the contrary, moſt clearly. He certainly meant them to take *ſucceſſively*, and not jointly. He could never mean, that they ſhould all live in the family-houſe *together*, or make ſeveral *concurrent* jointures. "For want of *ſuch* iſſue" means "for want of "heirs *male* of the body": and this is the true conſtruction. YATES, J. likewiſe declared he had no doubt.—Judgment for the defendant.

Chapman, *ex dim.* Oliver, *et al.* *v.* Brown, *et al.* Hil. Ter. 5 Geo. 3. B.R 3 *Burr.* 1626.

*Joſhua Brown*, being ſeiſed in fee of the premiſes in queſtion, by his laſt will, dated the 4th of May, 1694, deviſed the ſame to his wife for life, and after her death, to his brother, *Thomas Brown*, until ſuch time as *William*, the eldeſt ſon of his brother, *Reginald Brown*, ſhould attain the age of twenty-four; and from and after the ſaid *William*'s attaining that age, he gave the ſame to his ſaid nephew, *William Brown*, and his aſſigns, for and during the term of his natural life; and from and after his death, then to the firſt ſon of the body of the ſaid *William Brown*, lawfully begotten or to be begotten, and to the heirs male of the body of ſuch firſt ſon lawfully to be begotten; and for want of ſuch iſſue, then to the ſecond, third, fourth, fifth, and every other ſon and ſons of the ſaid *William*, according to their ſeniority, and to the heirs male of their bodies, the eldeſt of the ſaid ſons of the ſaid *William Brown*, and the heirs male of his body, always to be preferred before the younger and his heirs male; *and for want of ſuch iſſue of the body of the ſaid* William Brown, *then to the* SECOND SON of his ſaid brother, *Reginald Brown, for and during the term of his natural life; and after the death of the ſaid* ſecond *ſon of his ſaid brother*, Reginald Brown, *then to the firſt ſon of the body of ſuch* SECOND SON, *of his ſaid brother*, Reginald Brown, *lawfully begotten or to be begotten, and to the heirs male of the body of* SUCH SECOND SON, *lawfully to be begotten; and for default of ſuch iſſue, to the* (1) *third, fourth, fifth, and every other ſon, or ſons, of the ſaid* ſecond *ſon of the ſaid* Reginald *(according to their ſeniority), and to the heirs male of the bodies of the ſaid third, fourth, fifth, and other ſons*

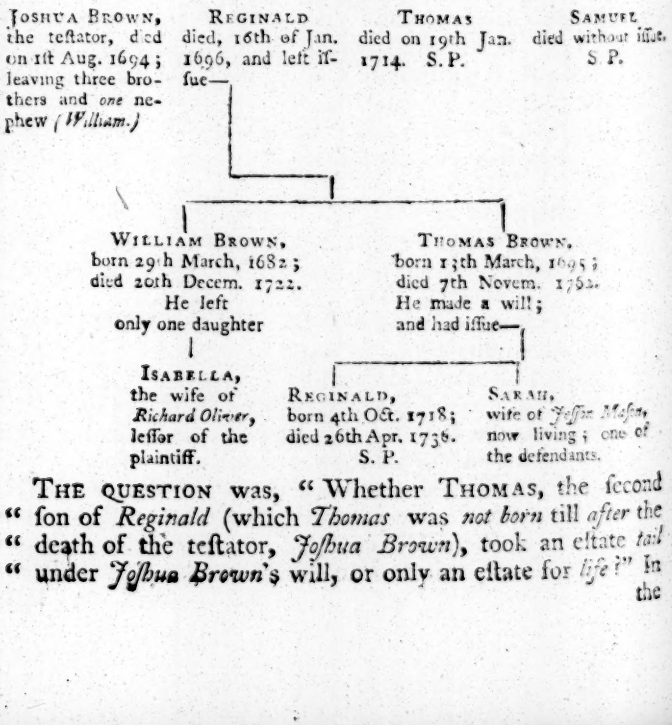
(1) Omitting the ſecond.

of

*of the said* second *son of the said* Reginald, *lawfully to be begotten*, the eldest of the said son and sons, and their several heirs male, according to the seniority and priority of birth, to be preferred before the younger of the said sons, and their heirs male; and for want of such issue, then to the *eldest or next son, or sons*, of the said *Reginald Brown*, for the time being, for the term of his natural life; and, after his or their deaths, to the heirs male of the body of such *eldest and next* son of his brother *Reginald*; and for want of such issue, then to the *first* son of his brother, *Samuel Brown*, for and during the term of his natural life; and from and after the death of such first son of his brother, *Samuel Brown*, then to the first son of the body of such first son of the said *Samuel Brown*, lawfully begotten or to be begotten, and to the heirs male of the body of such first son of the said *Samuel Brown*, lawfully to be begotten; and for want of such issue, then to the second, third, fourth, fifth, and every other sons of the eldest son of *Samuel*, in tail male; and for want of such issue, then to the second, third, fourth, fifth, and each other son and sons of *Samuel*, for their respective lives; and after their respective deaths, to their respective sons, in tail-male; and for want of such issue, then to his own right heirs for ever.—Then comes this article, "And I do declare that the reason of my settling "and limiting my said messuages, lands, and hereditaments "as aforesaid, is because I desire to have the same *continue in* "*my name and blood*, so long as it should please God to per-"mit the same." On the 1st of August, 1694, *Joshua Brown*, the testator, died seised of the premises, without any issue; leaving *Ann*, his widow; his three brothers, *Thomas*, *Reginald*, and *Samuel*; and his nephew, *William Brown*, the only son of the said *Reginald* at the time of the testator's death, and also at the time of making his will, and who was born on the 29th of March, 1682.—Upon the testator's death, *Ann*, the widow, entered; and so did *Thomas*, his brother; (on their respective parts, devised to them): and on the 29th of March, 1706, the nephew, *William*, having attained his age of 24 years, he also entered upon the tenements devised to him.—After the death of *Joshua*, the testator, but during the life of *William*, his nephew, *Reginald*, the testator's brother, had issue a second son, namely, THOMAS BROWN, who was born the 13th of March, 1695: and on the 16th of January, 1696, *Reginald* died, leaving issue, the said *William* and *Thomas*, and had *no other* sons. On the 12th of January, 1712, *Ann* the widow died; and *William*, the first son of *Reginald*, entered upon the premises; and died seised thereof, on the 20th of December, 1722; leaving issue, ISABELLA, now the wife of *Richard Oliver*, the plaintiff. Upon his death, THOMAS, his brother (the 2d son of *Reginald*), entered; and in 1727, 1 *G.* 2. obtained an act of parliament to enable him to grant building-leases

leaſes of the premiſes in queſtion; having then a ſon, named *Reginald*, and a daughter, both under age: this *Reginald* was born the 4th of October, 1718, and was the only iſſue male of *Thomas*; and died the 26th of April, 1736, without iſſue, and unmarried, and under the age of 21.—In 1747, a common recovery was ſuffered of the premiſes, by *Thomas Brown*, who was the vouchee: which, by indentures of bargain and ſale, and of releaſe, dated the 1ſt and 2d of April in the ſame year, was declared and agreed by all the parties to the ſaid indenture, to be and enure to the uſe and behoof of the ſaid *Thomas Brown*, his heirs and aſſigns for ever, and to, or for, no other uſe, intent, or purpoſe whatſoever.—*Thomas Brown*, being ſo ſeiſed, on the 5th of June, 1762, made his will, whereby he deviſed the premiſes in queſtion (after the death of *Margaret*, his wife, and *Sarah Barlow* [now *Maſon*], his daughter) to his grand-ſon, *John Barlow*, his heirs and aſſigns for ever; and on the 7th of November, in the ſame year, died; leaving the defendant, *Sarah Maſon*, the wife of the defendant, *Jeſſon Maſon*, his daughter and heir at law. —*Thomas* and *Samuel Brown*, the brothers of *Joſhua*, the original teſtator, died without any iſſue. ISABELLA OLIVER, the plaintiff, is *heir at law of* WILLIAM BROWN, the *firſt* ſon of *Reginald Brown*; and is alſo *heir at law of Joſhua Brown*, the original teſtator. The defendant, *Sarah Maſon*, is *heir at law of Thomas Brown*, the *ſecond* ſon of the ſaid *Reginald*.

*The following Pedigree will give a clear Conception about the Parties.*




THE QUESTION was, "Whether THOMAS, the ſecond "ſon of *Reginald* (which *Thomas* was *not born* till *after* the "death of the teſtator, *Joſhua Brown*), took an eſtate *tail* "under *Joſhua Brown*'s will, or only an eſtate for *life*?" In the

the argument for the plantiff, IT WAS ADMITTED that there was an inaccuracy or confuſion in the wording of the deviſe that is to take place immediately after the death of *Reginald*'s ſecond ſon. The words being, "And from and after the "death of the ſaid ſecond ſon of my ſaid brother *Reginald* "*Brown*, then to the *firſt* ſon of the body *of ſuch ſecond ſon* "of my ſaid brother *Reginald Brown*, and to the heirs male "of the body of SUCH SECOND SON; and for default of ſuch "iſſue, to the *third*, fourth, fifth, and every other younger "ſon or ſons of the ſaid *ſecond ſon* of my ſaid brother *Regi-* "*nald Brown*, and to the heirs male of the bodies of the "ſaid *third*, fourth, fifth, and other ſons of the ſaid *ſecond* "*ſon* of the ſaid *Reginald Brown*." But it was CONTENDED that this was owing to a mere *accidental omiſſion* in *tranſcribing* the fair copy of this will from the original rough draught of it. That it was evident, that a line was inadvertently left out: and it was moſt clear, what that line muſt have been. The deviſe immediately after the death of *Reginald*'s ſecond ſon is, "To the *firſt* ſon of ſuch ſecond ſon's body, and to the "heirs male of the body of ſuch."—Thus far the tranſcriber copied the draught *right*. But here he has plainly omitted the following words—"*Firſt ſon* lawfully to be "begotten; and for want of ſuch iſſue, then to the ſecond "ſon of the body of ſuch ſecond ſon of my ſaid brother "*Reginald Brown* lawfully to be begotten, and to the heirs "male of the body of ſuch."—And that if theſe words had been inſerted, the clauſe had been quite clear, ſenſible, and methodical. It was alſo obſerved, that *Thomas Brown*, the ſecond ſon of *Reginald*, had *himſelf* decided the preſent queſtion, by applying for and procuring an act of parliament, wherein he is, upon his own ſuggeſtion, *recited* to be *tenant for life*, with remainder to his firſt and other ſons in tail male ſucceſſively.—THE COUNSEL for the DEFENDANTS laid it down as an eſtabliſhed rule of law, "*That if a deviſe be* "*to one for life, and afterwards a limitation, either immediate or* "*mediate, to the heirs of his body, the deviſee takes an eſtate tail.*" And as to the INTENTION of the teſtator, ſuppoſing it to have been clearly what was contended for, on the behalf of the plaintiff; and ſuppoſing (though not admitting) "That "the imagined omiſſion in the will, might be ſupplied by "conſtruction;" yet that intention *could not take effect*; for it was a limitation of a *poſſibility upon a poſſibility*; and manifeſtly tended to a perpetuity, by a ſuſpenſion of the inheritance from veſting, and conſequently rendering the eſtate unalienable for a longer time than the policy of the law allows; which has not yet been permitted to laſt longer than the compaſs of a life, or lives in being, and one-and-twenty years beyond. THE COURT held that *Thomas*, the ſecond ſon of *Reginald*, took an eſtate TAIL. They could not inſert the limitations which the plaintiff's counſel ſuppoſed to be

left out: and as the will now ſtood, there was no queſtion in the caſe. But *if* the omitted limitations *could* have been ſupplied by conſtruction, they thought the *unborn* ſons of an *unborn* ſon could *not* have taken; and that, to effectuate the general intention of the teſtator, the word "*ſon*" ſhould be conſtrued a word of *limitation*; and an eſtate TAIL given to the ſecond ſon of *Reginald*.—Lord MANSFIELD:—A court of juſtice may conſtrue a will; and, from what is expreſſed, neceſſarily *imply* an intention not particularly ſpecified in words; but we cannot, from arbitrary conjecture, though founded upon the higheſt degree of probability, *add* to a will, or *ſupply* the omiſſions. Lord *Hardwicke*, though generally liberal in conſtruing the intent of teſtators, would *not* ſupply a *contingency omitted*, in the moſt favourable caſe that could exiſt. A mother deviſed her real and perſonal eſtate to her daughter (who was an only child); "And *if* ſhe died before ſhe is of age to diſpoſe thereof," then deviſed it over. The daughter lived to be married; and died, leaving a daughter, between 20 and 21. Lord *Hardwicke* decreed for the deviſee over, as to the *real* eſtate (1).—But *if* words are rejected, or ſupplied by conſtruction, it muſt always be in *ſupport of* the manifeſt intent. Here, adding the words would *defeat* the general intent, which certainly was, "*That the iſſue male of the ſecond ſon of* Reginald "*ſhould take, before it went to the others in remainder.*" But *if* the words were added, the limitation by the rules of law would be *void*. A POSSIBILITY cannot be deviſed *upon* a poſſibility. *The intent cannot be effectuated, unleſs the ſecond ſon of* Reginald *has an eſtate tail.* The blunder of expreſſion is here *favourable* to the *real meaning*; and therefore *cannot* be ſupplied by conſtruction: the conſtant object of which is, "to *attain* the intent." For *this* purpoſe, *words of limitation ſhall operate as words of purchaſe*; implications ſhall ſupply verbal omiſſions; the letter ſhall give way; every inaccuracy of grammar, every impropriety of terms, ſhall be corrected by the general meaning, if that be clear and manifeſt. But *here*, to ſupply the words omitted by miſtake or blunder, would introduce a *blunder in law*, and *defeat* the teſtator's general view and intention. As the words ſtand, the ſecond ſon of *Reginald* took an *eſtate tail.* The *intent* of the teſtator cannot be anſwered, *but* by giving him an eſtate tail. Therefore the literal conſtruction is moſt agreeable to the intent, and muſt prevail. The private act of parliament cannot effect *this* queſtion. WILMOT, J.—The queſtion is what this teſtator *intended?* and whether we can give it effect in *part?* At the time of the teſtator's death, *William* the firſt ſon of *Reginald* was born: *Thomas*, the ſecond, was *not*. He certainly meant the *ſame* eſtate to

(1) *Belaſis* v. *Uthwaite* et al. 11th February 1737-8. Thomas

*Thomas* as to *William*. But that intention *can not take effect* according to the rules of law: you cannot limit a *non-entity upon* a *non-entity*; a *poſſibility upon* a *poſſibility*. It was neceſſary that the ſecond ſon ſhould be tenant in tail, in order to give the intention of the teſtator an effect. If the deviſe to the ſon of *Reginald*'s ſecond ſon ſhould be a nullity, the general heirs at law of the teſtator would take, though never ſo many heirs male from *Reginald* ſhould be living. Let his intention therefore take place, *as far* as it can go: but it can go no further. The clauſe of his name and blood is, in effect, ſaying "That the blood of *Thomas* ſhall inherit, be-"fore it goes to his daughters." Beſides, how can we *make* wills, and inſert words *arbitrarily* and by *conjecture? Words in a will are to be conſtrued as words of limitation, or as words of purchaſe, as they will beſt effectuate the intention of the teſtator:* whereas the correcting this blunder (if it be one) muſt render the will *abortive*; and *diſappoint* the intention of the teſtator, to a very high degree. As to the act of parliament—It is nothing at all: it is only to impower him to make building-leaſes: and was intended for the ſecurity of the purchaſers. The will is there recited, different from what it really is. This is clearly an eſtate-TAIL.—Judgment for the defendant. And this judgment was affirmed by the Houſe of Lords, 26th February, 1767.

On the trial of an ejectment, the following caſe was reſerved for the opinion of the Court, *Thomas Layton*, on the 20th of May, 1723, by his laſt will and teſtament, gave and deviſed in the following words—"*Item*—I give, deviſe, and be-"queath unto my dear and loving wife (in lieu of dower), "all thoſe &c. (deſcribing the premiſes) during the term of "her natural life. *Item*—I give, bequeath, and deviſe my "aforeſaid manors, meſſuages, lands, and premiſes herein "before given and deviſed to my ſaid wife, during her "natural life, and after her deceaſe, to my daughter *Mar-*"*garet Lowndes* (now the wife of *William Lowndes*, junior, "eſq.) for and during the term of her natural life; *and* "*after her deceaſe, to my grandſon* Layton Lowndes, THE "SECOND SON *of my ſaid daughter* Margaret, *and to the heirs* "*male of his body*; and for want of iſſue male, to the iſſue "female of his body lawfully to be begotten; and *for want* "*of ſuch iſſue*, to *ſuch other* ſon of my ſaid daughter *Mar-*"*garet*.—If my grandſon *Layton Lowndes* ſhould live and be "the *eldeſt*, then *to ſuch ſon who ſhall be the* SECOND *ſon of her* "*body living at the time of her deceaſe*, by the ſaid *William* "*Lowndes*, her preſent huſband; and *if but* ONE *ſon living* at "the time of her deceaſe, then *to ſuch only ſurviving ſon and* "*his heirs for ever*. And for want of iſſue male at the time of "the deceaſe of my ſaid daughter by her preſent huſband; "if more than one daughter, then do I appoint that the "ſaid eſtate hereinbefore deviſed, ſhall be ſold, &c. &c." In

Fen, *ex dim.* Wm. Lowndes the younger, and Henry Lowndes, Eſqrs. *v.* Wm. Lowndes the elder, and Wm. Lowndes Stone, Eſqrs. Tr. Ter. 8 Geo. 3. B.R. 4 *Burr.* 2246.

December, 1723, the teſtator died, leaving *Elizabeth* his widow, and the ſaid *Margaret Lowndes*, his only child and heireſs at law: and the ſaid *Elizabeth* his widow entered upon the premiſes, and continued in poſſeſſion until her death, in December, 1757, when the ſaid *Margaret Lowndes*, or the ſaid defendant *William Lowndes* the elder, her huſband, in her right, entered by virtue of the teſtator's will. *Margaret Lowndes* had iſſue by the defendant *William Lowndes*, her ſaid huſband, born in the ſaid teſtator's life-time, the defendant *William Lowndes Stone*, her eldeſt ſon; *Layton Lowndes*, her ſecond ſon; *Charles Lowndes*, her third ſon; *Richard Lowndes*, her fourth ſon; the plaintiff *Henry Lowndes*, her fifth ſon; and *Thomas*, born after the ſaid teſtator's deceaſe. *Layton*, *Charles*, and *Richard Lowndes*, ſeverally departed this life in the life-time of their ſaid mother; and the ſaid *Layton* and *Charles* died unmarried and without iſſue; and the ſaid *Richard Lowndes* left iſſue two ſons, the ſaid plaintiff *William Lowndes* the younger, and *Richard Lowndes*, infants; and no other iſſue. The ſaid *Margaret Lowndes* departed this life the 2d of March, 1764; leaving the ſaid *William Lowndes Stone*, the defendant, and the plaintiff *Henry Lowndes* and *Thomas Lowndes* her only ſons; who, with the plaintiff *William Lowndes* the younger, and *Richard Lowndes* (ſons of the ſaid *Richard*, deceaſed), were her only male iſſue her ſurviving. Upon this caſe, the general queſtion ſubmitted to the Court was—WHETHER the plaintiff "is entitled to recover, upon either, and which of the two de-"miſes." Lord MANSFIELD, Ch. J.—The meaning of the teſtator was to form another family. He meant to exclude the eldeſt; and to give eſtates in ſucceſſion to the other ſons, excluſive of the eldeſt: his intention is plain.—CUR' *adviſare vult*.—Lord MANSFIELD, Ch. J. afterwards delivered their opinion: It is plain what the teſtator *meant*: he meant to give the eſtate to his ſecond grandſon *Layton Lowndes*, and his iſſue, in the firſt inſtance; and, in caſe of failure of *Layton*'s iſſue, to ſuch of his other grandſons as ſhould happen to be the ſecond ſon of his daughter *Margaret*, by Mr. *Lowndes*, at the time of her death, and to their iſſue, in tail; and in caſe of failure of all their iſſue, then according to the ſubſequent limitations mentioned in his will. He meant to make a new family in the then ſecond ſon, or whoever ſhould afterwards become the ſecond ſon of his daughter by her then huſband. Though this was manifeſtly his *intention*, I was extremely afraid that there were not *words* enow to warrant us to put this conſtruction upon it. But I think there are words ſufficient to juſtify a conſtruction agreeable to the intention of the teſtator. The firſt limitation is to *Layton Lowndes*, in tail; then to ſuch other ſon as might be the ſecond ſon of *Margaret*, living at the time of her deceaſe. *The ſubſequent limitation is upon a contingency which has not happened*,

*happened; viz.* Layton Lowndes' *becoming the eldest son* in Margaret's *life-time*; which he *never did. The last limitation implies an estate-tail in the second son of* Margaret, *and those that should become so at her death, successively.* Then he goes on—"And if his daughter should survive all her children by her "then husband, and the heirs of such children," then he gives it over. Therefore the *former* limitations to the second son of his daughter, *Margaret,* must also be construed to have been an estate tail. Consequently, all the sons, except the eldest, are to take successively in tail. It is immaterial whether tail male or tail general; it is enough that they take an estate *tail.*—Judgment for the plaintiff.

Hayes, *ex dim.* Abraham Foorde, *v.* Nicholas Foorde, Ea. Ter. 10 Geo. 3. B.R. 2 *Black. Rep.* 698.

A devise to the heirs male of *J. S.* in a will, and afterwards in a schedule annexed, this estate being recited to be given to *J. S.* shews the intent of the testator to give him an estate for life, which the law will conjoin to the estate given to his heirs male, and construe him to be tenant in tail.—*John Foorde* made his will on the 29th of June, 1711, having then two sons, *Rawlinson* and *William*, and also a brother, *Nicholas*, who had then also two sons, *James* and *Nicholas*, and gave his real estate (charged with an annuity to his wife) to his eldest son, *Rawlinson*, at the age of twenty-three, "*to* "*enjoy the whole during his life*; *and the whole estate* (of "which he is but tenant for life) *shall, after his decease, go to* "*his eldest son*, that shall then be living; *and, if he dies with-* "*out any son, or sons, to enjoy it during their lives* (of which "none are or shall be tenants, but while they live to enjoy "it), *that then it shall come to his brother*, William Foorde, "*during his life, and to any of his heirs males during their* "*lives, and no longer.* And, if they die without issue male, "then *to the heirs males of my brother*, Nicholas Foorde's, "*sons*, and to any of their heirs males, during their lives (of "which none of them are tenants any longer, nor shall it be "in any of their powers to sell, dispose, or make away, any "part or the whole of it). And, if in case they all die "without heirs male, then it is to go to the next of kin to "me."—At the same time, and with the same solemnities and attestation, he published a schedule referred to in the said will; the title to which schedule is in these words: "AN "ACCOUNT HOW I DISPOSE OF MY ESTATE TO MY "SON, *Rawlinson Foorde*, as followeth, he paying his "mother, out of my real estate, the sum of 15*l. per annum* "during her life, and 24*l. per annum* during her life, out of "my mortgages; and then, *all to revert to my son*, Rawley "Foorde, *during his life*; *and, after his death, to his sons*; "*and for want of sons, to his brother*, William Foorde, *during* "*his life*; *and afterwards to* William Foorde's *eldest son*; *and,* "*for want of he having sons, to my brother*, Nicholas Foorde's, "*sons*; and for want of any sons, to my eldest son's daughters, and so to the next of kin."—Afterwards, by a codi-

cil of the 15th of Auguſt, 1712, duly executed, he deviſes certain new purchaſed lands to his ſon, *William Foorde*, and *the heirs male of his body*, with remainder to *Rawlinſon*, and *the heirs male of his body*, remainder to the *female children of* ſaid *William Foorde*; and, for want of ſuch, to the *heirs female* of *Rawlinſon Foorde*; and, *for want of iſſue by him*, then to revert to the teſtator's *heir general*.—He then makes ſome other ſlight alterations, and poſtpones his ſon *Rawlinſon*'s poſſeſſion of the eſtates and mortgages deviſed by the will, till November, 1713; "and from and after the ſaid 1ſt "of November, the ſaid eſtate and mortgages to be and "remain to the ſaid *Rawlinſon and his heirs*, ſubject to the "limitations in the ſaid will."—*Rawlinſon* and *William*, the two ſons of the teſtator, died without iſſue male; the one in 1727, the other in 1732. *James*, the eldeſt nephew, died before *William*, the ſon; and, upon *William*'s death, in 1732, *Nicholas*, the youngeſt nephew, entered, having then only two ſons, *William* and *Savage*, both now dead, without iſſue; and afterwards two others, *Nicholas*, the defendant, and *Abraham*, the leſſor of the plaintiff, the youngeſt. *Nicholas*, the father of theſe two, in 1763, ſuffered a recovery, and deviſed to the leſſor of the plaintiff, the youngeſt ſon.—The queſtion was, Whether *Nicholas*, the nephew, took an eſtate for life, or in tail, under the will, ſchedule and codicil? Ld. MANSFIELD, CH. J. delivered the opinion of the Court: That the only doubt was, Whether, by the words of the will, *Nicholas*, the nephew of the teſtator, took any eſtate by implication? That this doubt was removed by the ſchedule, which expreſsly gives an eſtate to the ſons of his brother, *Nicholas Foorde*; that, therefore, *Nicholas*, the nephew, took an eſtate for life by implication, thus explained, which, being conjoined with the eſtate expreſsly given to his heirs males, will, by the known rule of law, gave him an eſtate in tail male; that the reſtrictions, afterwards impoſed by the teſtator, were inconſiſtent with the eſtate ſo given, and therefore void; and that *Nicholas*, the nephew, having ſuffered a recovery, had legally barred the eſtate tail.

Harriot Pleaſance Fell, *v.* Solomon Fell, Ea. Ter. 13 Geo. 3. C. B. 2 *Black. Rep.* 888. 3 *Wils.* 399.

This was a bill in Chancery, by *Harriot Pleaſance Fell*, an infant, againſt *Solomon Fell*, for an account of timber cut down by him, and for an injunction, inſiſting that the defendant is only tenant for life. The defendant by his anſwer inſiſts, that he, by virtue of the will hereinafter mentioned, did, on the death of the teſtator, or at leaſt on the death of his own ſons, become tenant in fee of the premiſes in queſtion, or tenant in tail in poſſeſſion, with remainder to himſelf in fee, and, therefore, entitled to cut down timber. On the hearing of the cauſe, on the 23d of April, 1771, the Lord Chancellor directed the following caſe to be made for the opinion of the court of Common Pleas.—On the 7th of December, 1763, the teſtator, *Thomas Fell*, by his will of that date, appointed his couſin, *Solomon Fell*, the defendant, "ſole executor of

"that

" that his will, and heir for life of all his estates; *and after* " *his death to his son*, Thomas, *and his heirs male for ever.* " But if the said *Thomas* should die without issue, *then to his* " *next heir male for ever, the elder to be preferred before the* " *younger: and if no male issue left behind said Solomon*, then " the estate to devolve to the females; and, if no females, " then my said cousin, *Solomon*, to give and dispose of the " same as he shall think fit."—The testator died on the 11th of December, 1764, leaving *Solomon Fell*, the father of the defendant, his cousin and heir at law, who died on the 20th of March, 1770, leaving the defendant, his only son, and heir at law.—The defendant, at the death of the testator, had issue, *Thomas*, his only son, and the plaintiff, his only daughter, but had had another son, named *Solomon*, born on the 7th of August, 1763, who died on the 7th of November following; and the testator, when he made his will, knew the defendant had had such a son, *Solomon*, born, but did not know that such son, *Solomon*, was dead.—The said *Thomas Fell*, the son of the defendant, *Solomon Fell*, died in February, 1765, and the plaintiff is now the only surviving child of the said defendant. THE QUESTION was, " What estate the defend- " ant, *Solomon Fell*, took in the premises in question, under " the said will; and whether the plaintiff took any, and " what, estate in the said premises, under the said *will?*"—This case was fully argued; AND THE LORD CHIEF JUSTICE acquainted the bar with the unanimous opinion of the whole Court, to the following effect: " We are all of opinion, that *Solomon Fell*, the defendant, takes an estate for life in the premises in question, and his son *Thomas* being dead without issue, the plaintiff, the daughter of *Solomon*, in the present situation of the family, has an estate in tail general now vested in her, in remainder expectant upon the death of the said *Solomon Fell*, and that the said *Solomon Fell* has the remainder in fee thereupon.

A devise to the heirs of the body of *A.* (the elder of such issue, and his, her, and their heirs, to take before the younger, &c.) vests an estate tail in the eldest daughter of *A.* there being no son, remainder in tail to the youngest.—The testator, *John Evans*, on the 19th of July, 1743, devised all his lands, &c. to a trustee and his heirs, upon certain trusts. And subject thereunto, in trust to pay the rents and profits to *Rebecca*, the wife of *Peter Barry*, M.D. for her separate use during her natural life; and, after her decease, " *to the use* " *and behoof of the heirs of the body of the said* Rebecca Barry, " *lawfully issuing*; the *elder* of such issue, and *his*, *her*, and " their heirs, to inherit and take place before the *younger* of " such issue, *his*, *her*, and their heirs," with remainders over in default of such issue.—The testator afterwards died seised, leaving *Rebecca* his widow, and the said *Rebecca Barry*, and *Mary Evans*, his daughters, and no other issue.—*Rebecca*,

Heny v. Purcel, Ea. Ter. 15 Geo. 3. C.R. 2 *Black. Rep.* 1002.

the widow, entered on her part, and died in October, 1767.—*Rebecca Barry* entered on the reſidue, and died in November, 1754, leaving two daughters, the defendant, *Mary Anne*, the wife of *Ignatius Purcel*, and the plaintiff, *Jane*, the wife of *Francis Heny*, and no other iſſue. THE QUESTION was, Whether the plaintiff, *Jane Heny*, took any and what eſtate, in any and what part of the premiſes? AND the Court were of opinion, and certified, "that the defendant, *Mary* "*Anne Purcel*, took, in the firſt place, an eſtate-tail in the "whole of the premiſes, and that the plaintiff, *Jane Heny*, "took an eſtate-tail in remainder, expectant on the deter- "mination of the ſaid precedent eſtate-tail, in the whole of "the ſame premiſes, with remainders over, in default of the "heirs of her body."

Wharton, *et al.* v. Greſham, *et al.* Ea. Ter. 16 Geo. 3. C.B. 2 *Black. Rep.* 1083.

A deviſe to a man and his ſons in tail male, and for want of ſuch iſſue male, remainder over; the deviſee having then no iſſue, gives an eſtate in tail male to the father.—*Edward Wharton* being ſeiſed in fee-ſimple, by will duly executed, after giving ſundry legacies, deviſes thus: "*All the reſt and* "*reſidue of my eſtates, as well real as perſonal, whereſoever* "*lying, or howſoever, in truſt for me, or wherein I have any* "*right*, I GIVE, DEVISE, AND BEQUEATH, *unto my* ne- "phew, *Anthony Wharton, and* TO HIS SONS IN TAIL "MALE: *And, for want of ſuch iſſue male, to his brother,* "*Captain* John Wharton, *and to his ſons in tail male*; *and* "*in failure of ſuch iſſue male, then to my right heirs.*"—Neither *Anthony Wharton* nor *John Wharton* (the plaintiff) had any iſſue at the time of making the ſaid will, or at the death of the teſtator. And, after the teſtator's death, *Anthony* entered on his real eſtates, and continued in poſſeſſion thereof till 1772, when he died, without ever having had any iſſue, or done any act which could bar an entail. On the death of the ſaid *Anthony*, his brother the plaintiff, *John*, entered, and is now in poſſeſſion, having at preſent one ſon and three daughters, who were all born after the death of the teſtator. THE QUESTION was, What eſtate did the plaintiff, *John Wharton*, take in the premiſes under the ſaid will? THE COURT were clear, from the authority of *Wild*'s caſe, 6 *Rep.* 17. and *Anderſon* and *Sonday*'s caſe, 9 *Rep.* 128. (where a deviſe to *Thomas*, and, if he marry and have a male iſſue, then his ſon to have it after his deceaſe; and, if he hath no iſſue male, remainder over,—was held an eſtate tail); that this was *an eſtate in tail male in the plaintiff*, the intent of the teſtator being not in favour of any ſon, or ſons, then in *eſſe*, but only that the male poſterity of *John* ſhould take the eſtate.

Morgan, *et ux.* v. John Griffiths, Hil. Ter. 15 Geo. 3. B.R. *Cowp.* 234.

The teſtator, *Thomas Griffiths*, being ſeiſed in fee of the premiſes in queſtion, by his laſt will, amongſt other things, gave and deviſed as follows: "I do give, bequeath, and de- "viſe, two parts, to be divided in three parts, of all that "tenement,

" tenement, &c. unto *Thomas Griffiths*, my grandchild, *for* " *and during his natural life*, and, after his decease, to his " right and lawful *heirs and assigns for ever*, AND *for want of* " *such lawful heirs*, I do give the said lands, as before ex- " pressed, to *Thomas Evan*, his heirs and assigns, for ever." THE QUESTION was, What estate the grandson, *Thomas Griffiths*, took in the premises, by the will of the said *Thomas Griffiths*, the grandfather? It was admitted by the counsel, who were to have argued for the plaintiffs, that the rule of law is clearly settled, that where one devises to *A.* and his heirs generally, which would convey a fee, yet, if there be a remainder over, for want or upon failure of such heirs, to a person who might take the estate as heir, the word heirs is restrained to heirs of the body, and *A.* has only an estate tail by such devise. THE COURT said, there could be no question about it, and accordingly certified, that the grandson, *Thomas Griffiths*, took an estate tail in the tenement.

The testator, *William Geering*, being seised in fee, devised as follows: " I give and bequeath to my grandson, *Samuel* " *Shenton*, all that my meadow-ground, called P. to hold " unto the said *Samuel Shenton, and the heirs of his body law-* " *fully to be begotten, and their heirs for ever*, chargeable " nevertheless, and charged with the payment of 8l. a year " unto my niece, *M. S.* the elder, during her natural life, to " be paid quarterly. *But in case the said* Samuel Shenton " *shall die without leaving issue of his body*, then I give and " devise the said meadow-ground unto my nephew, *W. G.* " to hold unto the said *W. G.* and his heirs for ever, charge- " able as aforesaid, &c." THE QUESTION was, Whether *Samuel Shenton* took an estate tail, or an estate in fee? Lord MANSFIELD, CH. J.—There is a distinction between a devise of lands and personal estate, where a limitation is upon a dying without issue; in the latter case, the words are taken in their vulgar sense, that is, *dying without leaving issue at the time of his death*; in the former they are taken in a legal sense, and that is, *whenever there is a failure of issue*, 1 *Pere Wms.* 199, 432, 563, 667.—HERE, the devise is to *Samuel Shenton, and the heirs of his body, and their heirs for ever*; but the words, *their* heirs for ever, are qualified by the subsequent words, *in case he shall die without leaving issue*, which clearly shew it to be an estate tail (1).

Denn, *ex dim.* Geering, *v.* Shenton, Hil. Ter. 16 Geo. 3. B.R. *Cowp.* 410.

The testatrix, the widow *Scolefield*, being seised in fee of the premises in question, which were then of the annual value of 17l. by a will, dated the 20th of June, 1767, devised them in the following words: " It is my will and mind, and " I do hereby give, bequeath, grant, alien, release, and con- " firm, all and every part of the said messuage, tenement, and

Doe, *ex dim.* Hanson, *v.* Fyldes, Tr. Ter. 18 Geo. 3. B.R. *Cowp.* 833.

(1) See *Doe*, ex dim *Long*, v. *Laming*, in p. 76, supra.

" all

" all and every the lands, &c. thereunto belonging, unto my " eldeſt daughter, *Alice Scholefield, and the heirs of her body* " *lawfully to be begotten, for ever*; and for want of ſuch iſſue, " then to my daughter, *Ann Scolefield, and the heirs of her* " *body lawfully to be begotten, for ever*; and for want of ſuch " iſſue, then to my third daughter, *Margaret Scolefield, and* " *the heirs of her body, for ever*; and for want of ſuch iſſue, " then to my youngeſt daughter, *Judith, and the heirs of her* " *body, for ever*; AND FOR WANT OF SUCH ISSUE, *then to* " *the right heirs of me, the ſaid* Alice Scolefield, *for ever*, " CHARGED AND CHARGEABLE, notwithſtanding, with " the full ſum of nineſcore pounds, to be levied and raiſed " out of the firſt clear annual and *yearly iſſues and profits* of " all and every the ſaid meſſuage, tenement, lands, and pre- " miſes aforeſaid; and, after my deceaſe, to be equally " diſtributed amongſt my three youngeſt daughters, *Anne*, " *Margaret*, and *Judith*, as the ſame ſhall be ſo raiſed, &c. " for and towards their maintenance and better preferment. " And it is my will and mind, that my executors hereinafter- " mentioned, ſhall and may ſtand and be ſeiſed, poſſeſſed, " and intereſted, of and in all and every the ſaid meſſuage, " lands, tenements, &c. with their appurtenances, from and " immediately after my deceaſe, for ſo long a time as until " they or their aſſigns ſhall have fully *raiſed*, received, and " taken up the aforeſaid ſum of *nineſcore* pounds, over and " above all coſts and charges as the ſame ſhall be ſo raiſed, " to and for the benefit of my ſaid daughters, *Anne*, *Mar-* " *garet*, and *Judith*, equally, or ſo long as *until the ſame* " *ſhall be paid and diſcharged by my eldeſt daughter*, Alice " Scolefield, *or her heirs*; *and from and after the raiſing* and " receiving, or other payment of the ſaid ſum of nineſcore " pounds, *by my daughter*, Alice Scolefield, *or her heirs*, IT " IS MY WILL AND MIND, *that ſhe and her heirs* ſhall " have, hold, and enjoy the ſaid meſſuage, &c. *for ever*, only " allowing my three youngeſt daughters, *A. M.* and *J.* and " my couſin, *Edward Scholes*, the kitchen, and the rooms " over belonging to it, to have and dwell in until they ſhall " happen to be married, and no longer." On the trial of an ejectment, brought by the heir of the body of *Alice Scolefield*, the eldeſt daughter, againſt the defendant, who claimed under a purchaſer, or creditor, of *Alice Scolefield*, *the defendant inſiſted*, *that under this will* Alice *took a fee*; and to ſhew this he offered evidence, that, in the year 1676, the teſtatrix, having then an eſtate for three lives in the premiſes, purchaſed the reverſion for 120l.; that an eſtate for three lives is conſidered as of equal value with the reverſion of ſuch eſtate, and, therefore, the full value of the whole was, at that time, about 240l.; the inference intended to be drawn from this was, that after payment and diſtribution of the 180l. amongſt the three

three younger daughters, there would remain only the value of 60l. for the eldeſt, therefore, ſuppoſing her to take a fee, ſhe would have no more than her ſiſters, but each would take an equal intereſt; on the other hand, as the annual value was but 17l. it was impoſſible the teſtatrix could intend the eldeſt to be ſo long without any benefit at all, as ſhe neceſſarily muſt be, before the rents and profits would amount to the ſum of 180l. This evidence was rejected by the judge, and a verdict found for the leſſor of the plaintiff.—AFTERWARDS, on a motion for a new trial, TWO QUESTIONS aroſe; FIRST, Whether *Alice Scolefield* took an *eſtate tail*, or an eſtate *in fee*, conſidering the whole will together, without regard to any foreign extrinſic circumſtances? SECONDLY, Whether the Court is at liberty to regard ſuch extrinſic circumſtances as were offered to be proved at the trial, reſpecting the will? PER CURIAM: The ſingle queſtion upon the conſtruction of this will is, "Whether the words, *heirs* "*of Alice Scolefield*, thrice repeated, relative to the redemption "of the term veſted in the executors, ſhall be conſtrued to "refer to the ſpecial deſignation of the heirs, to whom the "eſtate is deviſed in *the beginning of the will*, or to introduce "a *new* and more *general denomination of heirs*, and to "amount to a revocation of the expreſs tail given in the "beginning of the will, with all the remainders over to the "three ſiſters, and the reverſion in fee to the teſtatrix and "her right heirs?" —It is manifeſt, that the firſt deviſe is an expreſs eſtate tail to each of the four daughters ſucceſſively, and that the teſtatrix meant to charge the firſt eſtate tail to the eldeſt daughter with the ſum of 180l. for the immediate benefit of her other three daughters: there are, in the cleareſt words, ſucceſſive eſtates tail, ſubject to this charge, or, if the expreſſion may be uſed, the ſum of 180l. is to be raiſed, previous to any of the eſtates tail; for the teſtatrix ſays, that her executors ſhall ſtand poſſeſſed, that is, receive the rents and profits till they, or their aſſigns, ſhall have raiſed this ſum, or for ſo long time as till *Alice Scolefield*, and her heirs, ſhall have diſcharged the ſame; after which payment ſhe, and her heirs, ſhall enjoy the ſaid meſſuage, &c. for ever. What is to be paid or diſcharged? A ſum of money to the three ſiſters.—Who is to be hurt if it is not paid? *Alice Scolefield*, and the heirs of her body.—Who was to pay? *Alice*, and the heirs of her body. And it is to be paid to thoſe who would be her heirs if ſhe had no iſſue. The word *heirs*, therefore, in this part of the will, is uſed in contradiſtinction to the ſiſters. If the word *heirs* is ſo uſed in the firſt place, it muſt be ſo uſed in the ſeveral places that follow; nothing is to be implied from the additional words, *for ever*, becauſe that expreſſion is repeated by the teſtatrix in the deviſe of each of the eſtates tail. The nature of the proviſion affords a ſtrong

a strong argument, that she did not mean to change the sense of the word *heirs* in this part of the will, and to give a fee-simple, because it would be absurd and nonsensical to make a distinction between raising money by rents and profits, or by mortgage, or sale, or charge on the inheritance, where the first taker has a fee-simple. What does it signify how it is raised? But, where the possession and the inheritance are different, a direction to raise a sum of money out of the rents and profits is a burthen thrown upon the possession in favour of the inheritance. The testatrix here might not think of a common recovery; she appears to have meant, that her family estate, which was but a small one, should go to her family, clear and unincumbered: what knowledge she had, which induced her to think that *Alice* could discharge this sum of 180l. is not apparent, nor is it material; this seems to be the true construction of the will upon the face of it. As to the extrinsic evidence offered at the trial: there is no occasion, in this case, to go into the particular exceptions out of the general rule, "that a will shall be construed by what appears upon the face of it, and *not upon circumstances*, or matter extrinsic," because the extrinsic matter here proves nothing at all, for the Court cannot make a will for the testatrix; if she has not made the shares equal, the Court cannot say they shall be so. It is plain, *the testatrix did not mean* that all the daughters should take *equally*; if she did, she would either have made no will at all, or have directed the estate to be divided equally amongst them; but she has made an unequal provision, for the eldest daughter takes nothing till the younger are paid: the evidence offered, therefore, does not lay a foundation, to imply that *Alice* was to take a fee.—It is not like the cases where the Court has inferred a necessary implication of an estate in fee, from a devise of lands, without any words of limitation, where the lands are charged with a gross sum. The doctrine, in these cases, begun when the modification of uses was by way of condition, and charging the devisee with the payment of a gross sum, was looked upon as a condition, the non-performance of which amounted to a forfeiture of the estate: the direction was to pay a sum of money by way of condition, and the heir entered for the condition broken. Where the testator uses no words of limitation, there the rule of law, in the case of grants and deeds, "that without words of limitation it shall be for life, and for life only," takes place; but, as in case of a will, the manifest intent of the testator is decisive, and need not be expressed in any formal words, the certainty that the testator must mean a bounty and benefit to his devisee, is sufficient to supply the want of a formal limitation: but there never was an instance of such an implication, where an express estate for life, or an express estate tail, is

given

given in terms, and *here it is an* ESTATE TAIL *with ſeveral remainders over*, we are therefore unanimouſly of opinion that the eldeſt daughter took an eſtate tail, and that the evidence at the trial was totally nugatory and irrelevant.

Bradford v. Foly, *et al.* Hil. Ter. 19 Geo. 3. B.R. 1 Doug. 63.

Under a deviſe,—to the teſtator's ſon for life, remainders in tail to his firſt and other ſons, &c. by any future wife, but, if he married any perſon related to his preſent wife, in ſuch caſe to go over to the children of the teſtator's brother, the event of the ſon's marrying a ſecond wife related to his firſt, is not a condition precedent; and, on his death without marrying again, the eſtate veſts in the children of the teſtator's brother, and does not deſcend to the teſtator's heir at law.—The teſtator *Tempeſt Hey*, made his will, the material part of which was, "*I give and deviſe all and ſingular* "*my real eſtates whatſoever and whereſoever, to* Richard "Wright *and* Michael Tovey, *and their heirs, in truſt*, in "the firſt place, to protect and preſerve the contingent re- "mainders, herein and hereby created and limited, from "being defeated and deſtroyed, and then to and for the "ſeveral uſes herein aftermentioned, that is to ſay, *to the* "*uſe of my ſon* Thomas Hey (who now ſpells his name "*Hay*), *for and during the term of his natural life*, and from "and *after his deceaſe, to the firſt and every other ſon, which he* "*ſhall have by any* FUTURE WIFE, *with whom he ſhall after-* "*wards intermarry, in* tail male, and *for default of ſuch iſſue* "*male, to the uſe of all and every the daughter and daughters* of "ſuch future marriage, to have and to hold the ſame, in "caſe there ſhall happen to be more than one daughter, to "them and their heirs, *as tenants in common, and not as* "*joint-tenants.* PROVIDED ALWAYS, and it is my full and "expreſs intent and meaning, that *if my ſaid ſon ſhall hereafter* "*intermarry with any woman who is any ways related in blood* "*to* Muriet Ayſhecombe, *his now wife, that all and every the* "*above limited uſes, as far as the ſame ſhall relate to the iſſue of* "*ſuch future marriage, ſhall utterly ceaſe, determine, and be* "*void, to all intents and purpoſes*, it being my ſtedfaſt re- "ſolution, as far as the law enables me, to hinder that no "perſon any ways of kin to her in blood, or born or de- "ſcended from any ſuch perſon, ſhall inherit any part of "my ſaid eſtate; AND, IN SUCH CASE, *notwithſtanding there* "*ſhall be lawful iſſue of my ſaid ſon by ſuch future marriage* "*living at the time of his deceaſe, my will and mind is*, that "they, nor either of them ſhall take any thing by and under "this my will, but *that the ſaid truſtees ſhall ſtand ſeiſed of all* "*and ſingular the ſaid premiſes, to the uſe of all and every the* "*child and children of my late brother* John Hey *deceaſed*, "*which ſhall be living at the time of my deceaſe*, to have and to "hold the ſame, if more than one child, to them and their "heirs, ſhare and ſhare alike, as tenants in common, and

"not

" not as joint-tenants, such parts or shares thereof, as shall " respectively belong to the daughters of my said brother, " to be to their sole and separate use, independent and ex- " clusive of any present or future husband that they respect- " ively have, or may hereafter have, and not subject to the " debts or control of any or either of them; *and in case all* " *and every of the said children of my said brother shall happen to* " *die in my life-time, or after my death, without issue, then I* " *hereby give and devise all and singular my said real estate to my* " *right heirs*, I mean such heirs only, as shall be no ways " related in blood, or claim any descent from any person " related in blood to the said *Muriel Aysbecombe*, my said " son's now wife; all and every of whom I hereby utterly " exclude from any right, title, or benefit from my real or " personal estate, in any shape whatsoever."—*Thomas Hay*, the son of the testator, died without issue, AND WITHOUT HAVING MARRIED AGAIN, leaving *Thomas Farren Hey* his heir at law. On the 3d of October, 1771, the said *Thomas Hay* (son of the testator) made his will, and, as to what might become due to him *in expectancy or reversion*, gave the same to his executors thereinafter named, for the uses following, " First to pay his funeral expences, then his just debts that he had contracted, and if there should be an overplus, after all the expences were discharged, then he gave the same to his niece *Amelia Heyden* for her own proper use," &c. *The plaintiff claimed under* Thomas, *the son and heir at law of the testator; the defendants, under the children of the testator's brother*, John Hey. THE QUESTION was, " WHETHER *the children of* John Hey, *the brother of the testator, had taken any, and what estate in the case that had happened?*"—For the defendants, it was contended, that the children of the testator's brother had taken estates tail, with cross remainders, although the previous event, on which the devise to them was limited, had never happened.—For the plaintiff, it was insisted, that, if there was such a thing now in the law as a condition precedent, this was clearly one. That, in every view, the old reversion here must have remained. For here the contingency was not annexed to the precedent, but to the subsequent estate. And it was contended, as to intention, that it did not appear that the testator had taken into consideration the event of his son's having children by his then wife, and not marrying again. Lord MANSFIELD:—Nothing can be clearer than that the testator meant that no child of *Muriel Aysbecombe* should take in any event, and yet, according to that argument, such child (if there had been one) must have taken. " We " are therefore of opinion, that the children of *John Hey*, " the brother of the testator *Tempest Hey*, took estates tail, " with cross remainders.

Where

Where the deviſor had three ſiſters (one of whom was married), and deviſed land to truſtees and their heirs, "In truſt that they and their heirs ſhould, during the life of the married ſiſter, receive the rents and profits, and pay the ſame to the two other ſiſters, their heirs and aſſigns, and from and after the deceaſe of the huſband, in caſe the married ſiſter ſhould be then living, to the uſe of the three ſiſters ſeverally in thirds for life, with ſeveral remainders to their firſt and other ſons, in tail, remainder to the daughters as tenants in common, with croſs remainders between the ſiſters on default of iſſue of their bodies reſpectively, remainder over in tail." The condition of the married ſiſter's ſurviving her huſband is not annexed to any of the limitations ſubſequent to the limitation of the life eſtate. And the remainder-man in tail can alone make a good tenant to the *præcipe* upon the death of the three ſiſters without iſſue, notwithſtanding the huſband be then living.—The teſtator, *Edward Buſby*, by his will (*inter alia*) gave and deviſed the ſame as follows, viz. "As to the moiety of the "eſtates in Sedgley, Dudley, and Rowley, he gave and "deviſed the ſame unto his wife, her heirs and aſſigns. "And being next deſirous to provide for his ſiſters, but "conſidering that his ſiſter *Mary Sawrey*, wife of *William* "*Sawrey*, was already well provided for during the life of "her ſaid huſband, and therefore would not, unleſs ſhe "happened to ſurvive him, want any aſſiſtance to enable "her to live in the world, he gave and deviſed all his real "eſtates in the city of Oxford, Clanfield, and Aſcott, and "all other his eſtates in the county of Oxford, unto *Samuel* "*Salt*, eſq. and *Lancelot Shadwell*, the elder, chemiſt, "their heirs and aſſigns, IN TRUST, that they and their "heirs, during the life of the ſaid *Mary Sawrey*, ſhould "receive the rents and profits of the ſaid eſtates, and pay "the ſame to the teſtator's ſiſters, *Elizabeth Buſby* and "*Martha Buſby*, their heirs and aſſigns; and from and "after the deceaſe of the ſaid *William Sawrey*, in caſe the "teſtator's ſiſter *Mary* ſhould be then living, then in truſt "as to one-third part of the ſaid laſtmentioned eſtate to "the uſe of the ſaid *Mary Sawrey* and her aſſigns, for and "during her life; and as to one other third part of the "ſame eſtate, to the uſe of the ſaid *Elizabeth Buſby* and "her aſſigns, for and during her life; and as to the re-"maining third part thereof, to the uſe of his ſaid ſiſter "*Martha Buſby* and her aſſigns, for and during her life;" with ſeveral remainders to their firſt and other ſons in tail: remainder to the daughters as tenants in common, with croſs remainders between the ſiſters in default of iſſue of their bodies; remainder as follows: "and in default of ſuch "iſſue, then to the uſe of *John Shadwell Horton* (therein called

Horton, *v.* Whittaker, Tr. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 346.

" called *John Lancelot Horton*), eldeſt ſon of Mr. *John Horton*, " ſugar-baker, and the heirs of his body;" with ſeveral remainders over. The teſtator afterwards died without iſſue, leaving his ſaid ſiſters *Mary*, the wife of the ſaid *William Sawrey*, *Elizabeth Buſby*, and *Martha Buſby*, his co-heirs at law. The deviſor's ſiſter *Mary*, the wife of the ſaid *William Sawrey*, died without iſſue, in the life-time of her huſband. Afterwards the deviſor's ſiſter, *Elizabeth Buſby*, died without iſſue, inteſtate. And then the other ſiſter, *Martha Buſby*, alſo without iſſue, having made a will as to her perſonal eſtate only. Afterwards, in purſuance of an indenture of bargain and ſale, dated the 6th of November, 1782, in Michaelmas term, 23d *Geo.* 3. *John Shadwell Horton*, the remainder-man in tail, ſuffered a common recovery, and there were TWO QUESTIONS:—1ſt, Whether the limitation to *J. Shadwell Horton*, in the event which had taken place, was good? 2dly, Whether it was good to ſuch an extent as to effectuate the recovery ſuffered by him? AND THE POINT for the Court to conſider, was, Whether the condition (if it could be ſo called) of *Mary Sawrey*'s ſurviving *William Sawrey*, was merely confined to the life eſtate, or was to extend to all the ſubſequent limitations.—PER CURIAM: " We are of opinion that *J. Shadwell Horton*, " under the limitations of the ſaid will, and the recovery " ſuffered by him, took an eſtate in fee ſimple."

John Daintry, *v.* Michael Daintry and John Ryll, Tr. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 307.

The teſtator, *John Daintry*, by his will, after deviſing a houſe, &c. in Leek, to his brother *M. Daintry*, in fee, deviſed as follows: " Alſo it is my will and mind, and I do " hereby order and direct the ſaid *M. Daintry* and *J. Ryll*, " and the ſurvivor of them, to pay unto my ſon, *John* " *Daintry*, and his aſſigns, one annuity, or yearly ſum of " 400l. free from all taxes whatſoever, &c. the ſaid annuity " of 400l. to be paid to my ſaid ſon *John Daintry*, until he " ſhall attain his age of twenty-ſix years; and upon my " ſon *John Daintry*'s attaining his ſaid age of twenty-ſix " years, then I do hereby order and direct the ſaid *Michael* " *Daintry* and *John Ryll*, and the ſurvivor of them, to pay " unto my ſaid ſon *John Daintry*, the further additional an- " nuity, or yearly ſum, of 100l. &c.; the ſaid annuity of " 100l. to be paid to my ſaid ſon *John Daintry* until he " ſhall attain his age of thirty years; and upon my ſaid ſon " *John Daintry*'s attaining his ſaid age of thirty years, then " I do hereby order and direct the ſaid *Michael Daintry* and " *John Ryll*, and the ſurvivor of them, to pay unto my ſaid " ſon, the further additional annuity, or yearly ſum of 100l. " &c.; the ſaid ſeveral ſums making together the yearly " annuity of 600l. the ſame to continue to be paid to my " ſaid ſon, during ſuch time and until he ſhall marry; and " in caſe my ſaid ſon ſhall happen to marry before he attains

" unto

" unto the age of thirty years, then my will and mind is, " and I do hereby give and devise unto my said son *John* " *Daintry*, to him and the heirs of his body lawfully to be " begotten, all my real and personal estates whatsoever and " wheresoever (except the said estate devised unto my bro- " ther), subject to the payment of the several sums of money " hereinafter mentioned in this my will; and if my said son " *John Daintry* shall happen to die without leaving issue of " his body lawfully to be begotten, then I give, devise, and " bequeath, all my real estates, subject as aforesaid, unto " my said brother *M. Daintry*, his heirs and assigns for " ever; and also all my personal estate in general (subject as " hereafter is mentioned), unto my said brother *M. Dain-* " *try*, his executors, administrators, and assigns, to and for " his and their own use." The plaintiff, *John Daintry*, had attained his age of thirty years, and was and ever had been unmarried. The testator's freehold estate was very inconsiderable, but his personal property amounted to about 30,000l. THE QUESTIONS directed were, FIRST, What estate and interest the plaintiff *John Daintry*, the only child and heir of the testator *John Daintry*, took under the testator's will, dated the 5th day of August, 1785, in his real estate, other than in such part thereof, as was thereby devised to the testator's brother *M. Daintry*; and also what estate and interest the plaintiff took under the testator's will, in such part of the personal estate of the testator, as consisted of leases for years in land?—FOR THE PLAINTIFF, it was contended, that, in the event that had happened of *J. Daintry*, the plaintiff, continuing unmarried until he was thirty years of age, he was entitled both to the real and personal estates of his father *J. Daintry*.—FOR THE DEFENDANT, it was insisted, FIRST, That *John Daintry*, the son, not having complied with the condition imposed upon him by his father's will, of marrying under the age of thirty, was not entitled to any part of the real estate, but must rest satisfied with the annuity there given to him; SECONDLY, That whatever interest he may be entitled to in the real estate, the devise over to the uncle is a good executory devise, as to the leases for years.—Lord KENYON, Ch. J. The plaintiff, in this case, is the heir at law, the only child, and the sole next of kin, of the devisor, who, having a small landed estate, and a considerable personalty, proceeded to dispose of them both; he began his will, by giving different annuities to his son, varying according to the different periods of his life, and encreasing till it amounted to 600l. *per annum*, directing that the last annuity should be paid to the son " until he should marry;" and then he added, " *and in case my said son shall happen to marry before he attains unto the age of thirty years*, then my will is, and I do hereby give and devise unto my son *J.*

*Daintry*, to him and the heirs of his body, &c. all my real and perſonal eſtates, &c." According to the defendant's argument, if the ſon had lived to thirty without marrying, and then married, and had children, there would be no proviſion for thoſe who ought to have been the firſt objects of the deviſor. And ſuch is the caſe, if we determine according to the expreſs deviſes of the will; but I am glad to find that, though there is no expreſs deviſe to the ſon in the event of his marrying after thirty, there are words in the will ſufficient to raiſe a deviſe in favour of the ſon, of an eſtate tail; for, in the next clauſe, the words are, "if my ſaid ſon, *J. Daintry*, ſhall happen to die, without leaving iſſue of his body, then over, &c." Now thoſe words are ſufficient to raiſe an eſtate tail by implication; and though they are ſubſequent, in point of order, to the words expreſsly giving an eſtate to the ſon, in the conſtruction of wills, the laſt words are to take effect. If that be ſo, the ſon is entitled to an eſtate tail in the real eſtate, but the deviſe over of the perſonalty ſeems to be a good executory deviſe, becauſe it is not too remote. PER CURIAM: "The queſtions ariſing on this obſcure will have been argued before us, and we have conſidered them; and we are of opinion, that the intention of the teſtator, to be collected from the words of his will, will be beſt anſwered by giving an eſtate tail to *John Daintry*, in the real eſtates of inheritance, with remainder to *M. Daintry* in fee; and as to the leaſehold intereſt, it ſeems to follow of courſe, from what we have ſaid about the eſtates of inheritance, that the abſolute intereſt is veſted in *John*."

Doe, *ex dim.* Blandford and Wife, and Elias Dymock, *v.* Applin Mic. Ter. 31 Geo. 3. B.R 4 *Ter. Rep.* 82.

*A. Dymock*, being ſeiſed in fee of the premiſes in queſtion, by will, dated the 29th of Auguſt, 1758, deviſed as follows: "I give and bequeath unto my nephew, *William Dymock*, "*all that my freehold eſtate that I bought of Mr.* Kingſtone, "*ſituate at Alhampton, in the county aforeſaid*, to hold to him "*during his natural life*, and, after his deceaſe, *to and amongſt* "*his iſſue*, and, *in default of iſſue*, to be divided between my "nephew, *Elias Dymock*, and my niece, *Mary Dymock*, and "to their heirs and aſſigns for ever." TWO QUESTIONS AROSE; *Firſt*, What eſtate *William Dymock* took under the will of *A. Dymock*, whether for life, or in tail? *Secondly*, What eſtate his children would have taken, whether in tail or in fee? Lord KENYON, Ch. J.—In the firſt clauſe the eſtate is expreſſed to be given only during his natural life, but in the next limitation it is to go *to his iſſue, and in default of iſſue only* was it to go over; it is clear, therefore, from the whole of the will, that the deviſor did not intend that it ſhould go over to thoſe in remainder, until after a general failure of iſſue in *W. Dymock*. Now I think we are warranted by many determinations, and particularly by that of *Robinſon* v. *Robinſon*,

*Robinson*, 1 *Burr.* 38. to give that effect to the will, which will best answer the devisor's *general intention*, though by so doing we may defeat some *particular* intent. Here the general intent was, that *W. Dymock* and his issue should take first; then what construction will best effectuate that intention. It has been argued by the plaintiff's counsel, that *W. Dymock* took only an estate for life, and his children an estate tail; but it would be difficult to put two different interpretations on the word issue, and, even if that could be done, it would not further the intention of the devisor in this case, for there are no cross remainders to the children, and they can never be implied; so that, according to the construction contended for, if one of the children died, his share would go over to those in remainder, in prejudice of those children who survived, which was certainly not intended by the devisor. *Therefore we shall best answer his general intent by saying, that* W. Dymock *took an estate tail*; and, in so determining, we shall not go farther than has been done in other cases, especially in *Robinson* v. *Robinson*, 1 *Burr.* 38. where the estate was expressly given to *L. Robinson* for life, *and no longer*, and, *after his decease, to such son as he should have*, taking the name of *Robinson*, and for default of such issue then over; there, notwithstanding the devisor said, in express terms, that *L. Hicks* should only take for life, and no longer, this Court were of opinion that, in order to effectuate the manifest general intention of the devisor, he must, by necessary implication, take an estate tail. In addition to this case is *Dubber* v. *Trollop*, 8 *Vin. Abr.* 233; and the result of all the cases is, that the Court is to put such a construction on the whole of the will as will best effectuate the general intention of the devisor, contrary to *one* of the limitations, if a different construction will defeat the general intent: *and, according to that principle, I think that in this case* W. Dymock *took an estate tail.* BULLER, J.--I am not inclined to differ from my Lord in the construction which he has put upon this will, though I think, by so doing, we shall go farther than has ever been done in any of the former cases, because, in order thus to construe the will, we must reject the words "and amongst." But if we were to give effect to those words, it would defeat the general intent of the will, which will be better effected by giving an estate tail to *W. Dymock*; for the devisor certainly intended to prefer all the issue of *W. Dymock* before the more distant branches of the family, which would not be the case, as there are no cross-remainders, unless *W. Dymock* took an estate tail. The word "issue" may mean *children*, or *heirs of the body*; but it is too much to say that it means children in this will. for then grand-children would be excluded, and the next clause "in default of issue" could not have any effect at all. It, therefore, must mean "heirs of the body;" therefore,

I think that, as by rejecting the words "and amongſt," the general intent of the deviſor will be beſt effectuated, we are warranted in rejecting them.—GROSE, J. alſo agreed, and ſaid, the general intention of the deviſor can only be carried into effect by conſidering "iſſue" as a word of limitation. There is no caſe in which "iſſue" has been determined to be a word of purchaſe, unleſs coupled with other words expreſſing ſuch an intent; but here the contrary intent appears. Mr. *J. Rainsford*, in *Finch*, 282. arguing upon the diſtinction between *iſſue* and *children*, ſaid, "the word *iſſue* "is, *ex vi termini, nomen collectivum*, and takes in all iſſues to "the utmoſt extent of the family, as far as the words *heirs* "*of the body* would do;" and he obſerved, that it was reſolved in *Wild*'s caſe, 6 *Rep.* 17. "that a deviſe being to the "father and mother, and, after their deaths, to the children, "the word children ſhall be a name of purchaſe, and not of "limitation, and they ſhall have but an eſtate for life; but "had it been to their iſſues (as in the caſe then before him), "that word *iſſues* would have been conſtrued a word of "*limitation*, and not of purchaſe." That caſe is ſtrong, to ſhew that iſſue is a word of limitation, and not of purchaſe, and that it is different from children.

Roe *ex dim.* Chriſt. James, *v.* D. Avis and Mary his Wife, Archibald Hay and Elizabeth his Wife, and John Barber and Ann his Wife, Ha. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 605.

The teſtator, *J. Beech*, being ſeiſed in fee of the premiſes in queſtion, deviſed to his wife for life, and after her deceaſe "to be equally divided between his four children, "*Henry*, *John*, *Elizabeth*, and *Sarah*, and to each of them "and their heirs for ever, ſhare and ſhare alike; and in caſe "they ſhould be minded and agree among themſelves to ſell "the ſaid eſtate, then every one of his ſaid children ſhould "have their equal ſhares of monies from thence ariſing; but, "if they conſented and agreed to keep the eſtate whole to-"gether, then and in ſuch caſe all the rents, iſſues, and "profits thereof, from time to time, as they ſhould become "due and payable, ſhould be *equally paid and divided between "his four children, and to the ſeveral and reſpective heirs of "them, on their bodies lawfully begotten*, ſhare and ſhare "alike." *Ann James*, who was the only ſurviving child and heireſs of *Henry Beech*, the eldeſt ſon of *J. Beech*, the deviſor, and who was in poſſeſſion of the fourth of the eſtate which her father had, and who ſurvived her huſband (having alſo two daughters, *Elizabeth*, married to the defendant *Hay*, and *Ann*, married to the defendant *Barber*), by will, after reciting that ſhe was entitled to one undivided fourth part of a freehold eſtate at North Mimms, in the county of Hertford (the eſtate deviſed by her grandfather, *J. Beech*), "deviſed her ſaid undi-"vided fourth part, ſhare, or intereſt, of and in the ſaid free-"hold farm, &c. unto *M. Pearſon, and his heirs and aſſigns*, "upon certain truſts." And concluded, "and all the reſt, re-"ſidue, and remainder of MY ESTATE AND EFFECTS, I direct "to be ſold and diſpoſed of as ſoon as may be, after my de-

"ceaſe,

" ceaſe, and thereout the expences of my funeral to be paid; " and if there ſhall remain any overplus, the ſame to be equally " divided between my ſaid two daughters." TWO QUESTIONS were made; FIRST, Whether the four children of *J. Beech*, the firſt deviſor, took eſtates in fee, or in tail, under his will? SECONDLY, Whether the general words at the end of *Ann James*'s will paſſed a reverſion in two other of the undivided ſhares, which ſhe never had in poſſeſſion, and which would only deſcend to her on the death of her aunts, *Elizabeth* and *Sarah*, in the event of the four children of *J. Beech* taking eſtates tail; for, if they took a fee, thoſe two-fourths were deviſed away from her?—THE COURT ſaid, on the firſt point, that the children of *J. Beech* (the common anceſtor) took *only eſtates tail* in the reſpective fourths; for though it was given to them and their heirs, and they had alſo a power of ſelling the eſtate, by the former part of the deviſe, yet the ſubſequent words, " *to the ſeveral and reſpective heirs of them on their bodies lawfully begotten*," reſtrained the operation of the former words, and reduced the eſtate deviſed to an eſtate tail.—With regard to the other point, they thought that the two other undivided fourth ſhares did not paſs under the general words of the will of *Ann James*; for, although thoſe general words are ſufficient to paſs a fee, in order to anſwer the purpoſes of a will, yet in this caſe they ſaid, that it was manifeſt that this remainder was not in the contemplation of the teſtatrix when ſhe made her will, it being only a reverſion expectant on the determination of an eſtate tail, which her aunts might have barred; and the teſtatrix having, by the former part of her will, diſpoſed of all the freehold eſtate, to which ſhe ſuppoſed herſelf entitled. They obſerved that it was clear, from the purpoſe to which a part of the produce of what ſhe directed to be ſold, was to be applied, namely, the paying of her funeral expences, that ſhe only meant to diſpoſe of ſomething which could be ſold immediately; and that this reverſion might never have deſcended to her heirs.—Poſtea to the plaintiff (1).

The teſtator, *J. Benet*, being ſeiſed in fee, " deviſed all his " manors, lands, &c. in the counties of Wilts, Yorkſhire, " Southampton, and elſewhere, to his daughter *Martha*, " the wife of *P. Legh*, for life, remainder to his grandſon, " *Benet Legh*, ſon of *M. Legh*, for life, remainder to " truſtees to preſerve contingent remainders, remainder to " the heirs male of the body of his grandſon, lawfully to be " begotten; and for default of ſuch iſſue, to the ſecond, Henrietta Maria Atherton, Elizabeth Atherton, and Heſter Atherton, *v.* B. Pye, and Elizabeth his Wife, P. Legh, and W. Maire, Tr. Ter. 32 Geo. 3. B. R. 4 *Ter. Rep.* 710.

(1) So that the leſſor of the plaintiff recovered three-fourths; one-fourth, which deſcended from *Henry* (the firſt ſon of *J. Beech*, the common anceſtor) to his mother, *Anne James*, and from her to him; and the two-fourths, or ginally deviſed to *Elizabeth* and *Sarah*, the daughters of *J. Beech*, which deſcended on their reſpective deaths, to the leſſor of the plaintiff, as the heir at law of the above-named *Henry Beech*.

" third, and other ſon, and ſons, of his daughter *Martha*, " ſeverally and ſucceſſively, and to the ſeveral and reſpective " heirs male of the ſeveral and reſpective bodies of ſuch ſon " and ſons, &c.; and in default of ſuch iſſue, to " *all and* " *every the daughter and daughters of the body of his daughter*, " Martha, *and the heirs male of the body of ſuch daughter or* " *daughters, equally between them, if more than one, as tenants* " *in common, and not as joint-tenants*; and for and in default " of ſuch iſſue, he gave and deviſed *all* his ſaid premiſes " unto his right heirs for ever." *Benet Legh*, the grandſon, died in the life-time of his mother, *Martha*, an infant, and unmarried; and the ſaid *Martha* had other children by her huſband, *P. Legh*, viz. three daughters, *Henrietta Maria*, *Elizabeth*, and *Heſter*, *Legh*. THE QUESTION was, Whether croſs-remainders could be raiſed in the deviſe to the grand-daughters of the deviſor? Lord KENYON, Ch. J.—Although the caſes (1) upon this ſubject run extremely near to each other, many of them are ſo like the preſent, that they muſt decide it. It is true, that as between two only it ſhall be preſumed that croſs-remainders were intended to be raiſed; but, if there be more than two, it is neceſſary to reſort to other words in the will, to diſcover an intention to raiſe croſs-remainders. But here there is no doubt, from the words of the limitation over, but that the deviſor intended to raiſe croſs-remainders between the grand-daughters. The deviſe is " to all and every the daughter and daughters of the body of my daughter, *Martha*, and the heirs male of the body of ſuch daughter or daughters, equally between them, if more than one, as tenants in common, and not as joint tenants; and for and in default of *ſuch* iſſue (namely, the daughter or daughters), then I give and deviſe *all* my ſaid premiſes unto my right heirs for ever." He clearly intended, therefore, that the *whole* (2) ſhould go together; whereas, if no croſs-remainders be raiſed between the grand-daughters, it would go to the right heirs, by ſeparate portions, on the death of each grand-daughter. BULLER, J.—This is a ſtronger caſe for raiſing croſs-remainders than that of *Phipard* v. *Mansfield* (3); for here, beſides the words " for default of *ſuch* iſſue," namely, iſſue of all of them, the deviſe over is of *all* the deviſor's eſtates: now they cannot all go together, but by making croſs-remainders between the grand-daughters. PER CURIAM: " We are of opinion, that upon the death " of *Benet Legh*, and his mother, *Martha Legh*, the daughters " of the ſaid *Martha* took under the will of *Thomas Benet*, " the teſtator, eſtates in tail male, with croſs-remainders."

(1) Vid. *Holmes* v. *Meynell*, *Poll.* 425. Sir *T. Jon.* 172. Sir *T. Raym.* 452. *Skin.* 17. and 4 *Leon.* 14. *Comber* v. *Hill*, *Sir.* 969.

(2) *Holmes* v. *Meynel.* Sir *T. Raym.* 452. Sir *T. Jon.* 172; 4 *Leon.* 14; and 2 *Stra.* 970.

(3) *Cowp.* 797.

The

Denn, *ex dim.* John Webb, *v.* Puckey, *et al.* Tr. Ter 33 Geo. 3. B.R. 5 *Ter. Rep.* 299.

The testator devised to *A.* for life, without impeachment of waste, and, after his decease, to the issue male of his body, and to the heirs and assigns of such issue male for ever, and for default of such issue male to *B.* &c. held that *A.* took an estate tail. But supposing he only took for life, yet, as the remainder to his issue, and the subsequent remainders, are contingent, they may be barred by a recovery suffered by *A.* before any issue born.—*Walter Husband*, by will, "devised the "estates in question to his grandson, *Nicholas Webb, for life, "without impeachment of waste, and, after his decease, to the "issue male of his body lawfully begotten, and to the heirs and "assigns of such issue male for ever*; and, for default of such "issue male, remainder over." On the death of the devisor, *N. Webb* entered, and, having suffered a recovery of them to the use of himself in fee, devised them to *W. Webb* in fee. It was contended for the plaintiff, that the recovery suffered by *Nicholas Webb* was void, and a forfeiture of his estate; he being only tenant for life at the time. That the manifest intent of the devisor was that *N. Webb* should only take for life, having so expressed it in words, and also added "without im-"peachment of waste," which would otherwise be nugatory. That the only ground on which it can be contended that he took an estate tail is the subsequent devise to the *issue male of his body*. But though the word "issue" has sometimes been held a word of limitation, yet it is not necessarily or properly such, but is a word of limitation or of purchase as will best answer the devisor's intent. And that wherever words of limitation, as in this case the words "heirs and assigns of such issue male "for ever," have been added to the word *issue*, it has generally been construed a word of purchase; because the intent of the devisor is thereby manifested that the inheritance should go to the issue and not to the first taker.—SED PER Lord KENYON, Ch. J.—Nothing can be clearer than that the first intention of the devisor was to give only an estate for life to *N. Webb*, for it is given to him "for life" in express words; and these words are immediately subjoined, "without impeachment of waste." But it has been for a long time, and very properly settled, that if a devisor, ignorant of technical terms, sitting down to draw his own will, make clashing limitations, the Courts, in construing that will, must depart from some particular limitations, in order to give effect to the general intention of the devisor. That was solemnly decided, and anxiously inserted, in the certificate in *Robinson* v. *Robinson*, 1 *Burr.* 38; the determination of which case here was afterwards confirmed in the House of Lords. Now, what was the general intention of the devisor in this case? It was, that the male descendants of his grandson, *N. Webb*, should take the estate, and that none of those to whom the subsequent limitations were given should take, until all the male descendants of *N. Webb* were extinct.

That being the general intention of the deviſor, let us ſee by what conſtruction that will be beſt effectuated. It has been contended by the plaintiff's counſel, that *N. Webb* only took *an eſtate for life*; if ſo, what eſtate was given by the words, "*to the iſſue male of his body lawfully begotten, and to the heirs* "*and aſſigns of ſuch iſſue male.*" Was it to extend to more than one ſon? It would be difficult to extend it to more than one; and, I conceive that the eldeſt muſt have taken the abſolute intereſt in the eſtate. But that would defeat the deviſor's intention, becauſe it might have deſcended to the general heirs of that one ſon, to the diſinheriting of the other iſſue male of *N. Webb*. But even if theſe words comprehended all the male iſſue, as tenants in common, in tail, that would not have anſwered the deviſor's intention, becauſe there are no words to create croſs-remainders between them. And as his intention was, that all the deſcendants of thoſe children ſhould take before the remainder-men, that intention would be defeated by letting in any of the remainder-men, while there were any of the deſcendants of *N. Webb* in exiſtence. All theſe obſervations were made by Ld. Ch. J. *Wilmot*, in the caſe of *Roe* v. *Grew*, from 2 *Wilſon*, 322. and in p. 106, ſupra. I am, therefore, perfectly ſatisfied that the deviſor's intention will be beſt anſwered by our deciding that *N. Webb took an eſtate tail, which will comprehend* all his iſſue male, *and that none of the limitations over could have taken place while any of his iſſue were living.* In addition to the authorities cited, there is another in ſupport of our determination, which came before the privy council, by appeal from Barbadoes, in 1730, *Morris* v. *Le Gay*, cited 2 *Bur.* 1102. There the deviſe was "to *A.* for life, then to the heirs of the body of *A.* and their heirs; and if ſhe died without ſuch heir of her body, then over." And it was determined that it was an eſtate tail in the firſt taker.—But there is another way of conſidering this queſtion; and it has been argued by the defendant's counſel, on the authority of *Loddington* v. *Kime*. 1 *Cro. Jac.* 590, that by the limitation "to *N. Webb* for life, remainder to the iſſue male of his body, and to the heirs and aſſigns of ſuch iſſue male for ever," the iſſue of *N. Webb* took a fee as purchaſers; and in none of the caſes cited by the plaintiff's counſel was the limitation over "in default of iſſue," as in this caſe, but "for want of heirs." And this differs this caſe from that in *Cro. Car.* 415. Then if this were a limitation to the iſſue in fee on a contingency with a double aſpect, as it is called, the reſult here would be the ſame as in *Loddington* v. *Kime*, for then *N. Webb was tenant for life, with a contingent remainder in fee to his children, if he had any, and if he had none, then a contingent remainder over*; in which caſe, all the limitations over were deſtroyed by the recovery, which deſtroyed the particular eſtate. And therefore *quâcunque viâ datâ*, without determining whether

*N. Webb*

*N. Webb took an estate in tail, or for life only, with a remainder to his issue in fee*, the lessor of the plaintiff is not entitled to recover.—Ashhurst, J. I entirely concur that, in whatever point of view this case is considered, the defendant is entitled to judgment. I believe it very rarely happens that where a man makes his own will, his whole intention can be effected: but of the two evils, perhaps, it is the least that the intention of the devisor should be defeated in some particular point, than that judicial determinations, respecting real property, should be overturned. In addition to the cases already mentioned, I will refer to another, *Doe d. Brown* v. *Holme*, 2 *Bl. Rep.* 777. Where the devise was to "*J. L.* for life, and after his decease to the heirs male or female of the body of *J. L.* for ever;" and *J. L.* not having had any issue, suffered a recovery: Lord Ch. J. *De Grey*, who delivered the opinion of the Court, said that *quâcunque viâ datâ* the recovery vested an estate in fee in *J. L.* for *if it were an estate tail in him there could be no doubt*; and if he had only *an estate for life, with remainder in fee to his heirs male or female*, then being a contingent remainder, it was destroyed by the common recovery; and all the subsequent remainders depending thereon were barred, according to the case of *Loddington* v. *Kime*. I am, therefore, of opinion, that at any rate the lessor of the plaintiff is barred by the recovery.—Buller, J. I entirely agree that either on one ground, or the other, the defendant is entitled to our judgment. The case cited by *Ashhurst*, from *Bl. Rep.* only differs from the present in this respect, that there the limitation was to "the heirs of the body," and here it is to "the issue of his body." So in *Goodright* v. *Pullyn*, 2 Lord *Raymond*, 1437. And in the case from Barbadoes, the words were to the "heirs male of the body," &c. Now if there be no difference between the words "issue male" and "heirs male," those are direct authorities for the present case. In some cases a distinction certainly has been taken between the effect of those words; but according to my note of *Roe* v. *Grew*, Lord Ch. J. *Wilmot* thought there was none. —Grose, J. I observe that there is a distinction in some of the cases between the words "issue of the body" and "heirs of the body:" but in *Roe* v. *Grew*, *Gould*, J. commenting on the operation of the word "issue," thought otherwise, and that it was more properly a word of limitation than of purchase. And that case comes so near to the present that I think there is no real distinction between them.—Lord Kenyon, Ch. J. There is no doubt but that the words "heirs of the body" may be controlled by subsequent words; that was so held in *Law* v. *Davis*, 2 *Str.* 849. and in a variety of other cases; and yet it is worth remembering, as a matter of curiosity, that Lord *Holt*, and Lord *Somers*, thought that they could not be so restrained by any subsequent words,

words, as to carry less than an estate tail.—Postea to the defendant.

Denn *ex dim.* John Slater *v.* Joseph Slater, Tr. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 335.

The testator, *John Slater*, devised as follows: "*As touching the disposition of all such temporal and worldly estate as it hath pleased God to bestow upon me, I* dispose thereof as "followeth [after directing the payment of his debts, &c.]: "Also I give and bequeath all my copyhold lands, lying in "Hazlewood, to my nephew *Isaac Slater*; but if the aforesaid *Isaac Slater* should die without male heir, then my "will is, that my nephew *John Slater* shall enter upon "and enjoy the said copyhold lands, his heirs or assigns for "ever; charging the estate with an annuity of 8l. a year "to his wife during life, and several legacies to be paid at a "distant time." *Isaac Slater* paid the annuity to the testator's widow during her life, and the legacies. The lessor of the plaintiff was his eldest son, and heir at law; but he had devised the lands to the defendant, a younger son. By the custom of the manor, a recovery is necessary to bar an estate tail; but no recovery had been suffered by *Isaac Slater*. —THE QUESTION was, What estate *Isaac Slater* took under the will of *John Slater:* because if he only took an estate tail, and not an estate in fee, not having suffered a recovery, the lands descended to the lessor of the plaintiff as tenant in tail?—Lord KENYON, Ch. J. It is clear from all the cases on this subject, that *Isaac Slater* took an estate tail. In *Blaxton* v. *Stone*, 3 *Mod.* 123. where the father devised to his eldest son, "and if he died without heirs male, then to his other son," the Court thought that though it was evident that the word "body," which properly creates an estate tail, was omitted, the intent of the devisor might be collected out of his will, that he designed an estate tail; and they adjudged it to be so. And in 1 *Vent.* 230. Lord *Hale* mentioned *Burley*'s case, 43 *Eliz.*; "A devise to *A.* for life, remainder to the next heir male, for default of such heir male then to remain; adjudged an estate tail." And with regard to the other question, the law on this subject is very accurately stated by Lord *Mansfield*, in the case of *Doe* v. *Fyldes*; in *Cowper*, 833, (*ante*, p. 211.) Where an estate is given generally, without adding words which would create a fee or an estate tail, and it is charged with the payment of annuities, the devisee takes a fee: but that is not the case where an estate tail is given to the devisee. In this case, the devisor's wife, to whom the annuity was given, had a power of entry in case of non-payment of her annuity. And the legacies given were to be paid at a remote period, before which time the devisee had the power of acquiring the fee, by suffering a recovery. We should be removing the landmarks of real property, if we were to determine that *Isaac Slater* took an estate in fee.—ASHHURST, J. Agreed.—BULLER, J. The words "heirs male," may admit of three different constructions. First, if the king by patent

patent grant to a man and his heirs male, the latter words convey no intereſt. Secondly, if an individual by deed grant to *A.* and his heirs male, *A.* takes a fee; becauſe, againſt the grantor, the word "male" is rejected. Thirdly, but in the caſe of a deviſe in thoſe words, the deviſee takes an eſtate tail, becauſe the Court may ſupply the words "of the body," if they be wanted to effectuate the deviſor's intent.—Lord KENYON: A fourth caſe may be put, where a different meaning may be given to thoſe words: if an eſtate of freehold be limited to *A.* remainder to his heirs male, the latter words enlarge *A.*'s eſtate to a fee: but it is otherwiſe, where only a chattel, a term of years, is given to *A.* remainder to his heirs male; in ſuch caſe the latter words are words of purchaſe.—Poſtea to the plaintiff.

Doe *ex dim.* Neville, *v.* Rivers and Bradley, aſſignees of Neville, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 276.

The teſtator being ſeiſed of the premiſes in queſtion (after confirming his ſettlement, by which one part of this eſtate was ſettled on his wife *E. Fiſield* for life), "deviſed the reſt "of the premiſes to his daughter and only child, *Mary* "*Fiſield*, on her attaining twenty-one, *and to her heirs*; and "as to that part which was ſettled on his wife, he deviſed "the ſame to his ſaid daughter after the death of his wi- "dow. In caſe the widow ſhould die before the daughter "attained twenty-one, then he willed that both parts of the "eſtate ſhould go immediately *to his daughter and her heirs* "*for ever*; but he willed that his wife ſhould hold and en- "joy both parts until his daughter ſhould attain the age of "twenty-one; AND IN CASE HIS DAUGHTER SHOULD "DIE WITHOUT ISSUE, then he impowered her to diſpoſe "of the whole by will, or any other inſtrument in writing, "atteſted by three witneſſes, as ſhe ſhould direct, limit, or "appoint; and FOR WANT OF SUCH ISSUE *and direction*, "&c. then that the ſame ſhould deſcend and go to his own "right heirs." The daughter married *W. Neville* the elder, by whom ſhe had one ſon, the leſſor of the plaintiff, and ſhe is ſince dead. But previous to her marriage, having attained the age of twenty-one, and being in poſſeſſion of the unſettled part of this eſtate, ſhe, by leaſe and releaſe, conveyed the whole of the premiſes in queſtion to truſtees, to the uſe of herſelf and her heirs, until the intended marriage, and from and immediately after the marriage, to the uſe of *W. Neville*, the elder, and his aſſigns for his life; remainder to truſtees to ſupport contingent remainders, remainder to herſelf for life, remainder to the firſt and other ſons of the marriage in tail, with remainders over. *W. Neville*, the elder, became bankrupt, and the defendants claimed as his aſſignees.—IT WAS CONTENDED, for the plaintiff, firſt, That the daughter took only an eſtate-tail under her father's will; for though the premiſes are at firſt deviſed to her, and her heirs, it is manifeſt, from the two clauſes at the concluſion

ſion

ſion of the will, that the deviſor did not intend to give his daughter a fee, but that her children, if ſhe had any, ſhould take after her. And as to the queſtion that aroſe, on the effect of the ſettlement made on the marriage of that deviſee. It was clear that a conveyance by leaſe and releaſe, by a tenant in tail, neither bars the iſſue in tail, *ſtat. de donis* (1), nor works a diſcontinuance; *Lit. ſect.* 598. 600.; *Co. Lit.* 328, *a.*; *Finch's Law*, 190. But ſuch a conveyance paſſes a baſe fee, voidable by the iſſue in tail by entry. *Seymour's* caſe, 10 *Co.* 95; *Machell* v. *Clarke*, 2 Ld. *Raym.* 779; *Doe* d. *Tyrrel* v. *Shilſon*, 3 *Burr.* 1703. So that the huſband of the tenant in tail, *W. Neville*, was not now entitled to a life-eſtate, either under the ſettlement, or as tenant by the curteſy. The Court, being of this opinion, ordered the poſtea to be delivered to the plaintiff.

*Doe ex dim.* Candler *et al.* v. Smith, Ea. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 531.

The teſtator, *W. Aſcough*, being ſeiſed in fee of the premiſes in queſtion, by his will (after giving to his wife an annuity to be iſſuing out of his freehold eſtate), deviſed the ſame as follows; "I hereby give and deviſe all my freehold "meſſuages, lands, &c. (ſubject to the payment along with "my perſonal eſtate of all my debts, legacies, and funeral "expences), unto my daughter *Mary Aſcough*, *and the heirs "of her body lawfully to be begotten for ever*, as tenants in "common, and not as joint tenants, *and in caſe my ſaid "daughter ſhall happen to die before twenty-one*, OR *without "leaving iſſue on her body lawfully begotten*, then I give and "deviſe all thoſe my ſaid freehold meſſuages, lands, &c. "to *R. Aſcough*, his heirs and aſſigns for ever." *Mary Aſcough* having attained her age of twenty-one years, intermarried with *H. Candler*, and they have iſſue three children, viz. the leſſors of the plaintiff, and were all living at the time of levying the fine and executing the feoffment hereinafter mentioned. In trinity term, 1796, *H. Candler* and *Mary* his wife, levied a fine of the premiſes in queſtion, and, by deed of feoffment, dated the 1ſt of January, 1797, with livery of ſeiſin thereon, conveyed the ſame, and declared the uſes of the fine to the defendant *J. Smith*, and his heirs for ever. THE QUESTIONS were, 1ſt. WHETHER *Mary*, the wife of *Henry Candler*, the elder, took an eſtate tail in the premiſes abovementioned, to be conveyed to the defendant, or an eſtate for life only? and, 2dly. WHETHER the plaintiff is entitled to recover on the demiſes above ſtated?—Lord KENYON, Ch. J. It is a rule of conſtruction in caſes of this kind, ſettled by a variety of deciſions, but particularly by that of *Robinſon* v. *Robinſon*, 1 *Burr.* 38. firſt in this Court, and afterwards in the Houſe of Lords, that where it appears in

(1) 13 *Ed.* 1. *c.* 1.

a will,

a will, that the teſtator had a general intention, and alſo a ſecondary intention, and they claſh, the latter muſt give way to the former. This general propoſition is ſupported by this caſe. I admit that in this caſe the teſtator *intended that his daughter*, M. Aſcough, *ſhould only take an eſtate for her life*, and that her children ſhould take as purchaſers: *but then he alſo intended, that all the progeny of thoſe children ſhould take before any intereſt ſhould veſt in his more remote relations:* now the latter intention cannot be carried into effect, unleſs *M. Aſcough* takes an eſtate tail. In order, therefore, to give effect to the deviſor's general intention, according to the fair conſtruction of the will, *M. Aſcough* muſt take an eſtate tail.—Poſtea to the defendant.

Roe *ex dim.* Eberall *et al.* *v.* Lowe, *et al.* Tr. Ter. 30 Geo. 3. C.B. 1 *Hen. Black.* 446.

The teſtator *John Smith* being ſeiſed in fee, by his will of the 24th of December, 1625, after reciting that on the 21ſt day of December then laſt, he had ſurrendered *a copyhold meſſuage and cottage with the appurtenances, ſituate in Knowle in the ſaid county, then in the occupation of Robert Weſton*, being of the value of 11l. *per annum*, into the hands of the lord of the manor of Knowle, by two cuſtomary tenants, according to the cuſtom there, to ſuch uſes as were and ſhould be contained in that his will, did bequeath, and his will and deſire was, that the inheritance of the ſaid copyhold lands ſhould be granted unto *Rowley Ward*, eſq. *Thomas Cowper*, and *John Savage*, or to ſuch two of them as the ſaid *Rowley Ward* ſhould think fit, and their heirs; and he did, as much as in him was, grant and direct the ſaid copyholds to them and their heirs, and the rents, iſſues, and profits thereof, to the uſes, intents, and purpoſes hereinafter expreſſed; (that is to ſay), from and after the deceaſe of the ſaid *John Smith*, his will and deſire was, that *Suſannah* his wife ſhould hold and enjoy the ſame, and take the rents and profits thereof for her life; and that from and after the deceaſe of him the ſaid *John* and *Suſannah* his wife, then his will was, that the ſaid *Rowley Ward*, *Thomas Cowper*, and *John Savage*, or ſuch as ſhould be new takers thereof as aforeſaid, and their heirs, ſhould for ever ſtand and be ſeiſed thereof, and that the rents, iſſues, and profits thereof, ſhould for ever afterwards be employed and diſpoſed of in the buying and making up ten gowns yearly, againſt the feaſt of Chriſtmas, for ten poor men of the pariſh of Saint Mary in Warwick, ſuch as the ſaid *Rowley Ward* whilſt he lived, and after his death ſuch as the ſaid *Thomas Cowper*, and *John Savage*, and others ſucceeding them in the truſt, concerning the ſaid copyhold lands ſhould think fit; and his will was, that the herdſman of Saint Mary's for the time being ſhould be one; "alſo his will and deſire was, that "the RENT OF THE SAID COPYHOLD LANDS BEING 11l. "PER ANNUM, SHOULD NEVER BE IMPROVED OR "RAISED

" RAISED, BUT SHOULD CONTINUE AT 11l. PER ANN. " AND THAT THE SAID ROBERT WESTON, WHO WAS " THEN TENANT, AND HIS CHILDREN AND POSTERITY " WHICH SHOULD SUCCEED, SHOULD NEVER BE PUT " FORTH, OR FROM THE SAME, BUT ALWAYS CONTI- " NUE THE POSSESSION OF THE SAID COPYHOLD PRE- " MISES, *paying the ſame yearly rent, duly from time to time,* " *and to and for the purpoſes aforeſaid, and not otherwiſe.*"— *Thomas Weſton Harper*, great grandſon of the above-mentioned *Robert Weſton*, by his will, bearing date the 4th day of March, 1738, deviſed all and ſingular the premiſes deviſed by *Smith*'s will [except a houſe and ſhop, which he had built on part of the premiſes], unto his eldeſt ſon *Thomas Weſton Harper*, in fee, he and they paying out of the ſame the ſaid yearly rent of 11l. according to the will of the ſaid *Smith*, and thereby as far as he could for ever diſburthening the ſaid houſe, ſhop, &c. from the payment of the ſame or any part thereof, to the end that that part of the premiſes might be held and enjoyed, free from the payment of any rent whatſoever; and as to the ſaid houſe, ſhop, &c. being then in the tenure of the ſecond ſon *John Weſton Harper*, he deviſed the ſame and all his eſtate, right, title, and intereſt therein, and thereto, diſburthened as aforeſaid, unto his ſaid ſon *John Weſton Harper*, his heirs and aſſigns for ever. *John Weſton Harper* entered and enjoyed the laſtmentioned premiſes till his death. Afterwards his widow entered and enjoyed the ſame during her life; and, after her deceaſe, *Elizabeth*, a daughter who intermarried with *Thomas Parkes*, the elder, and *Mary*, another daughter, who intermarried with *John Bracknell*, claimed to be entitled, being the two daughters and coheireſſes of *John Weſton:* and, accordingly, by an indenture, bearing date December 30th, 1777, and made between the ſaid *John Bracknell* and *Mary* his wife, and *Thomas Parkes*, the younger, the eldeſt ſon and heir of *Thomas Parkes*, the elder, by the ſaid *Elizabeth* his wife, late deceaſed, of the one part, and *Edward Lockman* of the other part, for barring all eſtates tail in the premiſes, it was agreed that the ſaid *John Bracknell*, and *Mary* his wife, *Thomas Parkes* the elder, and *Thomas Parkes* the younger, ſhould levy a fine *ſur conuzance*, &c. of the premiſes [deſcribing them], which were in fact thoſe deviſed to *John Weſton Harper*, by the will of the firſtnamed *Thomas Weſton Harper*, in 1738, and part of the premiſes deviſed in and by the will of the ſaid *John Smith*, and deſcribed to be in the occupation of the ſaid *Robert Weſton*. The uſes of which fine were declared as to one moiety of the premiſes, *to ſuch uſes as they, the ſaid* John Bracknell *and* Mary *his wife, ſhould appoint*; and as to the other moiety thereof, to the uſe of the ſaid *Thomas Parkes* the elder, and *Thomas*

*Parkes*

*Parkes* the younger, in fee as joint-tenants. And in Trinity Term, 18 *Geo.* 3. a fine was duly levied with proclamations in consequence of the laſtmentioned deed.—ON THIS WILL THE FOLLOWING POINTS AROSE; 1ſt, WHETHER any and what eſtate is given by the will of *Smith* to *Robert Weſton?* 2dly, In whom the right of *Robert Weſton* is now veſted? 3dly, Whether this is a caſe in which a court of law can ſtop the effect of a legal title to obtain poſſeſſion?—Lord LOUGHBOROUGH, Ch. J. The will of *Smith*, with reſpect to *Robert Weſton*, is argued to import a mere recommendation of him and his family to be continued tenants; and it is ſaid that a direction not to raiſe the rent would be void, as repugnant to the eſtate given; to ſupport which poſition two caſes from 2 *Vern.* 596 & 746. were cited. But thoſe caſes are not applicable. In the one the truſtees of an eſtate given to a charity had thought fit to impoſe ſuch a condition; in the other, the chancellor had eſtabliſhed it on a propoſal for the benefit of the truſt eſtate. In both the act was done without due authority. But *a teſtator in giving his eſtate may impoſe any terms conſiſtent with the rules of law*, and it can only be a queſtion on the intention, when bequeſts ſeem to encounter each other. In the preſent caſe, the deviſees take no benefit, they are mere truſtees. The object of the charity is limited, and the ſum defined. *The direction to continue the poſſeſſion of* Weſton *and his children and poſterity paying that ſum, is as poſitive as the direction to lay out the* 11*l. and to diſtribute the gowns bought with it to ten poor men. The truſtees are as much bound to ſupport one bequeſt as the other.* But although it is clear that the *Weſton* family are the objects of a truſt in this will, it is far from being clear in what manner the bequeſt in their favour is to take effect. It is not a neceſſary concluſion that ſome eſtate muſt paſs to them by the will. *It muſt be allowed, that a condition to pay a rent for ever, will create an eſtate in fee*, as in the caſe cited from 3 *Bulſtr.* 194. and that "POSTERITY" may be a word of limitation, as in the caſes cited in the firſt argument. But all theſe caſes are upon words annexed to an expreſs deviſe of an eſtate. In this will there is no expreſs deviſe to *Robert Weſton.* It is only, that "*he who was then tenant, and his children and poſterity, "ſhould never be put forth, but continue the poſſeſſion.*" The idea of the teſtator ſeems to have been a perpetual tenancy at a fixed rent. Thinking the bequeſt imperative to the truſtees, I do not know, but that truſt might have been well executed by granting leaſes for years renewable. I am not ſure that it would be a breach of truſt to follow either the courſe of ſucceſſion to perſonal eſtate, or the legal courſe of deſcent in continuing the poſſeſſion to the poſterity of *Robert Weſton. But ſuppoſing that the truſt is executed in the truſtees, and that an eſtate paſſed to* Robert Weſton, *the words* "TO "HIS

" HIS CHILDREN AND POSTERITY WHO SHOULD SUCCEED," *muſt confine it to an eſtate tail.* An eſtate to a man and his children, if he have none born, is an eſtate tail according to *Wild's Caſe*, 6 *Co.* 16. *b. Poſterity* goes ſtill further. *It is an excluſion of collateral heirs, and muſt cut off the fee-ſimple by neceſſary implication.* If then any eſtate paſſed to *Robert Weſton*, it was *an equitable eſtate tail of a copyhold deſcendible by the cuſtom in Borough Engliſh, and the leſſor of the plaintiff* Mary Weſton Harper *is heir in tail unleſs it were barred.* THIS BRINGS IT TO THE QUESTION, WHETHER THE ESTATE TAIL IS BARRED? It was argued that it was barred by the will of *Thomas Weſton Harper.* Now, though it is true that the deviſe of an equity in a copyhold requires no ſurrender, yet that is where the teſtator has a deviſable eſtate. The entail muſt firſt be barred. The party muſt have done ſome antecedent act to enable him to deviſe. Here no ſuch thing was done. And the will of *Thomas Weſton Harper* did not operate long: there was no length of poſſeſſion againſt the entail on which to preſume a ſurrender. Then the third queſtion is, Whether there is ſuch an equity, as can obſtruct the clear legal title of the plaintiffs in the firſt demiſe to obtain poſſeſſion? Now the rule is, that unleſs in the caſe of a clear truſt, the equitable title of *ceſtui que truſt*, ſhall not be ſet up againſt the legal title of the truſtee; and in the preſent caſe it is not clear who is the *ceſtui que truſt.* If the truſts are not clearly executed in favour of any one, it is fit that the truſtees ſhould be in poſſeſſion, and if any remedy is required, it muſt be ſought in another place. We are therefore of opinion that a verdict muſt be entered for the leſſors of the plaintiff, in the firſt demiſe. [The truſtees.]

Dee, Leſſee of Fonnereau *v.* Fonnereau, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 483.

A limitation in a deed, cannot be united with one contained in a will.—*Claude Fonnereau*, being ſeiſed in fee, *by indenture*, bearing date the 1ſt of April, 1735, and made between him and his eldeſt ſon *Thomas Fonnereau*, in conſideration of natural love and affection, *did give and grant to the ſaid* Thomas Fonnereau, *and his aſſigns, the eſtate in queſtion, to hold the ſame to him, and his aſſigns, from Michaelmas then laſt paſt*, FOR LIFE, *without impeachment of waſte*, at the rent of a pepper-corn, if demanded: *Thomas*, the ſon, entered, and was ſeiſed in his demeſne as of freehold, for life, the reverſion in fee remaining in the father; and the father, *Claude Fonnereau*, on the 27th of June, 1738, deviſed the ſaid reverſion in the words following:— " Whereas I have ſettled my eſtate, called Chriſt-Church, " at Ipſwich, in Suffolk (the lands in queſtion), upon my " eldeſt ſon *Thomas Fonnereau*, for the term of his natural " life; my will is, and I do hereby, FROM AND AFTER " HIS DECEASE, give and deviſe the ſame to the heirs male " of

" of his body begotten in lawful marriage, and, in default " of ſuch iſſue, to the uſe and behoof of my ſecond, third, " fourth, and fifth ſons, ſeverally, ſucceſſively, and in re- " mainder, one after another, as they and every of them are " in priority of birth, and ſeniority of age, and of the ſeveral " heirs male begotten in lawful marriage, of the body and " bodies of my ſaid ſons reſpectively iſſuing, the elder of " my ſaid ſons, and the heirs male of his body, to be al- " ways preferred, and to take before the younger of my " ſaid ſons, and the heirs male of their bodies; and, for " want of ſuch iſſue, to my right heirs." The teſtator died, ſeiſed of the reverſion, leaving the ſaid *Thomas Fonnereau*, his eldeſt ſon, *Claudius Fonnereau* (the leſſor of the plaintiff), his ſecond ſon, and three other ſons. After the death of the teſtator, *his eldeſt ſon* Thomas, *being ſeiſed, covenanted to levy a fine, for the purpoſe of making a tenant to the* præcipe, *which he afterwards did, and ſuffered a recovery, to the uſe of himſelf in fee:* afterwards, he deviſed the premiſes to the uſe of his nephew *Martin Fonnereau* (the defendant), for life, with divers remainders over: and afterwards died without iſſue.—THERE WERE TWO GENERAL QUESTIONS; 1ſt, Suppoſing the limitations over to the ſecond, and other ſons, to have been good in their creation, WHETHER they were not barred and deſtroyed by the recovery? 2dly, WHETHER thoſe limitations were not void from the beginning? And there were four different heads of argument inſiſted upon by the counſel for the plaintiff. 1ſt, That the limitations to *Thomas in the deed*, and to his iſſue-male *in the will*, could not be coupled, ſo as to make the words of the latter words of deſcent, and to veſt an eſtate-tail in him.—2dly, That an eſtate-tail to *Thomas* could not be raiſed from the words of the will.—3dly, That the limitation to the ſecond ſon, was an immediate deviſe of the reverſion after *Thomas*'s life, by which an eſtate-tail, in that reverſion, veſted in the ſecond ſon *Claudius* (the leſſor of the plaintiff), immediately on the teſtator's death, with ſucceſſive veſted remainders over to the other younger ſons.—4thly, Or, if it ſhould be held that the ſucceſſive deviſes to the younger ſons were all future and executory, then, that they were not within the reaſon and principle upon which executory deviſes had been held void as being too remote. It was for the defendant argued, FIRST, That the primary intention of the teſtator manifeſtly muſt have been to give *Thomas* an eſtate-tail; for there can be no reaſon to ſuppoſe, that he meant to limit a different, or better, intereſt, to his younger ſons, than to him; and that the Court, therefore, would do every thing in their power, conſiſtent with the rules of law, to give effect to that intention. And that it had not then been determined, that two eſtates in the ſame land, though by different conveyances, given to the

ſame perſon, both voluntary, and both flowing from the ſame perſon, ſhall not unite. SECONDLY, That to raiſe an eſtate tail in *Thomas*, upon the words of the will itſelf, would be moſt conſonant to the intention of the teſtator, for he certainly muſt have meant that all the ſons of *Thomas* ſhould be capable of taking; yet, if *Thomas* had left ſeveral ſons, according to the conſtruction contended for on the part of the plaintiff, an eſtate-tail would have veſted in the eldeſt, on the father's death, and then the others would have been totally excluded, though the iſſue of the eldeſt ſhould afterwards have failed. Thoſe words, therefore, conſiſtently with the intention of the teſtator, cannot be conſtrued to limit an eſtate tail, by purchaſe, to the ſons of *Thomas*; and if it appear to the Court, that he muſt have meant to give ſuch eſtate to *Thomas* himſelf, they will give effect to that intention, if they can, either upon the expreſs words, or by legal implication. THIRDLY, That this could not be taken as a preſent deviſe of the reverſion to the ſecond ſon, ſubject to be diveſted, if *Thomas* ſhould have a ſon; 1ſt, Becauſe the ſecond ſon would take by purchaſe, and, when that is the caſe, a veſted eſtate is never diveſted again, by any ſubſequent event (1); and, 2dly, Becauſe the words of this will are all future, and nothing was meant to veſt till after the death of *Thomas*. FOURTHLY, That the idea of a double contingency is contrary to the intention of the teſtator; for it ſuppoſes him to have meant, that if *Thomas* had no ſons, his own ſecond ſon ſhould take the eſtate, but that he ſhould not if *Thomas* had a ſon; whereas the teſtator certainly meant (though his intention, as he has expreſſed it, was contrary to law), that his ſecond ſon ſhould take, at all events.—Lord MANSFIELD, Ch. J. ſaid, There was no doubt what the intention was; *the only queſtion was*, "if that intention could be fulfilled, conſiſtently with the rules of law?" He deſired the counſel would ſee if they could find any caſes, beſides that of *Baldwin* v. *Karver* (*ante* 23), where a double contingency had been implied in a caſe of real eſtate. And he ſaid that he thought the deciſion, in that caſe, had not gone upon that point; and he had always conſidered it as the ſettled doctrine, ſince the caſe of *Forth* v. *Chapman*, 1 *Pere Wms.* 663. that a double contingency may be applied as to perſonalty, but not as to real property. A few days afterwards, his Lordſhip ſaid, he had directed the certificate of the Court, in *Baldwin* v. *Karver*, to be ſearched for, and copied. He then read it; and it thereby

(1) *Qu.*—When an eſtate deſcends, it is often afterwards diveſted. Thus, when there is an executory deviſe, the inheritance deſcends to the heir, ſubject to be diveſted when the deviſe can take effect. So it is alſo now ſettled, ſince *Carter* v. *Barnardiſton* (*Canc. M.* 1708. 1 *P. Will.* 505.), that it deſcends in like manner in the caſe of contingent remainders; at leaſt if created by will. 2 *Doug.* 493. [n. 1].

appeared,

appeared, that, *although the Court had ſuſpended their opinion, and given the heir at law, and perſonal repreſentative, leave to be heard by their counſel, againſt the validity of the deviſe to the grandchildren*, THEY *did not inſtruct counſel to object to it*; and, therefore, the Court avoided the queſtion, and only gave their opinion on the point between the different grandchildren, on the ſuppoſition that the deviſe over was good. AFTERWARDS, his Lordſhip having aſked, whether the counſel had been able to find any caſe of real property, where the Court, on the words "in default of ſuch iſſue," had implied a reſtriction to "iſſue living at the death of the father," or, where a double contingency (1) had been implied,

(1) A double contingency, in the ſenſe in which the expreſſion was uſed in this caſe, is where an eſtate in truſt, or by way of executory deviſe, is ſo limited, that the time when it is to veſt in poſſeſſion, will, on one event, fall within the limits allowed by law, and, on another, will exceed them. It may be ſaid, however, that, in many other caſes of future limitations (indeed in by far the moſt uſual ſorts of them), there is a double contingency. Thus, ſuppoſe an eſtate is limited to *A.* for life, remainder to *B.* in tail, remainder to *C.*; here the time when *C.*'s eſtate ſhall veſt in poſſeſſion, depends on a double contingency. 1. If *B.* die without iſſue, before *A.* it will veſt immediately on the death of *A.* 2. If *B.* outlive *A.* it cannot veſt till after the eſtate tail in *B.* is at an end. Perhaps there may be ſome uſe in the following diſtribution of eſtates limited over after other preceding limitations. They may be divided into three claſſes: 1. Such as can take place in the alternative only. 2. Such as can take place in ſucceſſion only. 3. Such as may take place, either in the alternative, or in ſucceſſion. 1ſt. Of the firſt claſs are all thoſe, where, if the firſt eſtate ever veſt, they cannot; ſo that they are only good upon the alternative of the firſt never taking effect. This happens where there is a truſt, or deviſe, of perſonal property, to the heirs of the body, or the heirs of *A.* and, in default thereof, to *B.*; as in *Higgins* v. *Dowler*, 1 *Peere Wms.* 90 *infra*, p. 199. 200. *Stanley* v. *Leigh*, 11 *Cro. Jac.* 590, &c. Or where there is, in real property, a limitation over to *B.* after a contingent fee-ſimple to *A.* as in *Luddington* v. *Kime*, 1 *Cro. Jac.* 590. *Doe* v. *Holme*, *Goodright* v. *Dunham*. Eſtates of this claſs are often called limitations on a contingency with a double aſpect; or, with leſs quaintneſs, on a double contingency. They have alſo been ſometimes denominated concurrent, or contemporary limitations, 1 Ld. *Raym.* 208. But I have already remarked, that, in many of another ſort, there is, as much as in theſe, a double contingency; and they are certainly not aptly deſcribed by the words concurrent, or contemporary. Thoſe epithets are rather expreſſive of eſtates which take effect at one and the ſame time. They might, with propriety, be applied to the intereſts which veſt in coparceners, tenants in gavel-kind, or joint-tenants; or to ſuch remainders over as thoſe limited, in the caſe of *Carter* v. *Barnardiſton*, to *Thomas Styles* and ſir *Thomas Barnardiſton*; for there, after the previous contingent fee, in the manors both of *A.* and *B.* to a third perſon, there was a limitation of the manor of *A.* to the one, and of the manor of *B.* to the other, to take effect at the ſame time. 2dly, The ſecond claſs conſiſts of thoſe which can never veſt, unleſs the preceding eſtate take place before them, and then not till the other is either ſpent, or otherwiſe determined. Of this

plied, viz. to the iſſue, if there ſhould be any, and, if none, to the deviſee over, it was anſwered, that they had not met with any; and, thereupon, his Lordſhip delivered the opinion

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ſort there are examples in the caſes of *Davis* v. *Norton*, cited in 1 *Doug.* 77. and *Watſon* v. *Shippard*, cited in 1 *Doug.* 75. They are, however, very rare. It is certainly a general rule, "Where there is a remainder, or conditional limitation over, that, "if the precedent limitation, by what means ſoever, is "out of the caſe, the ſubſequent limitation takes place." Indeed Lord *Hardwicke*, in *Vezey*'s report of *Avelyn* v. *Ward*, 1 *Vez.* 422. is ſtated to have ſaid, that he knew of no caſe to the contrary. But the two I have mentioned are clearly of this ſort. They are often ſaid to be expectant on the firſt eſtate. 3dly, All other limitations, after previous eſtates, belong to the third claſs; and, in all of them, as in all of the firſt, there is a double contingency, as already explained. If the previous eſtate take effect, theſe await its determination, and then veſt in poſſeſſion. If the other contingency happen, that is, if the firſt eſtate never veſt, they take place immediately at the time when they firſt ought to have veſted. Ibid.

A deviſe after failure of the iſſue, or the heir, of *A.* without any previous eſtate to ſuch iſſue, or heirs, is void in its creation, whether it be of real or perſonal property. Such a deviſe, with a previous contingent limitation, to the iſſue or heirs of *A.* falls under the firſt, or third, of the above claſſes, and is not void in its creation. The reaſon of the difference may be thus explained: When there is no previous eſtate limited, if *A.* ſhould have heirs, or iſſue, they might laſt for ever, and while they did, there would be nobody who could bar the eſtate limited over; and, therefore, a perpetuity might take place, which the law will not ſuffer. But, where the eſtate is previouſly given to the heirs, or the iſſue of *A.* and (if future) is limited to veſt within the legal boundaries, in point of time, the principle of preventing perpetuities does not render it neceſſary to hold the deviſe over to be void in its creation. For, to conſider: 1. The caſe of perſonal property; if the firſt eſtate veſt (whether limited to iſſue, or heirs, is, there, exactly the ſame thing), the entire intereſt and dominion is thereby exhauſted, and there is nothing left upon which the ſubſequent limitation can attach, which, therefore, becomes immediately, by neceſſary operation of law, a mere nullity: 2. In the caſe of real property; if the firſt limitation is to heirs, the whole intereſt and dominion, in the ſame manner, veſts with that eſtate; if it is to iſſue (or heirs of the body, for I uſe thoſe words as ſynonymous, becauſe in wills they generally are ſo), then, upon its veſting, ſuch an intereſt is acquired, as enables the firſt taker, if he pleaſes, by the legal ceremony of a recovery, to convert his qualified, into an abſolute, intereſt and dominion, and thereby, in like manner, render the deviſe over a mere nullity. This laſt was the caſe in the preſent cauſe of *Doe* v. *Fonnereau*. The point, which is ſo clear, upon the principles laid down by Lord *Mansfield*, in delivering the opinion of the Court, was never before fully deved ped, and, directly, and explicitly, decided. Yet, to account for the certificate of the judges, in *Stephens* v. *Stephens*, we muſt ſuppoſe them to have held the ſame opinion, on this preciſe identical point. For all the deviſes there, as here, were executory; the limitation in fee to ſir *Richard* (the teſtator's brother), was after an indefinite failure of the iſſue of the grand-daughters, to whom a previous eſtate, in tail, was limited; and the certificate expreſsly ſays, that when the previous limitations ſhould be ſpent, the eſtate would go over to him, or veſt in him, by virtue of the laſt remainder to him in fee *. But, to go

* Caſes *temp. Talb.* 233.

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nion of the Court, to the following effect.—Lord MANSFIELD (having ſtated the ſpecial verdict): The caſe lies in a very narrow compaſs. If the eldeſt ſon was tenant in tail, the recovery was good, and barred the limitations over; or, if the limitations over were too remote, he was entitled, as heir at law. As to his being tenant in tail, a conſiderable objection has been made, viz. that he was tenant for life under the ſettlement, not under the will; and ſeveral authorities have been cited to prove, that the previous and ſubſequent eſtates, when limited by different conveyances, cannot unite. But, if they did not unite in this caſe, then the firſt limitation in the will was an excutory deviſe, which remained contingent till the death of *Thomas*, and the eſtate given to the ſecond ſon was alſo executory, and, being after an indefinite failure of iſſue, was too remote; therefore *quâ-*

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a little farther, if what was argued by the counſel for the plaintiff, in this caſe, is law (of which I believe there is no doubt), viz. that the words "heirs of the body of *Thomas*" were words of purchaſe, and that the eldeſt, and other ſons of *Thomas*, would have taken ſucceſſively, in tail male, under thoſe words, What elſe were the contingent eſtates to the younger ſons of *Thomas*, but executory deviſes, after the indefinite failure of the iſſue male of their elder brother? According to *John de Mandeville*'s caſe, the ſecond ſon of *Thomas* (and ſo of the others) muſt indeed have claimed, as heir-male of the body of his father, *per formam doni*, yet certainly not by deſcent, for as the eldeſt ſon took, ſo muſt he, by purchaſe.

It may be obſerved here, as not foreign to the caſe I am reporting, that the rule in *Shelley*'s caſe is not perfectly accurate, in ſaying, that, when there is, in the ſame conveyance, a limitation to the anceſtor, for life, and, mediately or immediately, to his heirs in fee, or in tail, the words, "his heir," are not words of purchaſe. When there is an intermediate veſted remainder, as in *Coulſon* v. *Coulſon*, thoſe words are words of purchaſe. They do not qualify the eſtate, or deſcribe the quantity of intereſt, given by the firſt limitation, but veſt another eſtate, viz. a remainder in fee, or in tail, in the tenant for life. They, at the ſame time, indeed, expreſs the quantity of that other eſtate, but ſo do other words of purchaſe, in general, expreſs the quantity of the intereſt: nor can it well be otherwiſe. The correct method of expreſſing the propoſition would be, that the words, in ſuch caſes, do not limit any eſtate to the heirs as purchaſors. *Rolle* ſeems to have intended to make this diſtinction, in the ſecond volume of his abridgment, title Remainder. He divides the rule laid down in *Shelley*'s caſe, into two paragraphs; and ſays, in the firſt, viz. with regard to an immediate limitation to the heirs, "The words 'the heirs' are words of limitation, "and not of purchaſe, 2 *Roll. Abr.* 417. Remainder (*G*) *pl.* 5." But, in the other, he changes the expreſſion. "When the anceſtor, by any gift "or conveyance, takes an eſtate of freehold, and, in the ſame gift or "conveyance, there is an eſtate, in fee, or in tail, to his right heirs me"diately (viz. where an eſtate for life, or in tail, is interpoſed between "the ſaid eſtates), this remainder ſhall attach in the anceſtor, and ſhall "not be in abeyance."

*cunque viâ datâ*, the deviſe by *Thomas*, under which the defendant claims, was good. AFTERWARDS HIS LORDSHIP ſaid, the Court had decided that the deviſe to the ſecond ſon was void, on the authority of the caſe of *Goodman* v. *Goodright*, 2 *Burr.* 873. 878. as reported by ſir *James Burrow*, but that they had ſince ſeen a manuſcript note of that caſe, taken by *Kenyon*, which aſſigned a ground for the determination different from that ſtated by ſir *James Burrow* (1). That the Court, upon this, entertained conſiderable doubts concerning the opinion delivered a few days before, and deſired to have the caſe argued again.—AT LENGTH the ultimate opinion of the Court was delivered as follows.—Lord MANSFIELD: After the ſecond argument, and upon conſideration of the caſe, we were of opinion, and gave judgment accordingly, that either *Thomas* was tenant in tail, by connecting his eſtate for life, in the deed, with the limitation, in the will, to his heirs male (without ſaying it was our opinion that they could unite), or that the limitation over was too remote, as being after an indefinite failure of iſſue; and we could find no caſe where the Court, in a will of real property, had raiſed an implication to confine the failure of iſſue to the life of the anceſtor. But, afterwards, turning the caſes on this ſubject in our minds, and conſidering the reaſons on which they proceed, namely, to prevent perpetuities; we ſtopped the judgment, and deſired the caſe might be again ſpoken to. It has been argued a third time, and we have changed our opinion, and ſhall give our reaſons. The rule is unqueſtionable, that *there cannot be an executory deviſe after an indefinite failure of iſſue.* But that is not the caſe here. We all think that *the eſtate for life being by one inſtrument, and the limitation in tail by another, they cannot unite*, and that the heirs male of *Thomas* would have taken by purchaſe. This is a ſettled point, and we lay it down as our

(1) It agrees, however, in the material part of the judgment of the court, with Mr. Juſtice *Blackſtone*'s account; and it appears, by both, that the deciſion went upon the alternative, either of the niece having taken an eſtate-tail by implication, or of the firſt deviſe (to the heirs of the body of the niece by any other huſband) being too remote, and, of courſe, the ſecond. The Court thought it unneceſſary to determine, whether the niece took an eſtate-tail by implication; and according to *Kenyon*'s note, Lord *Mansfield*, in giving judgment, ſaid, "The whole "of the caſe comes to this; whether Mrs. *Moſtyn* (the teſtatrix) in- "tended, by the deviſe, to give the heirs of the body of her niece *A. L.* "by a ſecond huſband, the remainder, reverſion, or eſtate (whatever it "is called), after the deaths of herſelf, *E. W.* and *A. L* and failure of "iſſue between them; or whether ſhe meant to give an eſtate in poſſeſ- "ſion, to the iſſue of *A. L.* by a ſecond huſband." His Lordſhip, therefore (being clear that it was not an immediate deviſe), put the caſe entirely on the remoteneſs of the firſt deviſe.

clear

clear opinion. What are the limitations here? They are, to the heirs male of the body of *Thomas*, and, in default of such issue, to the second, and other sons. There are two ways, in form of law, in which this last limitation may take effect. 1. If *Thomas* dies, leaving issue male, then the estate to the second son takes effect immediately, as a remainder expectant, which may be barred by a recovery. 2. Suppose the other alternative (which really happened), that *Thomas* has no son, then it is an executory devise to the second son, if *Thomas*, at his death, leave no issue male. This is within the limits established by law to prevent perpetuities. We have looked into the cases, to see how far this reasoning upon principle can be supported by authorities: and we think there are three which go a great way. In *Stephens* v. *Stephens*, the Court took a large stride of twenty-one years after a life in being. The argument was, that this would not create a perpetuity. Former cases had said, a limitation might be made to take effect on the death of a person *in esse*, or the birth of a posthumous child, and alienation was not restrained for any longer time in *Stephens* v. *Stephens*, for, if a devise could hold to a posthumous child, there could be no alienation till he should attain the age of twenty-one. An obvious objection to the alternative in this case is, that, if the limitation over is a remainder, it cannot be turned into an executory devise. That is true, if it ever vest as a remainder. But here it might, or might not, upon a contingency; and it never did. 2. So, in *Hopkins* v. *Hopkins*, Lord *Talbot* decided, in support of the intent, that a limitation, which in one event would have operated as a remainder, but which event did not happen, should operate as an executory devise. This he did upon principle, without precedents; and a great estate is now held under his determination. 3. *Brownsword* v. *Edwards* is another strong instance, where it was held that a devise may operate either way, according to the event (1). These are the authorities which go along with the principles I have stated, and enable us to support the intention of the testator. As to that, there is no doubt that he meant to give successive estates in tail male.—Judgment for the plaintiff.

The testator, *Samuel Hill*, by will, dated the 5th of October, 1759, devised to his son, *Richard Hill*, an annuity of 50l. for his life, to be issuing out of his real estates, and subject thereto; "he devised his copyhold "estates (which he had previously surrendered to the use of "his will), and also all his freehold estates, situate at Sowerby

Habergham, and Wife, and Wild v. Vincent and Wife, and Stansfeld, Mic. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 92

(1) *Canc.* 20 *March*, 1750-1. 2 *Vez.* 249.

" and Halifax, in the county of York, unto *J. Nuttall*, " *R. Nuttall*, *J. Whiteacre*, *G. Ramsden*, and *G. Stansfeld*, " and the survivors and survivor of them, their, and his heirs " and assigns, *to the use of his grand-daughter*, B. N. Hill, " *and her assigns, during her life*, without impeachment of " waste; remainder to trustees to preserve contingent re- " mainders; *remainder to her first and other sons, severally and* " *successively in tail male*; remainder to her daughters, as " tenants in common in tail general; *remainder unto, or for* " *the use of such person or persons*, and for such estate or estates, " *as he, by any deed or instrument to be executed by him, and* " *attested by two or more credible witnesses, should direct, limit,* " *or appoint.*" The devisor, *S. Hill*, by a deed poll, dated the 6th of October, 1759, under his hand and seal, and signed by him, in the presence of, and attested by two witnesses, after reciting his will, in pursuance of the power thereby reserved to him, limited and appointed his freehold and copyhold estates, " *after the death of his grand-daughter*, B. N. Hill, *and failure of her issue*, unto, and *to the use of the first, and other sons of his son*, R. Hill, by any woman he might thereafter marry (save and except a person therein named), severally and successively in tail male; with *remainder to the daughters of* R. Hill, *by such woman*, as tenants in common in tail; with remainder, *in default of such issue*, to the use of *the right heirs of the survivor* of the said *J. Nuttall*, *R. Nuttall*, *J. Whiteacre*, *G. Ramsden*, and *G. Stansfeld*, his heirs and assigns for ever." *G. Stansfeld* was the survivor of the five persons, to the right heirs of the survivor of whom, and his heirs and assigns, the freehold and copyhold estates were limited and appointed by the instrument of the 6th of October, 1759.—TWO QUESTIONS arose; FIRST, Whether the two instruments above stated, taken together, were at the time of the death of the devisor, sufficient to pass any estate or interest in the freehold, or copyhold premises, or either of them, not given by the first instrument? SECONDLY, Whether, upon the death of *R. Hill*, any, and what estate or interest in the freehold and copyhold premises, or either of them, passed by virtue of the said two instruments to the said *G. Stansfeld*, or will at his death pass to such person as shall then be his right heir?—Lord KENYON, Ch. J. The case of *Brudenell* v. *Boughton*, 2 *Atk.* 274. established this point, that, *where a will charges land with all legacies generally, any legacies given by a codicil unattested according to the statute of frauds, will be a charge on that land.* But on that point we are not now called upon to decide; because this instrument, of the 6th of October, is a deed and not a will; it was called a deed by the party himself, it is stamped, and has all the semblance of a deed. Then supposing this to be a deed, there is no case in which it was ever decided, that a series of limitations, in part created

created in one deed, and in part in another, can be conſolidated. But the contrary has been frequently determined, in *Moore* v *Parker*, 1 Lord *Raym.* 37. *Goodman* v. *Goodright*, 2 *Burr.* 873, and in many others (1). And where there is a limitation to *A.* for life in one deed, and to his heirs in another, they cannot be coupled, nor have the ſame effect as if both the limitations were contained in the ſame inſtrument. Then, in this caſe, the limitations created by the will, ceaſed on the death of *B. N. Hill*; and the limitations created by the latter inſtrument, whether conſidered as ſpringing uſes or executory deviſes, are too remote, becauſe they were only to take effect after a general failure of iſſue of *B. N. Hill.* What was the deviſor's ſituation after making his will? He was ſeiſed in fee of certain eſtates, and, being ſo ſeiſed, executed this deed on the 6th of October, by which he created certain limitations after a general failure of iſſue of his granddaughter: but thoſe limitations are too remote. And the limitations under the will have ceaſed by the death of the firſt deviſee, without iſſue.—GROSE, J. of the ſame opinion. PER CURIAM: We are of opinion, that the two inſtruments above ſtated, taken together, at the time of the death of the teſtator, were not ſufficient to paſs any eſtate or intereſt, in the freehold or copyhold premiſes, or either of them, not given by the firſt inſtrument. And we are further of opinion, that upon the death of *Richard Hill*, no eſtate or intereſt in the freehold and copyhold premiſes, or either of them, paſſed by virtue of the ſaid two inſtruments to the ſaid *George Stansfeld*, or will at his death paſs to ſuch perſon as ſhall then be his heir.

A child in *ventre ſa mère* may take an eſtate tail.—The teſtator *(inter alia)* deviſed as follows: "I give, deviſe, and "bequeath unto my grandſon, *John Heddon*, all my freehold, "leaſehold, fountainſhold, lands, tenements, hereditaments, "and eſtates whatſoever, to him, his heirs, and aſſigns for "ever, *ſave and except as hereinafter mentioned; that is to* "*ſay*, PROVIDED, *that in caſe my ſon*, John Whitelock, *ſhall* "*have any ſon, or ſons, begotten and born in lawful matrimony,* "*then I give, deviſe, and bequeath all my ſaid freehold, leaſe-*"*hold, fountainſhold, lands, tenements, hereditaments, and eſtates* "*whatſoever, hereinbefore given and deviſed to my grandſon*, John "Heddon, *to ſuch male iſſue as my ſaid ſon*, John Whitelock, "*ſhall, or may have* AT THE TIME OF MY SAID GRANDSON, "*John Heddon*, ATTAINING THE AGE OF TWENTY-ONE YEARS; "but I will, order and direct, that in caſe my ſaid ſon, *John White-*"*lock*, ſhall have any male iſſue, then I order and direct, that the ſaid

Whitelock, Adminiſtrator, &c. *et al. v.* Heddon *et al.* Ea. Ter. 38 Geo. 3. C.B. 1 *Pul.* & *Boſ.* 243.

(1) See *Doe* d. *Fonnereau* v. *Fonnereau*, *ante* 144.

"*John*

" *John Heddon* ſhall receive the rents and profits of my ſaid " freehold, leaſehold, fountainſhold, lands, tenements, hereditaments, and eſtates whatſoever, until he ſhall attain the " ſaid age of twenty-one years, as above mentioned." He next proceeded to give ſeveral legacies to his grandchildren, the *Heddons*, to ſome of his friends, and to the poor of Biſhop Monckton, in the county of York. *Thomas Whitelock*, the teſtator, died, leaving *John Whitelock*, his only ſon and heir at law. The deviſed eſtates were taken poſſeſſion of for the uſe of *John Heddon*, the firſt deviſee, till he attained the age of twenty-one years, and when that period arrived, viz. the 21ſt of May, 1792, he entered on thoſe eſtates. *After the death of* Thomas Whitelock, *the teſtator, and before* John Heddon *attained the age of twenty-one*, John Whitelock *had a ſon born, named* John, *who died when five weeks old, and before* John Heddon *attained twenty-one. At the time of* John Heddon *attaining the age of twenty-one, the wife of* John Whitelock *was* enſient *with a child, which was born the* 31 *of Auguſt*, 1792, *being ſomething leſs than three months after* John Heddon *attaining the age of twenty-one* (1). This child was chriſtened *Thomas*, and died the 24th of January, 1795. THE QUESTION WAS, WHETHER the above-named *John Whitelock*, the firſt ſon of the plaintiff, *John Whitelock*, or the ſaid *Thomas Whitelock*, the ſecond ſon of the ſaid plaintiff, *John Whitelock*, or either of them, were, or was entitled to any, and what eſtate, under the will of the ſaid *Thomas Whitelock*, their grandfather, in the eſtates thereby deviſed? EYRE, Ch. J. We have no difficulty in ſaying that *John Whitelock*, the firſt ſon, took no eſtate at all. With regard to the eſtate which *Thomas Whitelock* took, if it had been aſked of the teſtator when he was making the diſpoſition in queſtion, what intereſt he meant that ſuch a ſon, being in *ventre ſa mere* at the time of *John Heddon* attaining the age of twenty-one, ſhould have, I think it very probable that he would have ſaid, that ſuch a ſon ſhould take an eſtate in fee; and probably he would not have thought of the limitation over. This queſtion, however, has not been aſked of the teſtator, and it is but conjecture what anſwer he would have made if it had been aſked; we therefore muſt conſider what he has ſaid, and muſt put a reaſonable conſtruction on his words, with reference, where they are capable of different conſtructions, to the reſt of the will. *He has ſaid clearly, that he meant to give an eſtate in fee-ſimple to his grandſon.* John Heddon; *but that if his ſon*, John Whitelock, *ſhould have a ſon or ſons, then he meant to give a benefit to ſuch of them as ſhould be living at the time when* John Heddon *ſhould attain the age of twenty-one.* It is moſt

(1) See the caſe of *Doe* v. *Clarke*, in p. 17.

evident,

evident, that he meant all the sons of *John Whitelock* who should be living at the time when *John Heddon* should come of age, to have a benefit of some kind or other: and the words, "such male issue" must be construed to be so far synonymous to son, or sons, as that in some manner they should all partake of this benefit. Now there are but two ways in which this can be effected, either by their taking as joint-tenants, or in succession in tail male. In the strict acceptation of the words "*such* male issue," taken with reference to the words "son or sons," before used, they mean no more than son or sons; but when I consider that these sons were the sons of his own son, who it appears were to have the benefit of his bounty, in preference to the son of his daughter, and that this word "issue" is a collective term, capable of being descriptive either of person or interest, or both, *I think it reasonable to understand the word* "ISSUE" *in its largest sense, so as to deem it descriptive of an estate in tail male to the sons of* John Whitelock, *as many as there should be in order of succession.* This is what the words will bear. As to the argument, that a fee is conveyed to the sons of *John Whitelock*, by the word "estates," I take the rule to be, that it may convey a fee if the Court sees, on the whole context of the will, that the testator intended that it should do so; but that, in its strict technical sense, it does not convey a fee.—BULLER, J. The first question here will be on the sense of the word "estate," as used in this will. There are many cases in which this word has received different interpretations. *Noscitur a sociis.* Look to the words which accompany, and are connected with it. What I said in a former case, with respect to the word "hereditaments," has been mis-stated (1). I never said that it would in all cases carry a fee; but that, accompanied with other words, it might carry a fee. Lord *Kenyon* thought it never could, and that was the only point in which we differed. Now if the word "estate" will not pass a fee in this case, the whole dispute with respect to the freehold is at an end; for whether *Thomas Whitelock* took an estate tail, or for life, will make no difference; though I concur in opinion with my Lord, that the words used will give an estate in tail male. HEATH, J.—I am of the same opinion. The word "estate," must be taken according to the context. There is a case in *Eq. Cas. Abr.* 178. (2) where a man having devised the residue of his goods, leases, mortgages, estates, debts, ready money, and

(1) See the case of *Doe* ex dim. *Palmer* v. *Richards*, in p. 95, and *Denn* ex dim. *Mayor* v. *Mellor*, *infra*, p. 162.

(2) *Wilkinson* v. *Merryland*, *Cro. Car.* 447.

other

other goods whereof he was poſſeſſed; the word "eſtates" was confined to perſonal eſtate, being coupled with chattels. It may give an eſtate for life, in tail, or in fee, according as the intention of the teſtator appears. Here I think it carried a fee-tail, from the manifeſt intent of the teſtator to prefer the line of the ſon to that of the daughter.—ROOKE, J. I am of the ſame opinion. The word "eſtate" or "eſtates," may or may not give a fee-ſimple, according to the context. There is no expreſſion in this will to ſhew, that it was the teſtator's intention to deſcribe, by the word "eſtates," the quantity of intereſt which was to paſs, but only the premiſes; and I think it does appear that he meant to give an eſtate tail, it having been his manifeſt intention to give an inheritance to the ſon of his ſon, in preference to the grandſon by his daughter. PER CURIAM: We are of opinion that *John Whitelock*, the firſt ſon of the plaintiff *John Whitelock*, was not entitled to any eſtate under the will of *Thomas Whitelock*, his grandfather: and that *Thomas Whitelock*, the ſecond ſon, took an eſtate in tail male, in the eſtates which the teſtator held in fee-ſimple: and that, in reſpect to the leaſehold eſtates for lives, he and his heirs male, took as ſpecial occupants during the lives of the *ceſtui que vies*.

## *What Words will only create an Eſtate for Life.*

Frogmorton *ex dim.* William Wright *v.* Sarah Wright *et al.* Ea. Ter. 13 Geo. 3. C.B. 2 *Black.* 889. 3 *Wils.* 414.

The teſtator, *William Wright*, being ſeiſed in fee, duly made his laſt will and teſtament, dated the 19th of March, 1728, containing in the preamble theſe words: "*As touching* "*the diſpoſition of all my temporal eſtate, I give and diſpoſe* "*thereof as followeth; Imprimis*, firſt of all, I *will* that my "debts and funeral charges be paid and diſcharged. *Item*, I "give unto *Henry Wright* and *Nathan. Wright*, my nephews, "two houſes at Bank, in Leeds, with a croft and appur- "tenances belonging to them, to be equally divided between "them;" then follows the deviſe whereupon the queſtion ariſes; "*Item, I give unto* William Wright, *my nephew, two* "*houſes at Seacroft, with a croft and appurtenances belonging to* "*them; now in the occupation of* John Carter *and* Elizabeth "Thornton;" then he gives ſeveral ſmall legacies, and to his brother, *Henry*, five ſhillings in the year as long as he liveth; and then he goes on and ſays, "*And it is my will,* "*that none of the houſes and land named above, to be entered to* "*by the above-named* Henry Wright, Nathan. Wright, *and* "William Wright [his three nephews], *until the deceaſe of* "*my executor; Item*, I leave unto *Nathan. Wright*, my own "brother, to be full executor of all goods and chattels "whatſoever, and to be full executor of this my laſt *will*

"and

" and *testament.*" THE QUESTION was, Whether *William Wright*, the youngest son of *Nathan. Wright* (the testator's brother), and nephew of the testator, took an estate in fee, or for life only, in the two houses at Seacroft, with a croft with the appurtenances, being the premises now in question? It was argued, that by these words, *viz.* " *As touching the* " *disposition of all my temporal estate, as it hath pleased Almighty* " *God to bestow on me, I dispose thereof as followeth, in the* " *preamble*;" that *William*, the nephew, took a fee in the premises in question, by the intention and meaning of the testator.—LD. CH. J. DE GREY: It may seem probable, that the testator's intention was, that his nephew, *William*, should have a fee, *but it is a clear rule that there must be express words, or a necessary implication, to disinherit the heir at law*; neither of these appear in the present case, and therefore the legal operation of the words of the *will* must govern. By the words, *all my estate*, he must be understood to mean the thing, viz. his lands, and not the quantity of estate [a fee] which he had in those lands. There is a great difference between the description of the thing, estate, or lands devised, and the quantity of interest or estate in the thing, estate or lands devised. The word *hereditaments* may in a *will* be a fee: so if I make one my heir: or the word *reversion* may give a fee: but *all implied devises in fee, are subject to restrictions*; as, I " give all my estate in such a place to *A. B.*" or " I make such a one my heir for life," carry only an estate for life. Some words, as, " I give all my tenements, lands, houses, farms;" of themselves, never carry more than a description of the *thing per se.* It is true, where there's a purpose or intention joined to such words, as, " I give my houses to *A. B.* to pay my debts," those words carry a fee, so a devise to sell, is a fee; or a devise of houses charged with debts which takes money out of the pocket of the devisee, is a fee. It does not appear in this case, that the testator has charged the lands in question with any debts; he desires his debts to be paid, but doth not say out of what estate. *Where words taken by themselves [in a will] may only give an estate for life, yet by relation to other words in the will*, they may carry a fee, *Green* versus *Armsteed*, *Hob.* 65. and in *Salk.* 234. Upon the whole, I am of opinion, that *William, the nephew, took only an estate for life, and that the lessor of the plaintiff, who is heir at law to the testator, is entitled.* PER TOT. CUR.—Judgment for the plaintiff, the heir at law.

The testator, *Samuel Cardale*, after these introductory words *(as touching such estate wherewith it hath pleased Almighty God to bless me with)*, gave and devised all his real and personal estate to his wife, *for her natural life. Item*, " I give " unto my son, *Paul Cardale*, all that my land lying and " being in the parish of Dudley, in the county of Worcester, " near

Roe *ex dim.* Callow, *et al. v.* Bolton, Mic. Ter. 16 Geo. 3. C. B. 2 *Black.* 1045. 2 *Doug.* 761.

" near unto a certain place, called *Tinſly Hill*, into three " parts divided, *at or immediately after my wife's deceaſe.*" Then came ſeveral legacies of perſonal and leaſehold property to his ſon, *Iſaac Cardale*, and his daughter, *Elizabeth Maſon*, after his wife's death, and then followed this clauſe: *Item*, " my will is, that all my grandchildren that are living " twelve months after my wife's deceaſe, ſhall have five " ſhillings each of them, as a token of the love that I bear " *unto my generation.*" THE QUESTION was, Whether *Paul* took an eſtate for life under this will, or an eſtate in fee. AND THE COURT were clearly of opinion, that as there is nothing to prove the intention of the teſtator to give more, or a larger eſtate, than the legal import of the words convey, except the trifling pecuniary legacy of 5s. to his heirs at law; and even this depending on the contingency of their ſurviving their grandmother a twelvemonth; this will not be ſufficient to exempt it from the general rule of law, which declares, that *a gift to a man of lands, without expreſſing for what eſtate, veſts only an eſtate for life.*—Poſtea to the plaintiff.

Denn, *ex dim.* Gaſkin, *v.* Gaſkin, Mic. Ter. 18 Geo. 3. B.R. *Cowp.* 657.

The teſtator, *Jonathan Gaſkin*, being ſeiſed in fee, deviſed as follows: " *As to all ſuch worldly eſtate as God has endued* " *me with*, I give and bequeath as follows; I give, bequeath, " and deviſe, *all that my freehold meſſuage and tenement* lying " in G. together with all houſes, &c. unto *Matthew Robinſon*, " *George Robinſon*, and *Thomas Robinſon*, *equally* to them " my ſiſter's ſons." The teſtator then, after bequeathing ſeveral ſmall pecuniary legacies to moſt of his relations, " *gave to* John Gaſkin *(the leſſor of the plaintiff, and his heir* " *at law) ten ſhillings*; all the reſt of his goods, chattels, and " perſonal eſtate whatſoever, he gave to *Matthew*, *George* and " *Thomas Robinſon.*" THE QUESTION was, Whether the leſſor of the plaintiff, the heir at law, was entitled to recover? And in ſupport of his right to recover, it was argued; 1ſt, That by the deviſe to the teſtator's three nephews, they took only an eſtate for life in the premiſes; 2dly, That they took as tenants in common only, and not as joint tenants, and, conſequently, that two of the nephews, *Matthew* and *George*, being dead, he was intitled to two-thirds of the whole eſtate. PER CURIAM: It is ſettled in deviſes, as well as in deeds, that if no words of limitation are added, the deviſee can only take an eſtate for life, becauſe the law implies a life eſtate only, where there are no words of limitation: but as there are no technical words neceſſary in a will, if the teſtator makes uſe of what is tantamount, as if he ſays, *I give to ſuch a one in fee-ſimple*, or *all my eſtate*, that will carry all his intereſt in the land deviſed; but there muſt be words in the will to control the rule of law, which, in a variety of caſes, thwarts the intention of the teſtator. In this caſe,

caſe, the teſtator certainly meant to give his nephews a fee in the premiſes in queſtion, for he had no other landed property: he makes them reſiduary legatees of his perſonalty, and gives a diſinheriting legacy of 10s. to his heir at law, agreeable to the vulgar notion taken from the Roman law, that an heir is cut off with a ſhilling; becauſe, by the Roman law, a will that paſſed by the heir was called *inofficioſum teſtamentum.* BUT the ſingle queſtion is, Whether we can find any words in the will to take this caſe out of the rule of law, if we cannot, it muſt be adhered to; *for, though the intention is ever ſo apparent, the heir at law muſt of courſe inherit, unleſs the eſtate is given to ſomebody elſe.* Now it is impoſſible to find words in this will ſufficient to control the rule of law: if the teſtator had any way connected the introductory part, *as to all my worldly eſtate,* with the deviſe in queſtion, it might have done. He does not ſay in the introduction, that he *means to diſpoſe* (1) of *all* his worldly eſtate, but that, *with reſpect to it,* he deviſes ſo and ſo: if he did mean it, the misfortune is, that *quod voluit non dixit.* Great uſe has been made of this ſort of introduction in wills, in favour of the clear intention of the teſtator, and more in favour of creditors, to make a real eſtate liable to the debts of a teſtator. If it were poſſible to borrow aid from it, we would do it here; but there are no words that can connect the deviſe of the lands in queſtion, with the introduction in this caſe, ſo as to paſs the whole intereſt, therefore the deviſees can only take an eſtate for life.—As to the next queſtion, Whether this is a tenancy in common, or a joint-tenancy, there is no room for argument, EQUALLY as well as EQUALLY to be divided implies a diviſion; whereas, if they were to take as joint-tenants, there would be no diviſion.

ASTON, J. ſtated the caſe of *Wright*, ex dim. *Shaw* v. *Ruſſel*, in point, as follows: the words of the introduction to the will were, "*as touching the diſpoſition of all ſuch worldly eſtate as it hath pleaſed God to beſtow upon me*, I give, &c." Then the teſtator gave a houſe to his grandſon, *Henry*, and, after his deceaſe, to his two ſons, *Thomas* and *William*, *and then deviſed to* Thomas Ebb, *the huſband of the heir at law, one ſhilling.* THE QUESTION was, Whether *Thomas* and *William* took an eſtate *for life*, or in *fee?* AND the Court held, they took only an eſtate for life.

Wright, *ex dim.* Shaw, *v.* Ruſſel, Hil. Ter. 1761. in *Stace* cited *Cowp.* 661.

The teſtator, *Wm. Sparrowhawk*, being ſeiſed in fee, deviſed as follows: "FOR THOSE WORLDLY GOODS AND "ESTATES, wherewith it hath pleaſed Almighty God to "bleſs me, I give and diſpoſe in manner following; *imprimis,*

Right, *ex dim.* Mitchell, *et ux.* *v.* Sidebotham *et al.* Tr. Ter. 21 Geo. 3. B R. 2 *Doug.* 759.

(1) In moſt of the former caſes, the introductory words have run, *as to the diſpoſition of* my worldly eſtate.

"I give

" I give and bequeath to my ſiſter, *S. M.* one ſhilling. " *Item*, I give and bequeath to *J. M.* ſon of *S. M.* one " ſhilling, to be paid by my executrix hereinafter named, " within three months after my deceaſe. *Item*, I give and " bequeath to my loving wife, *Suſannah Sparrowhawk*, all " the reſt of my goods and chattels, and perſonal eſtate " whatſoever; ALSO I DO GIVE AND DEMISE *unto* Su- " ſannah Sparrowhawk, *my ſaid wife, her heirs and aſſigns* " *for ever, all my lands lying in the pariſh of B. in the county* " *of O. and now in the occupation of M. S.* AND I GIVE " AND BEQUEATH TO MY LOVING WIFE AFORESAID, " ALL MY LANDS, TENEMENTS, AND HOUSES, LYING " IN THE PARISH OF CHIPPING-NORTON; to wit, the " houſe I now live in, the ſign of the Plough, ſtanding be- " tween the houſes of *W. W.* and *T. A.* and now in my " occupation, with the yard, garden, and outhouſes, and all " other appurtenances thereto belonging. *Laſtly*, I do make " and conſtitute *Suſannah Sparrowhawk*, my ſaid wife, full " and ſole executrix of this my laſt will and teſtament." THE QUESTION was, Whether the laſt mentioned premiſes in the will were, by the true conſtruction thereof, deviſed to the widow in fee, or only for life? Lord MANSFIELD, Ch. J.—I verily believe, that in almoſt every caſe where, by law, a general deviſe of lands is reduced to an eſtate for life, the intent of the teſtator is thwarted; for ordinary people do not diſtinguiſh between real and perſonal property. The rule of law, however, is eſtabliſhed and certain, that expreſs words of limitation, or words tantamount, are neceſſary to paſs an eſtate of inheritance. " All my eſtate," or " all my intereſt," will do; but " all my lands lying in ſuch a place" is not ſufficient. Such words are conſidered merely as deſcriptive of the local ſituation, and only carry an eſtate for life. *Nor are words tending to diſinherit the heir at law ſufficient to prevent his taking, unleſs the eſtate is given to ſomebody elſe.* I have no doubt but the teſtator's intention here was to diſinherit his heir at law, as well as in the caſe of *Den* v. *Gaſkin*; but the only circumſtance of difference between that caſe and this, and which has been relied on as in favour of the defendants, if the teſtator had any meaning by it (which I do not believe he had), rather turns the other way, becauſe he uſes different words in deviſing two different parts of his eſtate. PER CURIAM: Judgment for the plaintiff.

Doe, *ex dim.* Cole, *v.* Weſton, *et al.* Tr. Ter. 18 Geo. 3. C.B. 2 *Black. Rep.* 1215.

*Nicholas Cole*, being ſeiſed of an eſtate in fee, " deviſed " to his ſon, *Thomas Cole*, and his daughter, *Lucy Hopkins*, " *all his real and perſonal eſtate, to be equally divided between* " *them, or the longeſt ſurvivor, paying his (the teſtator's) law-* " *ful debts and legacies, and, after their deceaſe, to the male* " *heir.* And gave his ſon, *Henry Cole*, one ſhilling, to be " paid

" paid by his executors or executrix." The teſtator died, leaving *Henry* his eldeſt ſon and heir at law. The deviſee, *Thomas Cole*, died without iſſue; and *Lucy Hopkins*, who ſurvived, afterwards died, leaving iſſue a daughter, *Betty Hopkins*.—*Henry Cole*, the eldeſt ſon and heir of the teſtator, was alſo dead, leaving iſſue, *Thomas Cole*, the leſſor of the plaintiff. THE QUESTION was, *Whether the ſon of* Henry, *or the daughter of* Lucy, *was entitled to the premiſes in queſtion?* PER CURIAM: By the firſt part of the will, *Thomas* and *Lucy* are made *tenants in common for life, which the ſubſequent words of ſurvivorſhip will not change into a joint-tenancy.* But this deviſe is under a *condition* to pay the teſtator's debts and legacies. Of the latter there are none to charge the deviſees; for the ſhilling is payable by the executors. *The remainder is to the male heir*, an obſcure expreſſion, leaving it uncertain whether he meant their male heir, or his own. But, *quâcunque viâ datâ*, the daughter of *Lucy* cannot take, for ſhe does not anſwer the deſcription; ſo, of courſe, it devolves to the heir at law.

The teſtator, *Chriſtopher Blacket*, was ſeiſed of the tenements in queſtion in his demeſne, as of fee, and was likewiſe poſſeſſed of ſeveral lands and tenements, held by him under leaſes for years, lying contiguous to the ſaid freehold tenements, and which ſaid leaſehold lands and tenements were demiſed along with the ſaid freehold tenements, without diſtinction, to the ſeveral occupiers thereof, who enjoyed the ſame leaſehold and freehold tenements, *without knowing or enquiring which were leaſehold and which were freehold*; and being ſo ſeized on the 24th of Auguſt, 1738, he made his laſt will and teſtament in writing, and thereby deviſed as follows: " I give, bequeath, and deviſe, to my dearly-beloved " wife, *E. B.* all my freehold and leaſehold meſſuages, " houſes, lands, and tenements, ſituate at N. in the county " of N. and elſewhere, and all my eſtate and intereſt therein, " *for and during her natural life*; and I do hereby conſtitute " and appoint *J. F.* truſtee for my ſaid wife, during her " natural life aforeſaid. AND FROM AND AFTER HER " DECEASE, *I give, deviſe, and bequeath, the ſaid meſſuages,* " *houſes, lands, and tenements,* TO MY SISTERS IN LAW, " Mrs. *Elizabeth Smart*, and Mrs. *Martha Bellaſyſe*, AS " TENANTS IN COMMON. *But in caſe my mother*, Mrs. " Alice Bellaſyſe, *ſhall give, or cauſe to be given, any diſturb-* " *ance or moleſtation to my ſaid wife, about the poſſeſſion and* " *enjoyment of my ſaid meſſuages, houſes, lands, and tenements,* " *then my mind and will is, that the ſame ſhall go to my kinſman,* " William Blackett, *&c. his heirs and aſſigns for ever: and* " *I give and bequeath the ſaid meſſuages, houſes, lands, and* " *tenements to him accordingly, and do make him my* SOLE " HEIR *thereof.*" THE QUESTION was, Whether the eſtate

Roe, *ex dim.* Bowes, *v.* Blackett, Hil. Ter. 15 Geo. 3. B.R. *Cowp.* 235.

given to the ſiſters in law, *as tenants in common*, was an eſtate for life, or in fee? LD. MANSFIELD, CH. J. delivered the opinion of the Court. There are no words of limitation added to this deviſe, and therefore it is clear, by the rule of law, that it is only an eſtate for life, unleſs it can be found, from the whole of the will taken together, and applied to the ſubject-matter of this deviſe, that the teſtator's intention was to give a fee; indeed, if, from the whole of the will ſo taken together and applied to the ſubject-matter, it can be collected, that the teſtator meant to give a fee, it ought to be ſo conſtrued, to give effect to ſuch intention. But I am not able to find, in this will, any circumſtances ſufficiently certain to ſatisfy my mind, that the teſtator really meant a fee: it is enough for our judgment, that the conſtruction is doubtful; for, in order to make a deviſe of lands, *without any limitation* added, a fee, ſuch an intention muſt appear, as is ſufficient to ſatisfy the conſcience of the Court in pronouncing it ſuch. If it is barely problematical, the rule of law muſt take place: no inference is to be drawn in this caſe, the one way or the other, from the circumſtance of the teſtator's knowing how to give, for that does not appear; *therefore*, it being very doubtful, whether the teſtator did mean a fee or not, our determination muſt go by the rule of law, namely, that there being no words of limitation, *the half ſiſters take an eſtate for life only*, and, conſequently, there muſt be judgment for the defendant.

Denn, *ex dim.* Moor, *v.* Meilor, Ea. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 558. 6 *Ter. Rep.* 175. 8 *Ter. Rep.* 67. 1 *Pal. & Baſ.* 30.

In this caſe, the Court of B.R. held, that only an eſtate for life paſſed under theſe words; "All the reſt of my lands, "tenements, and *hereditaments*, either freehold or copyhold, "and alſo all my goods, &c. after payment of my juſt debts "and funeral expences, I give to *A.* &c." But it ſeems that this judgment of the court of B.R. was afterwards reverſed on a writ of error, in the Exchequer Chamber.—

The teſtator, *John Carr*, being ſeiſed in fee of the premiſes in queſtion, being a copyhold inheritance, deviſed as follows: "I give and deviſe unto *N. Liſter*, of, &c. all that my "cuſtomary or copyhold meſſuage or tenement, with the "appurtenances, ſituate, &c.; *all the reſt of my lands, tene-* "*ments*, AND HEREDITAMENTS, *either freehold or copyhold,* "*whatſoever and wherefoever*; and alſo all my goods, chattels, "and perſonal eſtate of what nature or kind ſoever, *after* "*payment of my juſt debts and funeral expences*, I give, deviſe "and bequeath the ſame unto my wife *Siſſily Carr*; and I "do hereby nominate and appoint her, my ſaid wife, ſole "executrix of this my will." THE QUESTION WAS, WHETHER *Siſſily* took an eſtate *in fee*, or *for life* only, in the premiſes deviſed to her under the above will?—Lord KENYON, C. J. Had there not been ſuch a current of authorities as we find in the books, ſince the paſſing of the ſtatute of wills, on the conſtruction of wills, to further (as it has been called) the intentions of deviſors, perhaps it would

would have been better that the ſame ſtrict words had been required in teſtamentary diſpoſitions of land, as in thoſe by deed; becauſe then the language of paſſing eſtates would have been ſo familiar that few queſtions would have ariſen on wills. For it has been often obſerved, that few queſtions ariſe on the conſtruction of deeds when compared to thoſe which daily ariſe on wills. But we are bound to conſider the ſeries of authorities on this ſubject as the law of the land; and it would be extremely dangerous now to remove thoſe land marks of real property, on which mankind have acted for ſuch a length of time. In many of the caſes that have been litigated, and in which it has been decided that the firſt deviſee was only entitled to a life eſtate, one cannot but ſuſpect, privately ſpeaking, that it was the intention of the deviſor to give the abſolute property to the firſt taker; and Lord *Mansfield* uſed to obſerve that the common claſs of men imagined that they could deviſe a fee-ſimple by the ſame words that are ſufficient to give a piece of plate. But the contrary of ſuch a ſuppoſition has now been decided by ſo many authorities, that it would be dangerous to ſhake them; and in deciding on the conſtruction of wills, we muſt not indulge in conjectures or wiſhes, but determine on the words uſed according to thoſe authorities. Where the word "ESTATE" has occurred, that word has been held *ex vi termini* to paſs a fee. The courts, indeed, have gone as far as they could to give the abſolute intereſt to the firſt deviſee: but there are certain limits which they have put on their conſtruction of wills, and we muſt take care not to tranſgreſs them. *Where a deviſee is directed to pay an annual rent charge, or a ſolid ſum, to another perſon out of the eſtate deviſed, it has been properly decided that the deviſee ſhould take a fee, becauſe he might be a loſer unleſs the eſtate in his hands were at all events ſufficient to enable him to bear thoſe charges.* Where a ſum of money is given, it may be payable before the rents may become due, and where an annual charge is made on the eſtate, it may continue beyond the life of the deviſee, and therefore it is neceſſary in both thoſe caſes that the deviſee ſhould have a permanent fund. This caſe has been compared to that of *Doe* v. *Richards* (*ante* 95): but there the words were "*my legacies and funeral expences being* thereout *paid*," which imported that thoſe ſums were to be paid by the deviſee out of the intereſt given to her; and if ſhe had died immediately after the deviſor, and had only taken a life eſtate, the fund out of which ſhe was to bear thoſe charges might have failed; we were therefore compelled to make that deciſion, and I am now perfectly ſatisfied with it. But in this caſe the words of the will are, "after payment of my juſt debts and funeral expences." Now, ſuppoſing the deviſor had in the beginning of the will charged his debts and funeral expences on his real eſtate, and had then after a

ſeries of limitations deviſed to his wife in the words now uſed, it could not have been contended that ſuch a charge on the real eſtate would have paſſed the fee to his wife; and if not, the place in which the ſame words are introduced cannot vary the queſtion. I admit that the real eſtate is charged with the payment of debts and funeral expences, if the perſonalty be inſufficient for that purpoſe: but there are no words charging the eſtate in the hands of the wife with the payment of thoſe debts. This, therefore, eſſentially differs the preſent caſe from that of *Doe* v. *Richards* (*ante* 95): the debts were to be paid by the deviſee, and were a charge for there on the eſtate in his hands, whereas here the debts are no charge on the deviſee. I cannot diſtinguiſh this caſe from that of *Canning* v. *Canning*, *Moſely*, 240, where it was held that only an eſtate for life paſſed under ſimilar words: viz. *after his juſt legacies and funeral expences are fully ſatisfied and paid*, and there is another deciſion of the ſame kind in 2 *Atk.* 341. It has been contended, however, on another ground, that the wife of the deviſor took a fee, becauſe the word "HEREDITAMENTS" is uſed in the deviſe to her: but the caſes *Hopeland* v. *Ackland*, *Salk*, 239 (*ante* 96); *Canning* v. *Canning*, *Moſeley* 240; ſhew that that word is not ſufficient to paſs a fee, and thoſe caſes are not oppoſed by any one judicial authority. An expreſſion of *Buller*, J. in a late caſe, *Doe* ex dim. *Palmer* v. *Richards* (*ante* 96), has indeed been mentioned, as being contrary to the decided caſes: but it was not neceſſary for us in that caſe to make any determination on the legal import of that word, becauſe we were of opinion on another ground that the deviſee took a fee. I think he did not mean to be bound by the expreſſions he there uſed on this point; and at all events they do not neceſſarily import that he thought that the word "hereditaments" would paſs a fee. In ſome of the caſes upon wills, introductory words, declaring the deviſor's intention to diſpoſe of every thing he had, have been relied on as a circumſtance, taken into conſideration with others, to ſhew that he meant to give a fee, though that circumſtance alone has never been relied on for that purpoſe: however, in this caſe, it is ſufficient to ſay that thoſe words are wanting. Taking all the authorities together, and endeavouring to eſtabliſh an uniformity of deciſions, I think we are bound to determine againſt the deviſee in this caſe, for whatever our conjectures may be (and privately ſpeaking I think the deviſor meant to give an eſtate in fee to his wife), we are not at liberty to follow thoſe conjectures, but are compelled by the authorities to ſay that ſhe only took an eſtate for life under her huſband's will.—GROSE, J. In this caſe an attempt has been made to enlarge the deviſe to the widow by the word "hereditaments." But the caſes cited

ſhew

ſhew that that word alone will not paſs a fee, and no contrary deciſion has been mentioned. I think I am therefore bound to ſay that that word alone will not extend the deviſe to the widow beyond a life eſtate. Beſides, where a man gives his land, and then goes on to give his perſonal eſtate after payment of debts, it is fair to ſuppoſe that he intends that the payment ſhall be made out of that fund, which the law firſt appropriates to the payment of ſuch debts. On the authority of the caſes, and not finding any thing in the will, from which I can clearly ſee that the deviſor intended to diſinherit the heir at law, I am compelled to ſay, that in this caſe the widow took only an eſtate for life.

The leſſor of the plaintiff being diſſatisfied with the foregoing determination againſt him, brought this ejectment; and, on the trial, a ſpecial verdict was found, in order that the caſe might be carried up to the Houſe of Lords. But as the facts found by the ſpecial verdict, were preciſely the ſame as thoſe contained in the caſe before reſerved, the Court gave judgment for the defendant, without hearing another argument; ſaying that they ſaw no reaſon to alter the opinion which they gave, when the caſe was before argued.—Judgment for the defendant.

Doe *ex dim.* Mellor *v.* Moor, Hil. Ter. 35 *Geo.* 3. B.R. 6 *Ter. Rep.* 175.

But, in the caſe of *Doe* v. *Wright*, it was mentioned in the argument, that the above judgment, in *Denn* v. *Mellor*, has ſince been reverſed in the exchequer-chamber (1): not on the ground that the word hereditaments was of itſelf ſufficient to carry a fee, but becauſe, from the general context of the will, ſuch appeared to have been the deviſor's intent.—Lord KENYON, Ch. J. On the reverſal of the judgment in *Denn* d. *Moor* v. *Mellor*, I can make no obſervation, *never having heard of it until this moment, and not knowing, even now, on what grounds the judgment given in this Court was reverſed.* The principal argument in that caſe aroſe, not on the word "hereditaments," but on the words which created a charge on the real eſtate for the payment of debts; but now it is ſuppoſed that our judgment was reverſed, not on any one ground in particular on which the caſe was here decided, but on the whole will taken together.

Doe *ex dim.* Child *v.* Wright, Mic. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 67.

The deviſor, after theſe introductory words "as touching ſuch wordly and perſonal eſtate wherewith it has pleaſed God to bleſs me," gave an eſtate for life to his wife in his eſtates in A. and B.; and then deviſed to *J. W.* "all his lands, freehold, copyhold, and leaſehold, in A."—Alſo he deviſed to *J. W.* "all his eſtate freehold, and copyhold, in B.:" held that *J. W.* only took an eſtate for life in remainder in

Doe *ex dim.* Edward Child and Mary his wife *v.* Wright *et al* Mic. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 64.

(1) This alſo appears from the caſe of *Denn* ex dim. *Mellor* v. *Moor*, 1 *Pull.* & *Pry.* 30, inſerted under the title ERROR, *infra*.

the deviſor's eſtate in A.—The teſtator, *J. Camper*, being ſeiſed and poſſeſſed of divers freehold, copyhold, and leaſehold eſtates in Eſſex, Middleſex, and Huntingdonſhire, of which the premiſes in queſtion were part, devited in the following words; "*And as touching ſuch worldly and perſonal eſtate* "*wherewith it has pleaſed* God *to bleſs me in this life*, I give, "deviſe, and diſpoſe of the ſame in the following manner; "Imprimis, *I give and deviſe unto my wife* S. Camper *all my* "*lands, houſes, &c. freehold, copyhold, and leaſehold, whatſoever* "*and whereſoever, and to receive the rents and profits thereof* "*during* her life; and alſo all my deeds, mortgages, bonds, "and writings, and alſo all my ſtock, goods, chattels, effects, "and perſonal eſtate whatſoever and whereſoever, ſhe paying thereout the legacies hereinafter given. And I hereby "nominate and appoint my wife *S. Camper* ſole executrix "of this my will. *And after her natural life* my mind and "will is, and *I do hereby order, direct, give, deviſe, and bequeath, all* "*my lands, houſes, &c. freehold, copyhold, and leaſehold, in manner* "*following*; I GIVE AND DEVISE UNTO MY GRANDSON, "JAMES WRIGHT, ALL MY LANDS, FREEHOLD, COPYHOLD, "AND LEASEHOLD, IN THE COUNTY OF ESSEX (except "herein excepted and reſerved the houſe I now live in, with all "the lands, yards, outlawry, ſtables, and all other conveniences "and appurtenances thereunto belonging, and to be hereinafter "diſpoſed of). Alſo I give and deviſe unto my grandſon "*James Wright, all my eſtate, freehold and copyhold, lying and* "*being in* Ellington in Huntingdonſhire."—FOR THE PLAINTIFF, it was contended, that *James Wright*, the grandſon, took only an eſtate for life in remainder in the premiſes in queſtion after the widow's death; and that upon his death they deſcended to the heir at law of the deviſor.—BUT FOR THE DEFENDANTS, it was argued, that conſidering the whole will together, it appeared to be the deviſor's intention to give an eſtate in fee to *James Wright*. Lord KENYON, Ch. J. It has frequently been lamented that the ſame technical words are not required in wills as in deeds; becauſe had ſuch a rule been adopted, few queſtions would have ariſen on the conſtruction of wills. Some rules, however, have been eſtabliſhed by a ſeries of deciſions on this ſubject; and we ſhould be removing land-marks if we were to abandon that, which has been adopted as a rule of property, in the purſuit of a doubtful intention of a teſtator. In *Ibbetſon* v. *Beckwith* (1) it was ſaid that general introductory words in a will, like thoſe uſed in this inſtance, ſhewed that the teſtator had his whole eſtate in view at the time: but it

(1) *Caſ. Tabl. Templ.* 157.

is now clearly ſettled that thoſe words are not, of themſelves, ſufficient to carry a fee. Perhaps it would be too critical to advert to particular expreſſions in a will of this kind, drawn by a perſon ignorant of the profeſſion: but it is obſervable that in almoſt all the other clauſes of the will the teſtator uſed the word "eſtate," which is ſufficient to paſs a fee. He has not, however, uſed that word in the clauſe on which this queſtion ariſes, nor any word equivalent to it; and there is no part of the will that enables me to decide, conſiſtently with the authorities, that *James Wright* took a fee in the premiſes in queſtion. Certain rules have been adopted, by which the real property of this county has been governed for ages, and it would be too much for us now to overſet them. Therefore I am of opinion that *J. Wright* took only an eſtate for life.—ASHHURST J. It is better for the public that the intention of one individual ſhould be defeated than that a ſeries of deciſions, on which the real property of this county depends, ſhould be ſhaken. *Stare deciſis* is a maxim in our law. Where there is a general deviſe of land, without any words of inheritance, the law ſays that the deviſee ſhall only take an eſtate for life; and ſuch is the preſent caſe.—GROSE, J. of the ſame opinion.—LAWRENCE, J. I cannot find any words in this will, from whence I can diſcover, with certainty, that the deviſor intended to give more than an eſtate for life in this caſe.—Poſtea to the plaintiff.

Hay *v.* the Earl of Coventry *et al.* Hil. Ter. 29 Geo. 3 B R. 3 *Ter. Rep.* 83.

The teſtator, ſir *Robert Worſley*, being ſeiſed in fee of the premiſes in queſtion, by will, deviſed them to "*James Wor-*"*ſley* and *Robert Worſley*, and their heirs, upon truſt to raiſe "the ſum of 5000l. for his grand-daughter, lady *Frances Car-*"*teret*, afterwards *Frances* marchioneſs of Tweedale, in "manner therein mentioned, and ſubject thereto, upon truſt, "that the truſtees ſhould ſtand ſeiſed of the premiſes to the "uſe of his grandſon *Robert* lord *Carteret*, who was af-"terwards *Robert* earl *Granville*, for life; remainder to "truſtees to preſerve contingent remainders; remainder to "the firſt and other ſons of the ſaid lord *Carteret* (after-"wards earl *Granville*) in tail male; remainder to the ſaid "*Frances* marchioneſs of Tweedale, by her then name of "lady *Frances Carteret*, for life; remainder to truſtees to "preſerve contingent remainders; remainder to the firſt and "other ſons of the ſaid lady *Frances Carteret*, in tail male, "and in default of ſuch iſſue TO THE USE OF ALL AND "EVERY THE DAUGHTER AND DAUGHTERS OF THE "BODY OF THE SAID LADY FRANCES CARTERET "LAWFULLY ISSUING, AS TENANTS IN COMMON, AND "NOT AS JOINT TENANTS; and in default of ſuch iſſue, "to the uſe and behoof of his own right heirs for ever." Sir *Robert Worſley* died without iſſue, and without revoking his will. *Robert* earl *Granville* entered and died without

iſſue. Lady *Frances Carteret*, afterwards marchioneſs of Tweedale, had iſſue one ſon, who died an infant in the life-time of the ſaid *Robert* earl *Granville*, and one daughter named lady *Catherine*, who intermarried with *Edward Hay*, eſq.; and the ſaid lady *Catherine Hay* died in July, 1776, without iſſue male, leaving the plaintiff *Frances Hay* an infant, her only daughter and iſſue. THE QUESTION WAS, What eſtate lady *Catherine Hay*, deceaſed, the plaintiff's late mother, took in the eſtates in queſtion?—Lord KENYON, Ch. J. It is not neceſſary that any technical or artificial form of words ſhould be uſed in a will; but we muſt collect the meaning of the teſtator from thoſe words which he has uſed, and cannot add words which he has not uſed. The objection then occurs in this caſe, *voluit ſed non dixit.* The plaintiff's argument goes to ſhew that the daughters took eſtates tail general; but that could not have been the intention of the deviſor, as no ſuch eſtate is given by any part of the will; and the deviſor has totally laid aſide the daughters of the firſt deviſee, and the daughters of his ſons. The words here uſed, technically conſidered, only confer an eſtate for life on lady *Cath. Hay.* It was once doubted whether an eſtate for life could be given to unborn iſſue: and that doubt was ſtated by the counſel as a reaſon in the duke of *Marlborough*'s caſe in the Houſe of Lords, but was afterwards abandoned. It is not neceſſary for me to ſay what effect that would have had in the preſent caſe, if that point had remained undecided; becauſe the law is now clearly ſettled that *an eſtate for life may be limited to unborn iſſue, provided the deviſor does not go farther, and give an eſtate in ſucceſſion to the children of ſuch unborn iſſue.* Then it has been argued, that we may preſume an intention in the deviſor from other parts of the will to give an eſtate in ſucceſſion to the daughters: but I cannot find any words in the will to warrant ſuch a conſtruction. If, indeed, the word "ſuch" had not been introduced in this clauſe, we might, perhaps, have ſaid that, as "iſſue" is *genus generaliſſimum*, it ſhould include all the progeny. But here the word "ſuch" is relative, and reſtrains the words which accompany it. This caſe is preciſely ſimilar to that of *Denn* ex dim. *Bridden* v. *Page*, Mic. Ter. 24 Geo. 3. B.R. Where the words were (after a deviſe to *S. Naſh*, ſon of *T.* and *M. Naſh*, for life, remainder to truſtees to preſerve contingent remainders, remainder to the firſt and other ſons of *S. Naſh*, and the heirs male of his and their bodies reſpectively); "and for default of ſuch iſſue, to the "uſe of all and every the daughter and daughters of the "ſaid *T. Naſh*, on the body of the ſaid *M.* his wife, begot-"ten and to be begotten; and for default of ſuch iſſue, to "the uſe of the right heirs of *T. Naſh* for ever."—There THE COURT held that ſufficient did not appear on the face

of

of the will, to warrant them in saying that an estate of inheritance was given to the daughter; that if it were left to conjecture, they might suppose that some mistake had been made in the limitation; but they could not determine on conjecture, nor put that in the devisor's mouth, which he had not said.—PER CURIAM: The testator has used no words testifying his intention to give an estate of inheritance to the daughters, and we cannot supply them. WE are, therefore, of opinion, that lady *Cath. Hay*, deceased, the plaintiff's late mother, took an estate for life in the estates in question.

*A.* devised his estates real and personal "in trust to trustees for his brother *B.* and his first and every other son in tail male; failure of such issue, to his brother *C.* and his first and every other son in tail male, &c. &c; in all the foregoing cases without impeachment of waste, other than wilful;" and directed the renewals of a leasehold estate to be made "by the tenant for life:" held that *B.* took only a life estate, with remainder in tail to his children.—The testator *C. J. Phipps*, lord *Mulgrave*, devised his estates real and personal "in trust to *T.* lord *Longford*, &c. &c. for my first "and every other son in tail male, failure of such issue *to* "*my brother* Henry *and his first and every other son in tail* "*male*; failure of such issue *to my brother* Edmund *and his* "*first and every other son in tail male*; failure of such issue "*to my brother* Augustus *and his first and every other son in* "*tail male*; failure of such issue to *my daughter* A. E. C. "Phipps *and her first and every other son in tail male*; and in "failure of such issue to her eldest daughter and her first and "every other son in tail male; failure of such issue to her "daughters respectively in succession; failure of such issue "to the daughters of the last surviving lord *Mulgrave*; *in* "*all the foregoing cases without impeachment of waste, other* "*than wilful.*" Then, after making a provision for his daughter to the amount of 20,000l. the will proceeded thus: "My will is, that the money lodged at *Child*'s to pay for the "purchase of the Lvth rectory, be applied to that purpose "as soon as sir *J. Sheffield* can complete the title; *and the* "*renewals to be made by the tenant for life.*" "I name for "the executors in trust of this my will Mrs. *A. J.* my brother *Henry Phipps*, or whichever of my brothers may "succeed to the estate, &c." The defendant entered and became seised, and suffered a recovery to the use of himself in fee.—FOR THE PLAINTIFF, it was contended, that the defendant only took an estate for life, with remainder in tail male to his issue.—FOR THE DEFENDANT, it was insisted, that he took an estate in tail male, whether the words first and every other son be taken as words of limitation or of purchase. PER CURIAM: The words "first and every other son," "children," or "heir," may be taken as words of purchase,

Doe *ex dim.* E. Phipps *v.* lord Mulgrave, Tr Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 320.

chaſe, where it is neceſſary to give them that conſtruction, in order to effectuate the intention of the deviſor; as in *Robinſon* v. *Robinſon*, 1 *Burr.* 38. though, ordinarily ſpeaking, they are words of purchaſe. But in this caſe no doubt can be entertained reſpecting the deviſor's intent. Firſt he deviſed to his own "firſt and every other ſon in tail male;" and if he had no iſſue, "*then to his brother* Henry, *and his firſt and every other ſon in tail male*," &c. Now if he had given inſtructions to a conveyancer to draw his will, and to make his brothers tenants for life, and their children tenants in tail, theſe are preciſely the terms in which he would have given ſuch inſtructions; and in conſtruing wills, we muſt take into conſideration the ſhort hints of the deviſor, in order to diſcover his intention. To be ſure if the objection, *voluit ſed non dixit*, had occurred, it could not have been got over. We could not have inſerted words in the will, which would have varied the conſtruction of thoſe uſed, even if we thought that the deviſor intended to have uſed them: but here the intention is ſufficiently explained by the words which he has uſed. And great weight is alſo due to the ſubſequent words which direct the renewal of the life eſtate to be made "by the tenant for life;" for they can only apply to the deviſor's brothers, ſince there were no other perſons who could take a life eſtate under the will. In ſome of the caſes, indeed, nice diſtinctions have been made, to whom the word "heirs" ſhould be applied; as in *Oates* v. *Jackſon*, 2 *Str.* 1172; *Wild*'s caſe, 6 *Rep.* 16. *b.* &c.; but without entering into thoſe niceties, becauſe it is unneceſſary in this caſe, where the deviſor's intention may be collected from different parts of the will, we are all clearly of opinion, that on the fair conſtruction of the will, the preſent lord *Mulgrave only took a life eſtate, with remainder in tail to his iſſue*; and, conſequently, that, as the recovery ſuffered was a forfeiture of that life eſtate, the next brother, the leſſor of the plaintiff, is entitled to recover.

Doe, *ex dim.* Cooper and Wife, late Elizabeth Head, and Suſannah Head, and Eleanor Head, *v.* Collis, Tr. Ter. 24 Geo. 3. B.R. 4 *Ter. Rep.* 294.

The teſtator, *J. Newſom*, being ſeiſed of certain lands in Cambridgeſhire, deviſed them to his wife during the term of her natural life only; remainder "to his daughters, *Eleanor* "*Newſom* and *Suſannah*, the wife of *William Head*, to be "equally divided between them, not as joint-tenants, but as "tenants in common, viz. the one moiety, or half part "thereof, to his daughter, *Eleanor Newſom*, and her heirs, "for ever, and the other moiety to his daughter, *Suſannah*, "the wife of *William Head*, during the term of her natural "life; and, after her deceaſe, *to the iſſue of her body lawfully* "*begotten, and their heirs for ever*." *William* and *Suſannah Head* had three daughters (who are the leſſors of the plaintiff, *Elizabeth*, *Suſannah*, and *Eleanor*); and, after the birth of the laſt, *William* and *Suſannah Head*, for the purpoſe of barring

barring all eſtates tail, levied a *fine* of their moiety, the uſes of which were declared to be to *W. Head* in fee; and under that fine the defendant claimed. FOR THE PLAINTIFF it was contended, that *Suſannah Head* took an eſtate for life only, with veſted remainders to her children, as purchaſers; for that "iſſue" might be conſtrued to be either a word of limitation or of purchaſe, as would beſt effectuate the deviſor's intention, 2 Lord *Raym.* 205, and 2 *Wilſ.* 323. And here it was the intention of the deviſor, that Mrs. *Head* ſhould only take for life, and that her children ſhould take as purchaſers, for, at the time of the deviſe, ſhe had one child living. That in *Wild*'s caſe, 6 *Rep.* 17. *b.* this diſtinction is laid down, that if land be deviſed to huſband and wife, and to the men children of their bodies begotten, and they have no iſſue male at the time of the deviſe, they ſhall have an eſtate-tail: but if a man deviſe lands to *A.* and to his children, or iſſue, and they then have iſſue of their bodies, there his expreſs intent will take effect, and *A.* will take only an eſtate for life; and, if the children of *Suſannah Head* took as purchaſers, the fine levied by their mother, who was only tenant for life, does not bar the leſſors of the plaintiff. FOR THE DEFENDANT IT WAS CONTENDED, FIRST, *that iſſue in a will*, when uſed in the plural number, muſt be conſidered to be a word of limitation, unleſs coupled with other words to ſhew a different intention, and that, in the preſent will, there were no ſuch words to ſatisfy the Court that it was uſed as a word of purchaſe. But, SECONDLY, even ſuppoſing that Mrs. *Head* only took an eſtate for life, and her children took joint eſtates, the plaintiff cannot recover in this ejectment, becauſe there is no joint demiſe by the children (1). Lord KENYON, Ch. J.—On the general queſtion, the deciſion which we ſhall give will not diſturb the authority of a ſingle caſe; but, conſidering them altogether, I think this poſition is to be collected from them, that *in a will*, "ISSUE" *is either a word of purchaſe or of limitation, as will beſt anſwer the intention of the deviſor*, though, in the caſe of a deed, it is univerſally taken as a word of purchaſe. Now in this caſe there is no doubt about the intention of the deviſor, who "deviſed all his real eſtate unto his wife for her life, and, after her deceaſe, to his daughters, *Eleanor* and *Suſannah*, *to be equally divided between them*, not as joint-tenants, but as tenants in common;" and then he proceeds to ſhew how their iſſue ſhould take, namely, "the one moiety to his daughter *Eleanor*, and her heirs for ever, and the other moiety to his daughter *Suſannah Head*, for life, and, after her deceaſe, to the iſſue of her body lawfully begotten, and

(1) This point was not made at the trial.

their

their heirs for ever." Then how will this general intention, ſo declared, be beſt anſwered by the ſubdiviſion between the iſſue of the two daughters: the firſt moiety is given to one daughter, and her heirs for ever; the other to another daughter for life, then to her iſſue, and their heirs for ever. Now if the deviſe of the ſecond moiety be conſtrued to give an eſtate tail to that daughter, the deviſor's eſtate will not be equally divided; for then the ultimate reverſion of the ſecond moiety will be again ſubdivided between the heirs of the two daughters; and the firſt daughter, and her heirs, will take a moiety of this reverſion, over and above what they take under the deviſe of the firſt moiety of the whole. In ſome caſes, ſuch as *Doe* d. *Long* v. *Laming* (*ante*, p. 76), the words "heirs of the body," have been reſtrained in this way, and they always give way with greater difficulty than the word "iſſue;" therefore, without diſputing any of the caſes cited, but, on the contrary, in conformity with them all, and relying upon them for the foundation of this judgment, namely, that the intention of the deviſor muſt prevail, *I am of opinion that the deviſor, in this caſe, uſed iſſue as a word of purchaſe, and, conſequently, that the children of* Suſannah Head, *who, it is to be obſerved, were all in* eſſe *when the fine was levied, took a fee.* But on the other point, which is merely a queſtion of form, and which was not made below, I think the defendant ought not now to be permitted to take the objection. PER CURIAM:—Poſtea to plaintiff.

Goodtitle, *ex dim.* Richardſon, v. Anthony Edmonds, Eaſ. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 635.

*A.* deviſed two houſes to his wife for life, and willed that, on payment of a ſum of money to the wife by *B.* (one of his ſons), *B.* ſhould ſhare equally alike with the reſt of his brothers and ſiſters, *C. D.* and *E.*; and if any of his children ſhould die, then the ſhare of him or her ſhould go among the ſurvivors: held that the children, *B. C. D.* and *E.* took only eſtates for life under the will.—The teſtator, *A. Edmonds*, being ſeiſed in fee of two houſes, with the garden, yard, and appurtenances, in Finkle-ſtreet, in Selby, "deviſed the ſame "to his wife, *M. Edmonds*, together with all the barns, "ſtables, &c. and other appurtenances, all which premiſes "he willed ſhould be enjoyed by his ſaid wife ſo long as ſhe "remained a widow, or during her natural life. He likewiſe gave to his wife another houſe, then in the occupation "of *T. Archer*, ſituate, &c. to be by her diſpoſed of as ſhe "ſhould ſee meet or convenient to do with the ſame. *He "then willed that his ſon*, J. Edmonds, *ſhould pay to his* "(the deviſor's) *ſaid wife a certain ſum due to him, and, after "that money was paid to his ſaid wife, he willed that his ſaid "ſon ſhould ſhare equally alike with the reſt of his brothers and "ſiſter, namely, Anne Richardſon*, the wife of *William Richardſon, Anthony Edmonds*, and *Thomas Edmonds*, his (the "deviſor's) *children*; and if any of his ſaid children ſhould "happen

" happen to die, then the ſhare of him or her ſhould go " among the ſurvivors." Then, after diſpoſing of ſome of his perſonalty, " his will was, that his ſaid wife ſhould not " diſpoſe of any of the houſehold goods, but, after her " deceaſe or marriage, which ſhould firſt happen, his mind " was, that they, *with the houſes aforeſaid*, ſhould be " equally ſhared among his ſaid children as aforeſaid, *or as " ſhe ſhould think proper to diſpoſe of amongſt them*; and his " mind was, that his ſaid wife ſhould not ſell, or mortgage, " either of the aforeſaid houſes." On the death of the deviſor, *Mary*, his widow, entered and held till her death. *John*, the eldeſt ſon, died without iſſue; *Anthony*, the ſecond ſon, died, leaving *Anthony*, the defendant, his eldeſt ſon and heir at law; *Anne*, the daughter, who ſurvived her three brothers, died, leaving *Thomas Richardſon*, the leſſor of the plaintiff, her eldeſt ſon and heir at law. *After the death of the ſaid deviſor's children*, John, Anthony, *and* Anne, *but in the life-time of their brother*, *Thomas*, the ſaid *Mary Edmonds*, the widow, in her life-time, made her will, *and deviſed to her ſon, the ſaid* Thomas Edmonds, *and to his heirs and aſſigns for ever, all her real and perſonal eſtates whatſoever, in Selby aforeſaid, and elſewhere.* *Thomas* ſurvived his mother, and, on her death, entered upon and held the premiſes during his life: the ſaid *Thomas* died, unmarried, in 1797, having firſt made his will, and thereby *(inter alia)* deviſed the premiſes to his nephew, *Anthony Edmonds* (the defendant), his heirs, executors, and aſſigns, for ever. THE QUESTION was, Whether the plaintiff was entitled to recover? And this depended on two queſtions; FIRST, Whether the children of the deviſor took eſtates in fee, or for life only? SECONDLY, Whether, ſuppoſing them to take in fee, they took as tenants in common, or as joint-tenants? Lord KENYON, Ch. J.—Although this is a perplexed will, we muſt endeavour to extract the deviſor's meaning from it as well as we can. *The defendant is the heir at law of the deviſor*, he is the *deviſee of the ſurviving child of the deviſor*, and *the deviſee and appointee of the widow* of the deviſor, *Anthony Edmonds*; and, therefore, if the will of the deviſor, *A. Edmonds*, is ſo unintelligible, that we cannot ſay, with certainty, that any eſtate paſſed by it, or if only eſtates for life to his children, paſſed by it, or if an eſtate in fee paſſed to the ſurvivor of thoſe children under the will, or if the appointment of the widow were good, *in either of theſe caſes the defendant is entitled to our judgment.* And the ſecond of thoſe points is (I think) with him, there being no words of limitation to give an eſtate in fee to the deviſor's children. To prove that a fee paſſed to them, the plaintiff's counſel cited the caſe of *Oates* d. *Wigfall* v. *Brydon*, 3 *Burr.* 1895, infra; " but after the argument, and before the deciſion of that caſe, Lord *Mansfield* (certainly from the

moſt

moſt earneſt wiſh to do juſtice between the parties) directed certain enquiries to be made reſpecting the value of the eſtate deviſed, which, at the time, gave diſſatisfaction to the profeſſion, who thought that the rules of law ought to prevail in the conſtruction of the will, whether the eſtate deviſed by it were of the value of 20l. or 2000l. *per annum.* But I believe that, in ſubſequent caſes, Lord *Mansfield* doubted, whether in the deciſion of that caſe he had proceeded on ſubſtantial grounds; for, in ſome of thoſe caſes where he had no doubt but that the deviſor meant to give a fee, he lamented that there were not words in the will ſufficient for that purpoſe." Now I find no words in this will ſufficient to carry a fee. We are left to conjecture, but no conjecture of ours is ſufficient to diſinherit the heir at law. I admit that, if the purpoſes of the will cannot be anſwered but by the deviſee's taking a fee, a fee will paſs, as in *Shaw* v. *Weigh* (1), or where an eſtate is given to the deviſee, he paying a ſum of money: but I know of no other caſe where a deviſee takes a fee, unleſs there be words in the will (though no technical words are neceſſary for that purpoſe) ſufficient to paſs a fee. This is a ſacred rule of property not to be broken in upon: if we were now to depart from it, it would be removing one of the great land-marks of real property. On that ground alone, therefore, I am of opinion that the defendant is entitled; and I rather think, though in this I merely hazard a conjecture, that the teſtator meant to give the eſtate to the children who ſhould be living at the death of his widow; and in that caſe, if the child, who ſurvived the widow, took a fee, the defendant is the deviſee of that child; if that child only took an eſtate for life, then the defendant claims as heir at law of the deviſor, *A. Edmonds.*—Poſtea to the defendant.

Roe, *ex dim.* Betty Bendale, *v.* Summerſet, Mary Bendale, Widow, and Mary Bendale, the younger, Ea. Ter. 10 Geo. 3. B.R. 5 *Burr.* 2608. 2 *Blask. Rep.* 692.

*Benjamin Bendale*, being poſſeſſed of a term for ninety-nine years, if he, or his daughter *Betty*, or *John Bendale*, ſhould ſo long live, deviſed the premiſes granted by ſuch leaſe, as follows, viz. "Item, *I give to my daughter* Mary, "*after the deceaſe of my daughter* Betty, *my houſe, &c. during* "*the life of* John Bendale." *Betty* was a daughter by a former wife; *Mary*, by the defendant, *Mary Bendale*, now his widow. *Summerſet* was the tenant. The principal queſtion was, "Whether *Betty* was entitled to recover any "and what part of the premiſes, againſt the defendants, or "either of them?" And WILLES, J. and BLACKSTONE, J. the only judges preſent, held, that *Betty* took an eſtate *for life*, by *implication*, and that a *ſtrong probable implication* is ſufficient; it needs not to be a *neceſſary* implication. And

(1) *Fitzg.* 18. 2 *Str.* 803.

*Blackſtone*,

*Blackstone*, J. added, that in these days (1) a *term* may be devised *for life*, by a construction of the intent of the testator. —Ordered that the *postea* be delivered to the plaintiff.

## *What shall be good as an Executory Devise.*

A devise to *A.* for ninety years, if he so long live, remainder to the heirs of his body, and subject to these estates and contingencies to *B.* in tail, remainder to *C.* in fee: held that the heirs of the body of *A.* took an estate tail by *executory devise.*——Dr. *Coningesby*, on the 15th of February, 1766, made his will, in which *(inter alia)* are these words: "I give and devise my manor of Grendon Warren, &c. [describing the estate] unto my kinsman, *Coningesby Harris*, for the term of ninety years from my decease, if the said *Coningesby Harris* shall so long live; and, *after the determination of that term*, I give and devise all the said premises unto the *heirs of the body of the said Coningesby Harris.* And in default of such heirs, I give and devise all my said estates and premises unto my cousin, Mrs. *Susan Elletson*, for the term of ninety years, if the said *Susan Elletson* so long lives, and to commence from the decease of the said *Coningesby Harris*, he dying without issue; and, subject to the estates and contingencies before-mentioned, I give and devise all my said estates unto *Roger Elletson*, esq. son of my said cousin, *Susan Elletson*, for and during the term of his life; and from and after his decease (subject to the devises aforesaid) I give all my said estates unto the first, and every other son and sons of the body of the said *Roger Elletson*, and to the heirs male of the body and bodies of every such son lawfully issuing," with several remainders over. The testator died on the 15th day of March, 1766, leaving the defendant, *Elizabeth Barnes*, his only sister and heir at law.—The plaintiff, *Coningesby Harris*, the first devisee in the said will, soon after the death of the said testator, entered and took possession of the estates, but hath *no issue* of his body.—Mrs. *Susan Elletson*, the next devisee of the said estates, survived the said testator, and is lately dead, leaving *Roger Elletson* her only son and heir at law.—The said *Roger Elletson*, the next devisee of the said Herefordshire estates, is now living, but hath not any child.—THE QUESTION was, "Whether the *heirs of the body of the plaintiff*, Coningesby Harris, *took any and what estate*, under the said testator's will." Having heard counsel on

Harris v. Barnes, *et al.* Hil. Ter. 8 Geo. 3. B.R. 4 *Burr.* 2157. *Ambler's Rep.* 651. 666. 1 *Black. Rep.* 643.

(1) V. 1 *Burr.* 217, 285.

both,

both ſides, and conſidered this caſe, THE COURT were of opinion, that the clear manifeſt *intent* of the teſtator was to give an eſtate tail to ſuch perſon as ſhould be heir of the body of *Coningeſby Harris, at the death of the ſaid Coningeſby* (the only determination of the ninety years term in the teſtator's view), "*to him and the heirs of the body of the ſaid Coningeſby,*" with remainders over, as in the will; which intent of the teſtator might, by law, take effect as an *executory deviſe*; for, the contingency muſt happen within the compaſs of a life in being, and the freehold, in the mean time (being undiſpoſed of), deſcends to the teſtator's heir at law: and this, Lord MANSFIELD ſaid, would effectuate the whole intention of the teſtator.

Wellington v. Wellington, Hil. Ter. 8 Geo. 3. B.R. 4 *Burr.* 2165. 1 *Black.* 645.

A deviſe in default of iſſue of the teſtator's own body, he being a bachelor, is merely a conditional deviſe, and good, if the teſtator dies without marrying. On a caſe out of Chancery, it appeared that *Richard Cary* duly made his will, and after directing the payment of his debts and funeral expences, proceeded thus: "*Item*, in DEFAULT OF ISSUE OF "MY OWN BODY, I GIVE, DEVISE, AND BEQUEATH, &c." [all his eſtates] unto *John Arrowſmith*, and to *James Simmons*, and their heirs, IN TRUST to pay, out of the rents, iſſues, and profits, unto his ſiſter, *Elizabeth Wellington*, an annuity of 100l. *per annum* during ſuch time, and until all his juſt debts, funeral expences, and legacies (other than annuities), ſhould be fully paid and ſatisfied; and alſo an annuity of 40l. *per annum* to a ſervant, *Sarah Vollier*. Then he gives another annuity, and ſeveral legacies. Then he wills that IMMEDIATELY FROM AND AFTER SUCH TIME AS ALL HIS JUST DEBTS, FUNERAL EXPENCES, AND THE LEGACIES GIVEN by his will (other than annuities) SHALL BE FULLY PAID AND SATISFIED BY THE SAID TRUSTEES, FROM AND OUT OF THE RENTS AND PROFITS OF HIS SAID ESTATES, and ſubject to the two annuities before given to the ſaid *Sarah Vollier* and *Jane Wellington*, *he gives and deviſes all his eſtates to* his ſiſter, *Elizabeth Wellington, for life*; with divers remainders over in ſtrict ſettlement, and makes *Arrowſmith* and *Simmons* truſtees to preſerve the contingent remainders, remainder to his heir at law. The teſtator died a bachelor, leaving the ſaid *Elizabeth Wellington* and *Jane Collins*, wife of *Thomas Collins*, his ſiſters and coheirs. His ſaid truſtees accepted the truſts. THE QUESTION was, "Whether the ſaid *John Arrowſmith* and *James* "*Simmons*, the truſtees in the ſaid will, took *any*, and *what* "eſtate under the ſaid will?"—Lord MANSFIELD: When a deviſe muſt take effect *at* the death of the teſtator, it is not properly an *executory* deviſe. Such a deviſe, is a deviſe upon a contingent event which muſt happen at or before the death of the teſtator. An *executory* deviſe, is a deviſe that is to take place

place *in future*. As to an *implied* revocation, from alteration of circumstances, it is now settled—"that as to *personal* "estates, marriage, *and* having a child, *is* a revocation:" but no case has yet holden marriage *alone* to be a revocation. I see no ground of argument why the law should not be the same, as to devises of *land:* the *reason* is the same. In *Meggot* v. *Meggot*, Lord *Hardwicke* directed an issue, merely to try this question: but the cause was made up by the family, and never tried (1).—WE will think upon it, and give our certificate.—*The* CERTIFICATE was as follows: "Having "heard counsel on both sides, and considered this case, WE "are of opinion, that *John Arrowsmith* and *James Simmons* "took a FEE, *determinable* when the purpose of paying the "testator's debts, legacies, and funeral expences, out of the "rents, issues and profits of the devised premises, in aid of "the personal estate, shall be *performed.*"

By a devise to the second son (then unborn), of *A.* for life, and after his decease, or the accession of his paternal estate, to *his* second son, and his heirs male, with remainders over, such second son of *A.* when born, will take an estate in tail male, by way of executory devise, determinable on the accession of the family estate, and in the interim, the lands will descend to the heir of the testator.—*John Nicholl* devised "all his real "estates to trustees, to the use *of the second son of* William "Nicholl *of Tredonock, begotten or to be begotten, during* "*the life of such second son, and after the death of such* "*second son, or in case he should inherit his paternal estate* "*by the death of his elder brother, then to his second son,* "*lawfully to be begotten, and his heirs male*; and for default "of such issue to the third, fourth, and other son, and sons of "the said *William Nicholl*, severally and successively, according "to priority of birth, and the heirs male of the body of such "third, fourth and other sons respectively, with divers re- "mainders over, remainder in fee to *John Nichol* (son of *J. N.* "of St. A.) the plaintiff."—The testator left the defendant, *William Nicholl* of Tredonock, his heir at law, and the defendant, *John Nicholl* of Tredonock, his customary heir. *William Nicholl* of Tredonock *hath no sons, but hath two daughters, born since the death of the testator.* but had no children at the death of the testator, or at the time of making his will. *John Nicholl* of Tredonock was never married.—THE QUESTION was, "WHETHER *John Nicholl*, the plaintiff, is entitled to "any estate in possession under the will of the testator? And, "if not entitled, then what estate will the second son of

Nicholl *v.* Nicholl, Mic. Ter. 18 Geo. 3. C B. 2 *Black.* 1159.

(1) It has since been adjudged in the Court of Exchequer, by the opinions of Sir *Thomas Parker* (then Lord Chief Baron), Mr. Baron *Smythe*, and Mr. Baron *Adams*, against Mr Baron *Perrot*; and also at the Cockpit, Sir *Eardley Wilmot* and Lord Chief Justice *De Grey* concurring; "that marriage *and* a child, is a revocation of a devise of "*land.*"

"*William Nicholl*, the defendant, take in the real eſtates of "the teſtator?"—THE COURT certified, they were of opinion that the eſtate will veſt in the ſecond ſon of *William Nicholl* of Tredonock (when any ſuch ſhall be) *by way of executory deviſe*, and will in the mean time deſcend to the heir of the deviſor; and that *John Nicholl* was not entitled to any eſtate *in poſſeſſion* under the will in queſtion.—And they were alſo of opinion, that, in order to effectuate the general intent of the deviſor, ſuch ſecond ſon would take an eſtate to him, and the heirs male of his body, determinable on the acceſſion of the paternal eſtate (1).

Porter *v.* Bradley *et al.* Eaſter Ter. 29 Geo. 3. B. R. 3 *Ter. Rep.* 143.

If lands be deviſed to *A.* his heirs and aſſigns for ever, and if he die, *leaving no iſſue behind him*, then over, the limitation over is good by way of executory deviſe.—The teſtator, *John Dobin*, being ſeiſed in fee of the premiſes in queſtion, by will, deviſed as follows: "*Item*, I give and deviſe unto my "ſon, *Philip Dobin*, *his heirs and aſſigns for ever*, all that "meſſuage and tenement wherein I now live: BUT MY WILL "is, that in caſe my ſaid ſon, *Philip Dobin*, ſhall happen to "die, LEAVING NO ISSUE BEHIND HIM, then my ſaid wife "(meaning his then wife, *Joan Dobin*) ſhall receive and "take the rents, iſſues, and profits thereof, and diſpoſe of the "ſame at her will and pleaſure, and ſhall have, uſe, and "enjoy all my in-door goods, as long as ſhe ſhall continue a "widow, and no longer; and after her deceaſe, or marriage, as "aforeſaid, then the lands ſo deviſed to *Philip* as aforeſaid, I "give and deviſe the ſame, for want of iſſue by him, as "aforeſaid, unto my ſon, *James Dobin*, his heirs and aſſigns "for ever; chargeable nevertheleſs, with the payment of 50l. "a-piece to my ſix daughters, and their iſſue, within a twelve-"month after he ſhall ſo enjoy the ſame: but in caſe my ſon "*James Dobin* ſhall happen to die before my ſon *Philip*, and "the ſaid *Philip* ſhall not leave any iſſue of his body begotten, "then my will is, that my ſaid lands ſhall be ſold, and equally "divided between my ſix daughters, *Magdalen Lockyer*, *Mary* "*Mills*, *Sarah Boone*, *Elizabeth*, *Rebecca*, and *Ann Dobin*, "and their iſſues."—THE QUESTIONS were, FIRST, What eſtate *Philip Dobin* took under the will of *John Dobin*, his father? SECONDLY, Whether the ſix daughters of the teſtator, and their iſſue, took any and what intereſt under the laſt limitation in the teſtator's will, directing the eſtates to be ſold?—Lord KENYON, Ch. J. The firſt queſtion that ariſes in this caſe is, Whether *this is an eſtate tail, or in fee?* The firſt part of the deviſe to *Philip Dobin*, *primâ facie* carries a fee; for it is to him, his heirs, and aſſigns for ever: but it is

(1) See *Chapman ex dim. Oliver and Brown*, 3 *Burr.* 1626, and p. 110 *ſupra*, where a deviſe to the ſecond ſon (unborn) of *A.* for life, with remainder to the *eldeſt* ſon of ſuch ſecond ſon in tail, was held to be an eſtate tail in ſuch ſecond ſon.

clear

clear that thoſe words may be reſtrained by ſubſequent ones, ſo as to carry only an eſtate tail. And a long ſtring of caſes may be cited in order to ſhew, that where an eſtate is limited to a man and his heirs for ever, and, if he die without leaving heirs, then to his brother, or to any perſon who may be his heir, thoſe words ſhall not have their full legal operation, but ſhall be reſtrained to *heirs* of a particular kind, namely, *heirs of the body*. If the ſubſequent part of this deviſe had been, "and in caſe he ſhall die without heirs, then over," it would have given to *P. Dobin* an eſtate tail, which he might have barred by recovery. But here the words are "but in "caſe he ſhall happen to die, *leaving no iſſue behind him;*" which makes a very material difference, and brings it within the caſe of *Pells* v. *Brown*, *Cro. Jac.* 590, which is the foundation, and as it were the *Magna Charta* of this branch of the law. This queſtion aroſe ſoon after executory deviſes were firſt taken notice of, which was in the reign of Queen *Elizabeth*. And that doctrine has never been ſince doubted by the courts of law. But the defendant's counſel has attempted to diſtinguiſh this caſe from that of *Pells* v. *Brown*; becauſe there the words are, "If *Thomas* (the firſt deviſee) "died without iſſue, *leaving William*, his brother:" but it is to be obſerved, that there are words in this caſe equivalent to thoſe, namely, "if *P. Dobin* ſhall die, leaving no iſſue *behind* "*him*." If indeed only the firſt words "leaving no iſſue" had been uſed, they, according to the opinion of Lord *Macclesfield*, in *Forth* v. *Chapman*, 1 *Pere Wms.* 663. muſt be reſtrained to leaving iſſue at the time of his death. But it is contended, that this rule is confined to chattel intereſts only: however a great deal of argument is neceſſary to convince me that in the caſe of realty thoſe words ſhould be taken to mean an indefinite failure of iſſue. It would be very ſtrange if theſe words had a different meaning when applied to real and perſonal property. If ſuch a diſtinction exiſted in the law, it certainly would not agree with the rule *lex plus laudatur quando ratione probatur:* but it is not founded in law. And there are even additional words in this caſe, "leaving no iſſue *behind him*;" which neceſſarily import that the teſtator meant, at the time of his ſon's death. The ſubſequent parts of the will alſo convey the ſame idea; for the deviſor mentions this event as likely to happen in the life-time of his widow, or of his younger ſon or daughters. Therefore I have not the leaſt doubt but that *this is a good executory deviſe, to take place within the time allowed by law, which is borrowed by analogy from legal formal limitations, namely, for a life, or lives in being, with a remainder in tail to unborn children, who cannot bar it till twenty-one.* With reſpect to the other point, the ſhape of the queſtion muſt be altered before we certify to the Lord Chancellor; for, as it ſtands now, we cannot take cognizance of the queſtion in a

court of law. But if we were to conſider this as a limitation of real property, inſtead of land, to be converted into money, this may be ſupported as a contingency with a double aſpect. And I ſhould have no difficulty in ſaying that, in the event of *Philip Dobin* dying without leaving iſſue at his death, the widow, if ſhe were alive, might take; if not, the ſecond ſon, or the daughters of the deviſor.—PER CURIAM: We are of opinion, that *P. Dobin* took an eſtate in fee-ſimple in the premiſes above deviſed to him: but, as *Philip* died without iſſue living at the time of his death, we are of opinion, that the further diſpoſition made by the teſtator in that event, is good by way of executory deviſe.

Wilkinſon *v.* South, Ea. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 555.

Under a bequeſt of a term of years "to *A.* and the heirs of his body, and to their heirs and aſſigns for ever, but in default of ſuch iſſue, then after his deceaſe to *B.* and his heirs," the limitation over to *B.* is good by way of executory deviſe. —The teſtator, *E. Parker*, being poſſeſſed of a leaſehold meſſuage, or tenement, in Little George-ſtreet, Weſtminſter, for the reſidue of a term of years, which is not yet expired, by will, dated the 9th of September, 1778, gave and bequeathed the ſame "to his wife, *Mary Parker*, during the term of her "natural life, and after her deceaſe, to go to his ſon, *S.* "*Parker*, *and to the heirs of his body*, lawfully begotten, *and* "*to their heirs and aſſigns for ever*, BUT IN DEFAULT OF "SUCH ISSUE, THEN AFTER HIS DECEASE to go to his "(the teſtator's) grandſon, *T. Wilkinſon* (the plaintiff), his "heirs and aſſigns for ever." The teſtator died without revoking his will, leaving the ſaid *S. Parker*, him ſurviving: but *Mary Parker* died in his life-time. *Samuel Parker*, after the deceaſe of the teſtator, entered on the ſaid leaſehold eſtate under the ſaid bequeſt, and is dead without ever having had any iſſue of his body. THE QUESTION was, WHETHER *the ſaid* T. Wilkinſon *was entitled under the ſaid will to any, and what intereſt in the ſaid leaſehold premiſes?*—Lord KENYON, Ch. J. The only queſtion is, Whether, on the fair conſtruction of the words of this will, the teſtator meant that the limitation over to *T. Wilkinſon*, the plaintiff, ſhould only take effect after an indefinite failure of iſſue of *S. Parker*, or on a failure of iſſue living at the time of the death of *S. Parker?* It is, therefore, a queſtion of intention, and as ſoon as the intention is diſcovered, there is an end of the caſe. *If perſonal property be ſo limited that, if it were an eſtate of inheritance, it would give an eſtate tail, the abſolute intereſt veſts in the firſt taker.* BUT *if the limitation be with a double aſpect to* A. *and to the iſſue of his body, if there be any ſuch iſſue living at his death, if not then over, it is a good limitation.* It was ſo ſettled in *Sabbarton* v. *Sabbarton* (1), and a variety of other caſes,

(1) *Caſ. Temp. Talb.* 55. 245.

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ſome of which are not in print. Here the words of the will are, "to *S. Parker*, and the heirs of his body, and to their heirs and aſſigns for ever:" if thoſe words ſtood uncontrolled by any thing ſubſequent in the will, the abſolute intereſt would have veſted in him: but other words are added, "but in default of ſuch iſſue, *then after his deceaſe* to go to the teſtator's grandſon." There is a caſe in the books to ſhew, that *then* and *when* are adverbs of time. Then at what time was the eſtate to go over to the teſtator's grandſon? At the death of *S. Parker*, if he left no iſſue; there is nothing in the will to ſhew, that the teſtator intended that the limitation over ſhould not take effect until future generations, but, on the contrary, there is ſufficient to ſhew, that he intended that the eſtate ſhould in one event, veſt in the grandſon, at the time of *S. Parker*'s death, and that is within the time which the law allows in the caſe of executory deviſes. The rule reſpecting executory deviſes is extremely well ſettled; and a limitation by way of executory deviſe is good if it may take place after a life or lives in being, and within twenty-one years, and the fraction of another year afterwards.—PER CURIAM: "We are of opinion, that *T. Wilkinſon* is entitled under the will of *E. Parker* to the abſolute and entire intereſt in the leaſehold premiſes abovementioned."

Under a deviſe to *T. F.* and his heirs for ever, and in caſe he ſhould depart this life, *and leave no iſſue*, then to *E. M.* and *S.* or the ſurvivor or ſurvivors of them, ſhare and ſhare alike: held that the deviſe to *E. M.* and *S.* is a good executory deviſe. —The teſtator, *J. Goodacre*, being ſeiſed in fee of the premiſes in queſtion, "deviſed to his wife, *A. Goodacre*, for life; after "her deceaſe, to his daughter, *Mary Friſwell*, wife of *W. Friſwell*, for life; and after her death, to his grandſon, *T. Friſwell*, ſon of *W.* and *M. Friſwell*, *and to his heirs for ever:* BUT IN CASE his ſaid grandſon, *T. Friſwell*, "ſhould *depart this life*, *and leave no iſſue*, then (his will was) "that the ſaid dwelling-houſe, &c. ſhould be, and return unto "*Elizabeth*, *Mary*, and *Sarah*, the three daughters of *W.* and "*M. Friſwell*, or the ſurvivor or ſurvivors of them, to be "equally divided betwixt them, ſhare and ſhare alike." THE QUESTION was, WHETHER *Thomas Friſwell*, the grandſon, took an eſtate tail, or a fee, defeaſible on the event of his leaving no iſſue at the time of his death?—Lord KENYON, CH. J. This is a queſtion of conſtruction depending on the intention of the party; and nothing can be clearer in point of law, than that if an eſtate be given to *A.* in fee, and by way of executory deviſe, an eſtate be given over which may take place within a life, or lives in being, and twenty-one years, and the fraction of a year afterwards, the latter is good, by way of an executory deviſe. The queſtion therefore, in this and ſimilar caſes, is, Whether from the

Roe *ex dim.* Elizabeth Sheers and John Mawſon, and Mary his wife *v.* William Jeffery, Richard Butler, and Elizabeth Goodyer, Ea. Ter. 38 Geo. 3. B. R. 7 *Ter. Rep.* 589.

the whole context of the will, we can collect that, *when an eſtate is given to* A. *and his heirs for ever, but if he die without iſſue, then over;* the teſtator meant, dying *without iſſue, living at the death* of the firſt taker. The rule was ſettled ſo long ago as in the reign of *James* the Firſt, in the caſe of *Pells* v. *Brown* (1), where the deviſe being to *Thomas*, the ſecond ſon of the deviſor, *and his heirs for ever*; and if he died without iſſue, leaving *William*, his brother, then *William* ſhould have thoſe lands to him, and his heirs for ever; the limitation over was a good executory deviſe. That caſe has never been queſtioned or ſhaken, but it has been adverted to as an authority, in every ſubſequent caſe reſpecting executory deviſes; it is conſidered as a cardinal point on this head of the law, and cannot be departed from, without doing as much violence to the eſtabliſhed law of the land, as (it was ſuppoſed by the defendant's counſel) we ſhould do, if we decided this caſe againſt him. On looking through the whole of this will, we have no doubt but that the teſtator meant that the dying without iſſue, was confined to a failure of iſſue at the death of the firſt taker; for the perſons to whom it is given over, were then in exiſtence, and life eſtates are only given to them. Now, taking all this into conſideration together, it is impoſſible not to ſee that the failure of iſſue intended by the teſtator, was to be a failure of iſſue at the death of the firſt taker; and if ſo, the rule of law is not to be controverted. It is merely a queſtion of intention, and we are all clearly of opinion, that there is no doubt about the teſtator's intention.—Poſtea to the plaintiff.

Robert White, and Eleanor his wife, (which ſaid Eleanor was the widow and deviſee of Edward Preſgrave, deceaſed), Edward Preſgrave and John Preſgrave, infants (who are the two ſurviving ſons, and only children of the ſaid Edward Preſgrave, deceaſed), by the ſaid Robert White, their next friend, v. Thomas Barber, John Preſgrave, John Pare, Edward Preſgrave Cham, William Cham, Edward

This was a caſe out of Chancery, ſtated as follows.—*Edward Preſgrave* gave and deviſed to *Eleanor*, his wife, ſeveral freehold and copyhold premiſes particularly mentioned, *to hold the ſame unto the ſaid* Eleanor, *until his ſon*, Thomas Preſgrave, *ſhould attain the age of twenty-one years*; *in truſt, nevertheleſs, that ſhe ſhould educate and maintain him till that time, out of the rents and profits of the ſaid premiſes*: AND THEN HE DEVISED THE SAME TO HIS SAID SON THOMAS, IN FEE. "But if it ſhould happen that his ſaid wife "ſhould be *enſient* with one or more children at the time of "his deceaſe, and his ſaid ſon *Thomas* ſhould die without "iſſue before he attained the age of twenty-one years, ſuch "child or children being then living, *he then deviſed the ſaid* "*premiſes to his ſaid wife, till ſuch child or children ſhould attain his, her, or their ages, of twenty-one years*; *in truſt,* "*nevertheleſs, that ſhe ſhould educate and maintain ſuch child* "*or children till that time, out of the rents and profits of the* "*ſaid premiſes*: AND THEN HE DEVISED *the ſame to ſuch*

(1) *Cro. Jac.* 590.

"*child*

" *child or children in fee. But if it happened that his ſaid ſon* Preſgrave, and
" Thomas *ſhould die without leaving iſſue of his body, and be-* Thomas Cham,
" *fore he attained the age of twenty-one years, or that his ſaid* Ea. Ter.
" *wife ſhould at the time of his, the ſaid teſtator's deceaſe, be* 11 Geo. 3. B R.
" *enſient with one or more child, or children, who ſhould die* 5 *Burr.* 2703.
" *without leaving iſſue of his, her, or their body, or bodies, be-*
" *fore he, ſhe, or they, attained their age or ages of twenty-one*
" *years,* THEN HE DEVISED *the ſaid premiſes to his ſaid*
" *wife, for the term of her natural life* ;" and from and after her deceaſe, then as to part of the ſaid copyhold premiſes, he deviſed the ſame to his nephew the defendant *Edward Preſgrave Cham,* in fee ; and the other part of his ſaid copynold premiſes he deviſed to his nephew *Thomas Barber,* in fee : but if he ſhould die without lawful iſſue of his body, then he deviſed the ſaid premiſes to the right heirs of *John Cham* and *Mary* his wife (both deceaſed), in fee. And as to the reſidue of the ſaid freehold and copyhold premiſes ; he deviſed the ſame to his nephew the defendant *William Cham,* to his godſon, the defendant *Edward Preſgrave,* and to his nephew, the defendant *Thomas Cham,* in certain proportions, in fee.—The teſtator, at the time of making his ſaid will, had only one child, the ſaid ſon *Thomas :* but after the making thereof, and before his death, he had two other ſons born, viz. the plaintiffs, *Edward* and *John.* On the 12th of January, 1759, the ſaid teſtator, *Edward Preſgrave,* died, leaving iſſue three children, the ſaid *Thomas Preſgrave,* who died without iſſue, in Auguſt, 1766 ; and the ſaid *Edward Preſgrave* and *John Preſgrave,* infants of tender years, who were born after the making of the will, in the teſtator's life-time, and who are ſtill living, and who are not provided for, unleſs they take by this will.—The ſaid *Eleanor* is ſtill living ; but was not enſient at the time of the teſtator's death.—THE QUESTION WAS, " Whether, in the event that has happen-
" ed, any and what eſtate is veſted in the plaintiff *Eleanor,*
" and the ſeveral defendants, the deviſees, or any of them :
" and if no eſtate is veſted in them, or any of them, then
" whether any and what eſtate is veſted in the plaintiffs,
" *Edward* and *John Preſgrave,* the two infant children, or
" either of them ?"—THE JUDGES CERTIFIED AS FOLLOWS:—We are of opinion, that the proviſion made by the teſtator, being for children which were to be born after the making of his will, he certainly intended to comprehend all the children which ſhould be born of his then wife (whether before or after his deceaſe). For, we think, that a father, in making an expreſs proviſion for any children which his wife ſhould be enſient with at the time of his deceaſe, could never intend to give his eſtate to ſuch children, in excluſion of, or to his nephews (as the event has happened), in preference to any child or children that might be born in his life-

time. We are of opinion, therefore, that (notwithſtanding the defect of expreſſion in this will), the children born before the teſtator's death, are virtually included in the proviſion ſo anxiouſly made by a parent for his poſthumous children; and that, upon the true conſtruction of this will, the plaintiffs *Edward* and *John* will be entitled (from the teſtator's manifeſt intent) to take an eſtate in fee in the premiſes, at their reſpective ages of one-and-twenty; and that, in the mean time, the plaintiff *Eleanor*, their mother, is entitled to hold the ſaid premiſes, ſubject to the truſt of the ſaid will, for their education and maintenance.

Statham *v.* Bell, Fa. Ter. 14 Geo. 3. B.R. *Cowp.* 40. 1 *Doug.* 66. (n. 4.)

The teſtator, being ſeiſed in fee of the meſſuages in queſtion, made his will, by which *(inter alia)*, he there ſays: "Whereas my wife is now pregnant, if ſhe bring "forth a ſon, I will that he ſhall inherit my eſtate "at twenty-one years old, paying 4l. a year to my wife, "and 30l. a year to my daughter, at her coming to "the age of twenty-one years, and 10l. more to her on "the death of my wife: but if it be a daughter, I give "one moiety to my wife, and the other to my two daughters, to be divided between them, and to be given them at "the age of twenty-one years. If either died before that "time, the ſurvivor to have her ſiſter's ſhare: *if both died "before that time, I give both their ſhares to my wife, and her "heirs for ever.* If ſhe die then I give her ſhare to my two "daughters."—The teſtator died, leaving his widow and an only child, a daughter; the teſtator's wife was not *enſient* at the time of making the will, nor at the time of the teſtator's death. The daughter died under age, and without iſſue.—THE QUESTION was, Whether the wife took any, and what eſtate, under his will, no child being born? AND THE COURT were unanimouſly of opinion, that it was the plain intention of the teſtator, that in caſe no ſon ſhould be born, and he ſhould have no daughters who ſhould live to the age of twenty-one years, that the wife ſhould have the whole eſtate; and that in the event which had happened, ſhe was ſo entitled.—And Lord *Mansfield* added, that it was clear that if the teſtator had died during the pregnancy of his wife, the eſtate would have deſcended to the heir at law in the mean time.

## *Contingent Remainders.*

Hodges *v.* Middleton, *et al.* Tr. Ter. 20 Geo. 3. B.R. 2 *Doug.* 430.

A deviſe of all the teſtator's real eſtate in A. to *B.* during life, and at *B*'s death, to the children of *B.* with remainder over, gives either an eſtate tail to *B.* or an eſtate for life to *B.* remainder in tail to the children of *B.*—The teſtatrix, *Frances Bladen*, widow, deviſed as follows:—"*I give to my*

"*King-*

" *kinſwoman, Mrs. Anne Middleton*, my houſe and lands at " Arborough Hatch, and all my real eſtate in the pariſh " of Barking, *during her life*, AND AT HER DEATH, *to* " *her children*, upon condition that ſhe, or they, conſtantly " pay 30*l.* a year for a clergyman to officiate in my chapel, " &c. and on failure of theſe conditions here mentioned, " then I give the ſaid houſe and lands to my own next heirs, " to be enjoyed on the ſame conditions; and, IN CASE OF " FAILURE OF CHILDREN of my ſaid kinſwoman, Mrs. " *Anne Middleton, then I give the houſe and lands aforeſaid* " *to her brother, Mr.* George Hodges, *and his children*, on " the ſame conditions; and, in caſe of failure of his child- " ren, then I give the ſaid houſe and lands to the ſiſters, or " ſiſter, of the ſaid *Anne Middleton* and *George Hodges*, to " be equally divided between them, or their children, that " are living at that time."—The teſtatrix died, leaving the ſaid *George Hodges*, the father of the leſſor of the plaintiff, his heir at law. *Anne Middleton*, the deviſee, entered upon the premiſes on the death of the teſtatrix, and enjoyed the ſame till ſhe died, but previouſly ſuffered a recovery.—THE QUESTION was, " What eſtate *Anne Middleton* took, and " whether the children of the ſaid *Anne Middleton* took any, " and what eſtate, in the premiſes in queſtion, under the " will of *Frances Bladen*, the teſtatrix, in the pleadings of " the ſaid cauſe named?"—PER CURIAM: " We are in- " clined to think, that, under the will of *Frances Bladen*, " the teſtatrix, *Anne Middleton*, took an eſtate-tail; but, if " ſhe took an eſtate for life only, we are of opinion, that " her children would take an eſtate-tail; and, in either caſe, " the limitation to *George Hodges*, the heir at law, the fa- " ther of the leſſor of the plaintiff, was barred by recovery, " and the plaintiff has no title."

On a deviſe to the teſtator's ſeven ſiſters, ſhare and ſhare alike; on the death of any of them, her ſhare to go to her firſt and other ſons in tail male; and for default of ſuch ſons, to her daughters, as tenants in common. In caſe of any of the ſeven ſiſters dying without iſſue, or ſuch iſſue dying under twenty-one, the ſurviving ſiſters to take her ſhare; and if all the ſiſters ſhould die without iſſue, or ſuch iſſue die under twenty-one, then over. It was held, that the words " for default of ſuch ſons," did not make the remainder to the daughters *contingent*, which took effect notwithſtanding the birth of a ſon.—*John Trevor*, being ſeiſed in fee, by will dated the 5th of April, 1743, deviſed his capital manſion-houſe, called Glynde, in Suſſex, with the lands, &c. &c. and all his eſtates in Suſſex, to his kinſman, Dr. *R. Trevor*, in fee. He then gave to his ſiſter, Mrs. *Rice*, during her life, an annuity of 300*l.* to be paid half-yearly out of his eſtates in Middleſex, Denbigh, and Flint; to *Elizabeth*

Doe *ex dim.* Gertrude baroneſs Dacre *v.* Mary Jane Roper, dowager lady Dacre, Ea. Ter. 38 Geo. 3. C.B. 1 *Pul. & Doſ.* 250.

*beth Forſter*, formerly his nurſe, an annuity of 50l. for her life, charged on the ſame eſtates; to his nephew *George Rice*, and his niece *Lucy Rice*, children of his ſiſter Mrs. *Rice*, a legacy of 1000l. each; and to his couſin *Robert Trevor*, brother of Dr. *Richard Trevor*, a like legacy of 1000l. charged in default of his perſonal eſtate upon his ſaid eſtates in Middleſex, Denbigh, and Flint. "He then deviſed *all his* "*manors*, *meſſuages*, *tithes*, *lands*, *tenements*, *and hereditaments*, lying, and being in the ſaid counties of Middleſex, "Denbigh, and Flint, or elſewhere, not before diſpoſed of, "ſubject to the charges before mentioned, *unto*, *and amongſt*, "his dear ſiſters, *Grace Trevor*, *Mary Trevor*, *Ann*, the "wife of the honourable *G. Boſcawen*, *Margaret Trevor*, "*Ruth Trevor*, *Gertrude Trevor*, and *Arabella Trevor*, "*during their natural lives* reſpectively, ſhare and ſhare "alike; and from and after the deceaſe of any of them, "then the part, or ſhare, of her, or them, ſo dying, to go "to the firſt and other ſons of ſuch of them ſo dying, and "the heirs of his and their bodies ſucceſſively; AND IN "DEFAULT OF SUCH SONS, then to and amongſt the "daughters of his ſaid ſiſters ſo dying, as tenants in common, and not as joint-tenants, and the heirs of their reſpective bodies iſſuing; but in caſe any of his ſaid ſeven "ſiſters, laſt-mentioned, ſhould die, without leaving any "iſſue of her body begotten, or that ſuch iſſue ſhould die, "before he, or ſhe, ſhould attain his, or her, age of twenty-one years, and without iſſue, then he gave her ſhare "to, and amongſt, the ſurvivors or ſurvivor of his ſaid "ſeven ſiſters, and their iſſue, to go and deſcend in like "manner, as before is mentioned, as to the ſhares, parts, "or proportions, before given to them reſpectively." Then, having given the overplus of his perſonal eſtate, plate, and jewels, after debts and legacies paid, to be divided amongſt his ſaid ſeven ſiſters, he proceeded thus: "And I do further will and appoint, that in caſe all my ſaid ſeven ſiſters "ſhall happen to die without iſſue, or, leaving iſſue, ſuch "iſſue ſhall all die before he, ſhe, or they, ſhall attain the "age of twenty-one years, and without iſſue, that then my "ſaid eſtate in Middleſex and Wales (ſubject as aforeſaid), "ſhall go to, and be enjoyed by, ſuch perſon or perſons, "who ſhall then be entitled to my eſtate in Suſſex, hereinbefore deviſed."—The deviſor died on the 9th of September, 1743, leaving *Lucy Rice* and his ſeven other ſiſters his coheireſſes, him ſurviving. On his death, thoſe ſeven ſiſters, his deviſees, entered and were ſeiſed as tenants in common. One of them, viz. *Gertrude*, on the 27th of July, 1744, married the Honourable *Charles Roper*, by whom ſhe had iſſue, *Trevor Charles Roper* (afterwards Lord *Dacre*), and *H. Roper*, who died, and *Gertrude*, now BARONESS DACRE (the

(the leſſor of the plaintiff). On the 4th of February, 1754, *Charles Roper* died, leaving his widow, *Gertrude*, ſole ſeiſed of her undivided ſeventh part of the premiſes in queſtion. In 1764. *Ruth Trevor*, one of the ſeven ſiſters, died without having been married, as did alſo *Margaret*, another of them, in 1770. On the 2d of March, 1773, *Trevor Charles Roper* (the ſon of *Gertrude*) married the plaintiff in error; previous to and in contemplation of which marriage, a recovery was ſuffered of the one undivided fifth part of the premiſes, of which his mother, *Gertrude*, was ſeiſed for life, with remainder to him (her eldeſt ſon) in tail; and the ſame was ſettled to the uſe of *Gertrude* for life, remainder to *Trevor Charles Roper*, for life, remainder to truſtees, &c. remainder to the firſt and other ſons of the marriage in tail male, remainder to the daughters as tenants in common in tail general, with croſs-remainders, &c. remainder to the uſe of the ſaid *Trevor Charles Roper* in fee. On the 3d of May, 1775, *George Boſcawen* died, whereby his wife, *Anne*, became ſole ſeiſed for life of her undivided fifth part of the premiſes. On the 21ſt of March, 1780, *Mary Trevor* died, unmarried, whereby her fifth became divided between her four ſurviving ſiſters, *Grace Trevor*, *Anne Boſcawen*, *Gertrude Roper*, and *Arabella Trevor*. On the 13th of July, 1780, *Gertrude Roper* died, whereby her one-fifth of the whole, of which a recovery had been ſuffered on her ſon's marriage, and her one-fourth of her ſiſter *Mary*'s one-fifth, deſcended to *Trevor Charles Roper*, her eldeſt ſon. On the 2d of April, 1784, *Anne Boſcawen* died, leaving *George* her eldeſt ſon, and heir at law, to whom deſcended her undivided fifth part of the whole, and her one-fourth of her ſiſter *Mary*'s one-fifth. On the 13th of January, 1786, *Trevor Charles Roper* became Lord *Dacre*; and on the 21ſt of December, 1788, his younger brother, *Henry Roper*, died without iſſue. On the 21ſt of September, 1789, *Arabella Trevor* died unmarried, whereby her one-fifth of the whole, and her undivided fourth of her ſiſter *Mary*'s fifth part, became divided in thirds amongſt *Grace Trevor*, *Trevor Charles* Lord *Dacre*, and *George Boſcawen*. On the 25th of Auguſt, 1790, *Trevor Charles* Lord *Dacre* made his will, duly executed, to paſs real eſtates, whereby he deviſed to his wife, the defendant [Dowager Lady *Dacre*], all his property, both perſonal and real, for ever; and he died on the 3d of July, 1794, without iſſue. *At the time of his death, he, the ſaid* Trevor Charles *Lord* Dacre, *the ſaid* George Boſcawen, *Lord* Dynavor *(grandſon and heir of* Lucy Rice), *and* Grace Trevor, *were the heirs at law of* John Trevor, *the deviſor firſt mentioned.* On Lord *Dacre*'s death, the defendant, his widow and deviſee [the Dowager Lady *Dacre*], entered not only into his one undivided fifth, of which a recovery had been ſuffered (and

(and to which ſhe was certainly entitled), but alſo into the undivided fourth of his aunt *Mary*'s fifth, by him held, and into the undivided third of his aunt *Arabella*'s fifth, and alſo into the third of her undivided fourth of her ſiſter *Mary*'s fifth, by him alſo held as tenant in tail; for which three laſt undivided parts the preſent ejectment was brought by Lord *Dacre*'s only ſiſter, the preſent Lady *Dacre*, leſſor of the plaintiff.

The leſſor of the plaintiff, the now Lady *Dacre*, under the words "in default of ſuch ſons," claimed the one-fourth of one-fifth part of the whole eſtate, being the late Lord *Dacre*'s ſhare of his aunts, *Mary* and *Arabella*'s ſhares, which came to him on their deaths after the recovery ſuffered, and of which, at the time of his death, he was ſeiſed in tail.

*The following pedigree will shew the state of the family.*

FOR THE DEFENDANT it was contended, that as the words, "IN DEFAULT OF SUCH SONS," introduce the limitation to the daughters, that limitation is contingent, and the contingency having happened by the birth of a ſon, all the ſubſequent remainders are deſtroyed. BUT FOR THE PLAINTIFF it was inſiſted, that thoſe words do not create a contingency, being only a continuation of the preceding limitation to the ſons, and mean the ſame as if the teſtator had ſaid, "on failure of the preceding limitation." EYRE, Ch. J.—In the conſtruction of a will, whether the words uſed be technical or not technical, or even of vulgar and common parlance, the Court is to put that ſenſe upon them, in which, on a fair conſideration of the whole context, they collect, that the teſtator intended to uſe them. In this caſe, the words on which the difficulty ariſes are by no means technical; they may import many things, according to the ſubject-matter, and we are to enquire in what ſenſe the teſtator meant to uſe them. If we can diſcover that, the next conſideration will be, whether the words will bear that ſenſe, or whether we are tied down, by any rule of law, to underſtand them in any other, though, indeed, I can hardly put ſuch a caſe. Taking a general view of the whole will, the intent of this teſtator appears to me to be obvious: *he meant to make proviſion for each of his ſeven ſiſters, and their children; and he meant, that if either of his ſiſters, or her children, ſhould fail within a given time, that there ſhould be a ſurvivorſhip in favour of the other ſiſters and their children*; and he alſo intended, that if neither of his ſiſters ſhould have children, or if the children ſhould all die under twenty-one, and without iſſue, another branch of his family ſhould take. In ſome event or other, he meant, not only that the ſons ſhould take an eſtate-tail, but alſo that the daughters ſhould take ſuch an eſtate, failing the ſons. Then let us conſider in what ſenſe the teſtator ſuppoſed that he had uſed the words which conſtitute the limitation to the daughters. Immediately after the diſpoſition to the daughters, he ſays, "*In caſe any of my ſaid ſeven ſiſters laſt mentioned ſhall die without leaving any iſſue of her body begotten, and that iſſue ſhall die before* HE *or* SHE *ſhall attain* HIS *or* HER *age of twenty-one years, then I give her ſhare to my ſurviving ſiſters.*" He gives an intereſt to the ſurviving ſiſters in the event of ONE SISTER DYING WITHOUT EITHER SON OR DAUGHTER; and expreſsly ſays, therefore, that there ſhall be no ſurvivorſhip if any of the daughters ſhould have iſſue, either male or female. Did he not then ſuppoſe that he had uſed words ſufficiently ſtrong to give an eſtate-tail to the daughters, in the event of the ſons dying without iſſue? Next comes the limitation to Dr. *Trevor*, which was to take place in the event of every one of the ſiſters dying without either

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ſons leaving iſſue, or daughters leaving iſſue, and ſuch iſſue dying under twenty-one. Did he not then underſtand, that by the original deviſe, and by the clauſe of ſurvivorſhip, he had given over every ſhare of each ſiſter, to the ſons firſt, and their iſſue; and that limitation failing, to the daughters, and their iſſue? Would he have confined the clauſe of ſurvivorſhip to the death of the ſons and daughters of his ſiſters under twenty-one, and without iſſue, if he only meant to give a contingent limitation to the daughters, in the event of no ſon being born? Or would he have clogged the limitation to Dr. *Trevor*, with the exiſtence of perſons to whom he had not given any intereſt? The next conſideration is, whether the words will bear the conſtruction which the teſtator palpably intended to give them. I do not feel diſpoſed to go all the lengths which ſome of the caſes on wills would warrant: I am for aſſiſting, to a reaſonable extent, teſtators, who are not always aſſiſted by the beſt advice, and whoſe ſtate of mind often partakes of the ſtate in which their bodies are; and whoſe adviſers, if they have a little knowledge of law, frequently make a ſtrange mixture of technical and common words. When I have got at the teſtator's meaning, I will, if poſſible, give ſuch a conſtruction to his words, as may carry his meaning into execution; but, if he has not expreſſed his will in ſuch words as can bear out his meaning, then the will muſt take its effect according to the conſtruction which the words will bear, and his intention will be defeated. In ſhort, I will depart from the technical ſenſe of words, to effectuate the intention of teſtators as far as poſſible, without violating the rules of law. The words uſed in this caſe are, "in default of ſuch ſons." It is impoſſible to ſay, without reference to the context, what the meaning of theſe words is. I do not know a larger or looſer word than "default." Abſtracted from other words, what does it mean? In the expreſſions, "judgment by default," and "a juror making default," we underſtand it differently. In its largeſt and moſt general ſenſe it ſeems to mean, failing. It has been argued, that the birth of a ſon would ſatisfy the words, and ſhew that there was no default, and, conſequently, defeat the remainder. Is there any reaſonable ground for ſo confining the word "default," as to make the mere birth of a ſon deſtroy the contingency, contrary to the plain ſenſe of the teſtator, who clearly meant the default of ſuch a ſon as would take the benefit of his deviſe; whereas a ſon, dying in the life-time of his mother, could take nothing? By the word "default," the teſtator meant to denote the failure of that ſon at ſome time or other. Without referring to the context, natural death is the circumſtance which he may firſt be ſuppoſed to have pointed at; if there ſhould be ſons, and they ſhould die, then the daughters ſhould take. But if we look

look to the context, it will appear, that he meant failure of thoſe ſons to whom an intereſt was given by the former part of the deviſe. "Such" is a word of reference, and may be referred either to the individual perſon, taken abſtractedly from any thing connected with him, or it is powerful enough, where the intent appears, to include every circumſtance added to the deſcription of the perſon in the former part of the deviſe. The moſt obvious meaning of "ſuch ſon," in a proviſion of this nature, is, that ſon to whom, and to whoſe iſſue, he had given an eſtate in the former inſtance. Whatever the daughters were to take, they were to take when the proviſion to the ſons ſhould be ſpent. If there were no ſons there could be no iſſue: there might be ſons, and there might or might not be iſſue. A conveyancer might have thought right to add words to include every poſſible event, though *Holcroft*'s caſe, *Moor*, 486, 520, ſhews that this was not neceſſary. I do not intend to encumber myſelf with caſes. Deciſions upon other words ſomething like thoſe in queſtion, in other wills, where the whole context of thoſe other wills muſt be gone into, can afford very little aſſiſtance. The caſe of *Spalding* v. *Spalding*, *Cro. Car.* 185. which I mentioned in the courſe of the argument, is not in point; but the principle, that the whole context of the will muſt be looked into, to effectuate the intent of the teſtator, is applicable to this caſe. There the queſtion was, Whether a former eſtate, expreſsly given, ſhould be defeated? Here it is, Whether a new limitation ſhall take place? Yet, if we adhere ſtrictly to the words "default of ſons," it will have the effect of giving an eſtate tail to the daughters, in preference to the iſſue of a ſon; that, indeed, would be a moſt violent conſtruction, becauſe it would diſappoint an expreſs limitation, whereas here the queſtion depends on the conſtruction of the particular words creating the limitation; but, as applied to the apparent intent of the teſtator, it is equally violent and improper. *I think, therefore, that we are bound by every rule to ſay, that this teſtator meant to uſe the words,* "IN DEFAULT OF SUCH SONS," in the ſenſe of "FAILING THE LIMITATION TO THE SONS;" *and that the daughters did take; which diſpoſes of this queſtion.* BULLER, J.—*The difference which prevails between me and the reſt of the Court lies in a very narrow compaſs.* I agree, that a teſtator may expreſs his intention by what words he pleaſes, and the Court is to so expound his expreſſions, that every word may ſtand, if poſſible. The Court is to pronounce according to the apparent intent of the teſtator, but that intent muſt be found in the words of the will, and is not to be collected by conjecture *dehors* the will, or, as my Lord Chief Juſtice expreſſed himſelf in a late caſe, as the queſtion has not been aſked of the teſtator, it is but conjecture what would have been his

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anſwer. I hold, that if there are repugnant or inconſiſtent clauſes, the Court muſt take the whole will, and find the meaning as far as they can; but if the words are ſenſible, and there are none uſed but what *may* ſtand, then they *muſt* all ſo ſtand, and the will muſt be conſtrued according to the plain meaning of thoſe words, without any ingenious conjecture, whether the teſtator meant more or not. In this caſe it has not been argued, that any part of the will is inconſiſtent, or that every word may not ſtand. It has been contended, that the words, "in default of ſuch ſons," mean either, if there are no ſons, or if there are ſons, and thoſe ſons die; and that the words are capable of either of thoſe interpretations. But I think that the teſtator could not mean, that where the ſons died the eſtate ſhould go over, becauſe I find, on the face of the will, that if there was a ſon, that ſon ſhould take an eſtate in tail general, and, conſequently, his iſſue ſhould take after him. The words, however, may be conſtrued, "if there be no ſons;" and where there are two conſtructions, one of which is ſenſible, and the other not, you muſt take that which is ſenſible, and reject the other. Thus ſtands the firſt argument. Then it was argued that, on the authority of caſes, we muſt make the words bend to the intent: but all the caſes which have been cited depend on the ground of the wills being repugnant or inaccurate. Thus, in *Tuck* v. *Frenſham*, *Moor* 13; *Dyer*, 171, 1; *Ander.* 8, *Co. Lit.* 21. [a. note] 126, 15, the firſt limitation to *heirs male*, and the ſubſequent remainder over, in caſe the deviſee ſhould die without *heirs* generally, being inconſiſtent, it was neceſſary for the Court to take the whole together, in order to diſcover the real meaning of the deviſor, and then to put a ſuitable conſtruction on his words. So in the caſe of *White* v. *Barber*, 5 *Burr.* 2703, and p. 108, *ante*, the will was very inaccurate, and the Court were obliged to take a liberty with it, in order to make ſenſe. In *Spalding* v. *Spalding*, *Cro. Car.* 185, the deviſe over was inconſiſtent with the preceding limitation. With reſpect to the caſe of *Evans* v. *Aſtley*, 3 *Burr.* 1570, and p. 108. *ſupra*, the proviſo that the deviſees and their "deſcendants" ſhould take the name and arms of the deviſor, was inconſiſtent with a mere eſtate for life. My diſtinction is, that in incorrect wills the Court may take liberties, but that, if the words are correct, they have no power to make any alteration. In this caſe, as the teſtator has ſpoken plainly, it is no matter what he would have ſaid if he had been aſked; indeed, if he had been told what would become of his eſtate, he might have given different anſwers. He would not have acted unreaſonably if he had ſaid, that without any wiſh to continue the eſtate in his family for ever, he ſhould be ſatisfied, if in caſe either of his ſiſters ſhould have a ſon, the eſtate were ſecured to

him. Besides we must recollect, that in great families, when a son is born, very little regard is paid to the daughters. Or he might have said, "if there should be a son, he will have the power of cutting off the entail, and I will not trouble myself to make any further disposition." But whatever answer he might have given, the Court cannot alter the words of the will, and can only say, *quod voluit non dixit:* besides, if there can be a doubt, we must recollect, that by the construction contended for we shall disinherit the heir at law, a circumstance which it is not usual to lay out of the consideration of the Court. The case of *Hay* v. *Coventry*, 3 *T. R.* 83. and p. 167. *supra*, may be cited to shew, that where the words of a will are such, that the Court cannot help believing, in their own private opinion, that it was the intention of the testator to give a fee, yet, if the words used are not sufficient for that purpose, the Court cannot make any alteration. There are two other cases, however, which more immediately apply to the point in dispute. (Here Mr. Justice *Buller* referred to his own notes of the cases of *Denn* ex dim. *Briddon* and Wife, v. *Page* and another (1),

(1) *Denn* ex dem. *Briddon* and Wife *v. Page* and another, *B. R. M.* 23 *G.* 3. 1 *Pul.* & *Bos.* 261. [n. a.]—The testatrix devised lands to *S. Nash*, son of *T.* and *M. Nash*, for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *S. Nash*, and the heirs male of his and their bodies; "for default of such issue, to "the use and behoof of all and every the daughter and daughters of "the body of the said *T. Nash*, on the body of the said *M.* his wife "begotten, and to be begotten, *and for default of* SUCH *issue* to the use "and behoof of the right heirs of the said *T. Nash* for ever." *S. Nash* died, leaving a daughter, *Mary*, one of the lessors of the plaintiff; *Jane*, a daughter of *T. Nash*, on the death of her brother *S. Nash*, entered into possession of the premises in question, suffered a common recovery, and conveyed to the defendants.—THE QUESTION was, Whether *Jane* took an estate for life, or an estate-tail?—FOR THE LESSORS OF THE PLAINTIFF it was contended, that the words "default of such issue" could not be held to carry an estate in tail male; and if they were construed to convey an estate in tail general, a greater estate would by that construction be given to the daughters than had before been given to the sons. —FOR THE DEFENDANT it was insisted, that the words "for default "of such issue," after the limitation to the sons, could not be confined to the mere failure of sons, but extended to the failure of sons of those sons. Lord MANSFIELD, Ch. J.—I conjecture that this was a blunder, and that another limitation was intended, but I do not know of what nature, whether to heirs general or special. Is there then any authority for supplying the defect, and making the will anew? Had the words been "if they die without issue," an estate-tail would have been implied; but here the words are "*for default of* SUCH *issue*," viz. that issue which is before mentioned. The Court has no power to strike out the word "SUCH," and if they did, what are they to supply it with? are they to give an estate in tail general, or in tail male? There is no intention therefore apparent on the will to direct the Court. PER CURIAM:—Judgment for the plaintiffs.

and

and *Keene* ex dim. *Pinnock* and Wife *v. Dickson* (1). In both those cases the Court was of opinion, that the word "such" could only refer to that issue which had been beforementioned, viz. to the sons. Looking at these cases, then, I do not feel myself at liberty to reject any word of the will before us. *The clauses are sensible throughout, and the plain construction of the limitation,* "IN DEFAULT OF SUCH SONS," *is, that the daughters shall take, in case there be no sons.* HEATH, J.—It seems admitted, both by the bar and the bench, that the clear intention of a testator will control the literal construction of his words. It must be admitted, that

(1) *Keen* ex dim. *Pinnock* & ux. v. *Dickson*, *B. R. M.* 23 *Geo.* 3. 1 *Pul.* & *Bos.* 254. [n a.]—The testator, *Henry Dakings*, being seised in fee, devised the same to his brother *P. D.* for life, and after his decease to his niece *Grace Pinnock* for life, then to trustees to preserve contingent remainders; and after the decease of *P. D.* and *Grace Pinnock*, "in trust, "and to and for the use and behoof of the first son of his niece *Grace* "*Pinnock*, lawfully to be begotten, and the heirs of the body of such first "son lawfully issuing; and for want of such issue, to the second, third, "fourth, fifth, and sixth, and all and every other the son and sons on the "body of his said niece to be begotten, and the heirs of the body of such "son and sons lawfully issuing, according to the seniority of age and pri"ority of birth; the elder and the heirs of his body to be always pre"ferred, and take place before the younger, and the heirs of his body; "*and for want of such issue male, then to the use and behoof of all and every* "*the daughter and daughters of his said niece* Grace Pinnock, *thereafter to* "*be begotten*; AND FOR DEFAULT OF SUCH ISSUE, then *to the use* "*and behoof of* Richard Corbin, *and the heirs of his body lawfully to be* "*begotten*; and for default of such issue, to the use and behoof of the "second son of *Gawin Corbin*, deceased, and the heirs of his body to be "begotten for ever." Provided that *R. Corbin*, and the second son of *G. Corbin*, and the heirs of their respective bodies, in whom the estates should become vested, should take the testator's name.—FOR THE PLAINTIFF, it was contended, that *the daughters took only estates for life*, or that if any thing more was necessary to satisfy the intention of the testator, *they took joint estates for life, with remainders in tail to their children*.—FOR THE DEFENDANT, it was insisted, that the daughters took an estate tail; AND FOR THE REMAINDER-MAN, that on the birth of a son, the estate tail vested in him, and then the remainder over vested also. Lord MANSFIELD:—No case exactly the same as this has ever been decided, or perhaps ever will be; but the case of *Briddon* v. *Page*, was very like it. In my private opinion, I think that the whole was a blunder; but that conjecture is not a foundation for a judicial determination. We cannot supply a limitation to the issue of the daughters, for the words are express. The estate is given to the sons and the heirs of their bodies generally, and "for want of such issue male" (which must mean sons), over. If therefore the estate is to go over for want of sons, the contingency on which the daughters were to take has not happened; for there was a son who took, so no want of sons, and the event in which the daughters were not to take has happened. I am satisfied with this construction, because it effectuates the intention of the testator, as the daughters will take in fee. WILLES J.—On such an embarrassed will, it is difficult to find out a right construction. It is clear that the line of *Corbin* was not to take until after a general failure of issue of the *Pinnocks*. The estate to the daughters is a joint-tenancy. *Co. Litt.* 181. *Cook* v. *Cook*, 2 *Vern.* 545.

the words here expreſs a condition on which the limitation over to the daughters of the ſiſter ſhall take place; but it is eaſy to conjecture by what ſlip theſe words were uſed; and the queſtion is, Whether ſuch a ſlip ſhall defeat the apparent intention? It has been held, in caſes of remote antiquity, that a limitation, which in form appears to be conditional, ſhall be conſtrued to be abſolute, if moſt ſuitable to the intention of the teſtator. The words in *Holcroft's* caſe, *Moore*, 486, 520. are very ſtrong, and yet it was reſolved, that the deviſe ſhould take effect as a limitation. So in *Andrews* v. *Fuller*, *Str.* 1092. which was decided in later times, the Court obſerved that it was no unuſual thing for words of condition to be taken as words of limitation, where there is a remainder over. And it was laid down as a principle in *Ives* v. *Legge*, 3 *Term Rep.* 489. that the courts will not conſtrue a remainder to be contingent, where it can be taken to be veſted. In *Keene* ex dim. *Pinnock* v. *Dickſon*, no intention of the teſtator could be collected, and, therefore, the words were conſtrued according to their literal meaning. Now the queſtion here is, Whether the intention of the teſtator cannot be collected to be, that *from and after the death of ſuch ſons the daughters ſhould take?* This intention is ſtrongly ſhewn by the different deviſes in the will, and the limitation over to the *Trevor* family. If the conſtruction contended for by the defendant ſhould take effect, the conſequence would be, that the heir at law would be admitted, and the limitation over entirely defeated, and that which was the clear intention of the teſtator would not take place:—for theſe reaſons I am with the leſſor of the plaintiff. Rooke, J.—On looking at this will, I cannot but think that the teſtator meant, that in caſe the ſons, and the iſſue of ſuch ſons, ſhould fail, the daughters ſhould take; and that he could not intend, that on the birth of a ſon, all the ſubſequent limitations ſhould be defeated. The words, "default of ſuch ſons," may either mean, if there be no ſons, or if there be ſons, and thoſe ſons ſhall die. By a former part of the will, an eſtate tail is given to the ſons. Now a ſubſequent proviſion is not to be conſtrued to revoke a former proviſion, but muſt, if poſſible, receive ſuch a conſtruction as is conſiſtent with it. I cannot ſay that the words, ſtrictly taken, mean if there ſhall be no ſon: the expreſſion, "default of ſuch ſons," is as vague as default of ſuch iſſue, which imports on the general failure of iſſue; ſo here the e words cannot be taken merely to mean if no ſons ſhall be born, but when ſons ſhall fail; and this conſtruction is conſiſtent with the preceding limitation, and in this way all the proviſions of the will may ſtand. But if there be any doubt on this conſtruction, we are ſtill warranted by the caſe of *Spalding* v. *Spalding*, to inſert the words "heirs of their bodies;" and, though the Court might not think

think themſelves warranted in *Keene* v. *Dickſon* to alter the words, yet that caſe does not much move me, as the words were not the ſame as they are here: indeed I have long been tired of looking into caſes on wills. I think, however, that it is not neceſſary to ſupply any words, as the expreſſion, "default of ſuch ſons," may either apply to having ſons, and thoſe ſons dying, or to not having ſons at all; and, therefore, the Court is bound to give that conſtruction which is conſiſtent with the other clauſes of the will.—Judgment for the plaintiff.

Mary Jane Roper, Dowager Lady Dacre, v. Doe, Leſſee of Gertrude, Baroneſs Dacre, in Error, Hil. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 112.

The defendant, being diſſatisfied with the above judgment of the court of Common Pleas, brought a writ of error in B.R. and CONTENDED, that the deviſe over to the daughters, "*and in default of ſuch ſons*, &c." was only to take place, in caſe there ſhould be no ſons born of any of the deviſor's ſiſters, and was, therefore, contingent; and there having been a ſon born, the remainder to the daughter of *Gertrude* (the leſſor of the plaintiff below) never took effect; and then the eſtate deſcended to the heirs at law of the deviſor, from one of whom the plaintiff in error claimed, it being clearly the intention of the deviſor, that the ultimate remainder to Doctor *Trevor* ſhould not take effect ſo long as any of the children of his own ſiſters ſhould be living. And the caſes relied on were, *Keene* d. *Pinnock* et ux. v. *Dickſon*, B. R. M. 24 Geo. 3. and *Denn* d. *Briddon* et ux. v. *Page*, in the ſame term.—On the other hand it was contended, that thoſe words meant no more than *on failure of ſons*, or *of the eſtates before deviſed to the ſons, and to the heirs of their bodies*; and that the intention of the deviſor was to give eſtates for lives to his ſeven ſiſters, remainder to their firſt and other ſons in tail, remainder to the daughters as tenants in common in tail, with croſs-remainders to the ſiſters and their iſſue, in caſe any of the ſiſters died without iſſue, or ſuch iſſue died before twenty-one. And in ſupport of this conſtruction, he counſel relied much on the ultimate remainder to Doctor *Trevor* being given over upon the event of all the ſeven ſiſters dying without iſſue (i. e. male or female), or ſuch iſſue dying before twenty-one, and without iſſue.—Lord KENYON, Ch. J.—THE QUESTION is, *Whether the mere birth of a ſon of one of the ſiſters put an end to all the ſubſequent limitations of that portion?* and in order to determine this, it becomes neceſſary to conſider the whole of the will, and particularly the laſt clauſe in it, which is this: "In caſe all my ſaid ſeven ſiſters ſhall happen to die without iſſue, or leaving iſſue, ſuch iſſue ſhall all die before he, ſhe, or they, ſhall attain the age of twenty-one years, and without iſſue, then my ſaid eſtate in Middleſex and Wales, ſubject as aforeſaid, ſhall go to and be enjoyed by ſuch perſon or perſons who ſhall then be entitled to my ſaid eſtate in Suſſex, hereinbefore

deviſed according to this my will." Here the intention of the deviſor ſeems to be expreſſed in terms which cannot be miſunderſtood. If the ſeven ſiſters take an eſtate tail, the whole of this clauſe will have effect: but if they do not take an eſtate tail, that part, the limitations of which are defeated by the birth of a ſon, will not go to Doctor *Trevor*, but to the heirs at law of the deviſor, one of whom the deviſor intended ſhould not take; and that ſhews the importance of the argument derived from the obſervation that there was an eighth ſiſter, who was excluded by the limitations to the ſeven other ſiſters. This circumſtance alone would be ſufficient to decide this caſe: but, independently of this, I think that the former clauſe in the will would create an eſtate-tail in the ſiſters. In the conſtruction of wills, we cannot do better than adopt the rule mentioned by Lord *Hale*, *noſcitur à ſociis*. Now here an eſtate-tail is given, in the ſame clauſe, to the ſons of the ſiſters, and then "*in default of ſuch ſons*," the limitations are to the daughters: but it is contended, that there is a ſlip in the expreſſion uſed in making this limitation, and that the deviſor did not intend that the portion of either of the ſiſters ſhould go to her daughter, if ſhe had a ſon born; but on weighing and conſidering every part of this clauſe, *I have no doubt but that the deviſor intended that the ſiſters ſhould take eſtates-tail.* But the caſe of *Denn* d. *Briddon* v. *Page* has been relied on by the plaintiffs in error, where Lord *Mansfield* intimated an opinion, that there was a blunder in the will. *I find myſelf preſſed by whatever fell from ſo great a judge, and it is always with doubt and diſtruſt of my own mind, that I differ from him in opinion; but I am not prepared to ſay, that there was any blunder in that will.* There the deviſor gave to *S. Naſh*, the ſon of *T.* and *M. Naſh*, for life, remainder to truſtees to preſerve contingent remainders, remainder to the firſt and other ſons of *S. Naſh*, and the heirs male of his and their bodies; then, having provided for the male heirs (who are, in general, the favourites in caſes of landed property), it is not improbable that it ſhould occur to the teſtator to provide for the preſent generation, and, therefore, he deviſed to all and every the daughters of the body of *T. Naſh* by his then wife; and for default of ſuch iſſue, to the right heirs of *T. Naſh* for ever. Now, when there is nothing in the will to lead to ſuch a ſuppoſition, why ſhould it be ſuppoſed that that was a blunder that brought forward the daughters of ſons in preference to the iſſue of the ſiſters? I have known many cautious teſtators make limitations in their wills like that. *Here the word* "SONS" *has been ſlipped in inſtead of* "ISSUE" *in one place, but it is ſupplied in another; and, on the whole, I have no doubt, but that the judgment given in the court of Common Pleas ought to be affirmed.* ASHHURST, J.—

C.

On reading the whole will, it is evident, that by the words, "and in default of ſuch ſons," the deviſor meant "failing the limitation," then over: therefore I concur in the opinion given by Lord *Kenyon*. GROSE, J.—The queſtion here is, Whether the words, "in default of ſuch ſons," are not to be underſtood as meaning, that "that limitation failing," the limitations to the daughters and their iſſue ſhould take effect? or whether, by the birth of a ſon, the limitations to the daughters ſhould be defeated? Every word in this will ſhews (I think) that the former was the intention of the deviſor. He intended, firſt, that the ſons ſhould take eſtates tail, and, when that limitation failed, that the daughters ſhould take in remainder. The limitation to the daughters ſhews that this was his intention; and, if there were any doubt on the conſtruction of that part of the will, the laſt deviſe removes all doubt, for there the deviſe over of the eſtates in Middleſex and Wales is only to take place, "in caſe all his ſeven ſiſters ſhould die without iſſue," &c. It is ſaid, however, that though we may conjecture that this was the deviſor's intention, the words of the will do not prove it; and the counſel for the plaintiff in error went into a minute comment on the particular penning of the will; but, if we comment very minutely on the words in the will, I think I can read them, ſo as to make the conſtruction which we put on the whole conſiſtent with every word. The words after the limitation to the ſiſters, and their firſt and other ſons, &c. are; "and in default of ſuch ſons, *then* to and amongſt the daughters," &c. But when is that to take place? At the time of the deaths of the ſons. This mode of reading the words is conſiſtent with the whole will: but, in order to ſupport the conſtruction we put upon the will, I am not driven to this argument, becauſe, conſidering the whole will together, and particularly the laſt clauſe of it, I am clearly of opinion, that it was the deviſor's intention, that the limitation to the daughters ſhould take effect, when the limitation to the ſons failed. LAWRENCE, J.—The limitation, on which the argument for the plaintiff in error is built, is to the firſt and other ſons, and the heirs of his and their bodies ſucceſſively; and in default of *ſuch* ſons, then to and amongſt the daughters, &c. that is, in default of a firſt and other ſons, for thoſe are the words immediately preceding. Now that is equivalent to a limitation to the firſt, ſecond, third, and fourth ſons, &c. and the limitation over, "in default of ſuch ſons," is the ſame as if it had been in words, "in default of a firſt, ſecond, third, and fourth ſons, &c." that is, "if there be but one ſon," I give to the daughters of my ſiſters, on the failure of a ſecond ſon; if there be two ſons, and no third ſon, then on the failure of a third ſon, and ſo on: ſo that, according to this conſtruction, whenever there is a failure, or default,

of a second, third, or other son, who would be entitled to take on the death of a prior son without issue, the daughters of the sisters shall take. And this obviates the objection, that the construction contended for by the defendant in error will exclude the daughters of sons; for, if there be a son who leaves a daughter, that daughter would take; and if she died without issue, and there were no second, third, or other son of the devisor's sister to take, then there would be a default of sons, and the limitation to the daughters of the devisor's sisters would take effect: so that, if there were a first and second son, and the second should die leaving daughters, and then the first son should die without issue, the daughters of the second son would take the remainder in tail vested in their father; and, if they were to die without issue, and there were no third son, then there would be a default of sons, and the remainder to the daughters of the sisters would take effect.—Judgment affirmed.

Doe *ex dim.* Brown, *v.* Holme and Longmire, Tr. Ter. 11 Geo. 3. C. B. 2 *Black. Rep.* 777. 3 *Wils.* 241. *Fearne's Cont. Rem.* 549.

Tenant for life, remainder to the heirs male of his body in fee, remainder over, in a will, is a contingent remainder with a double aspect, and may be barred by the recovery of tenant for life.—The testator, *James Longmire*, devised all his lands and tenements in Windermere, Westmoreland, to his son, *James Longmire, with impeachment of waste*, for the term of his natural life; and after his decease, unto *the heirs, male or female*, lawfully to be begotten of the body of his said son, *James Longmire*, for ever; they paying out of the same 400l. viz. 200l. to his daughter, *Elizabeth Brown*, and 200l. to the children of his daughter, *Dorothy Birket, to be paid within two years after the death of his son, James Longmire*; in default whereof, he devises the premises to the said *Elizabeth Brown*, and her heirs, to hold for such term, as will raise the said 400l. out of the rents and profits; and then the premises to *return* to the *heir male or female of his said son, and to his and her heirs for ever*. But if his said son should die, *leaving no lawful issue*; then he devises the premises to his daughter, *Elizabeth Brown*, and her heirs and assigns for ever. *James Longmire*, the son, suffered a recovery, and did the proper acts to bar an estate tail, declaring the use to himself in fee; and conveyed the premises to the defendants and their heirs; and died without having had any issue. And the lessor of the plaintiff was the testator's daughter, and residuary devisee.—THE QUESTION was, WHETHER the remainder to *Elizabeth Brown* was barred by this recovery? And it was contended that it was not; for that *James Longmire* took only an estate for life, with contingent remainder in tail to his issue, with a vested remainder in fee to *Elizabeth Brown*; in which case, *James Longmire*, being only tenant for life, could not by his recovery bar such vested remainder. BUT THE COURT, without determining whether *James Longmire* took an estate only

only for life or in tail, were clearly of opinion, that take which he would, as he certainly took a freehold ſufficient to ſupport a contingent remainder, the limitation to *Elizabeth Brown* could not enure as an executory deviſe; becauſe that is not admitted where there is a preceding freehold, capable of ſupporting a contingent remainder; and then as a remainder, if *James Longmire* took an eſtate tail, it was clear his recovery barred it; if he took only for life, then they were clear that the ſubſequent limitation to the heirs, male or female, &c. of *James Longmire*, was a good contingent remainder in fee-ſimple; and of conſequence, the limitation to *Elizabeth Brown* muſt alſo be contingent, and not veſted; for *a remainder cannot veſt after a remainder in fee:* therefore they adjudged, that the remainder to *Elizabeth Brown*, was barred or deſtroyed.

So where the teſtator, *Thomas Laming*, being entitled to a remainder in fee, in the premiſes in queſtion, expectant on the death of *Ann Bulver*, tenant for life, by a codicil to his will, deviſed them, in the following words:—"I give my "meſſuage, &c. (deſcribing the premiſes), *to my ſon* Jeffrey "Laming *for his life, and after his death, unto all and every* "*his children equally, and to their heirs; and in caſe he dies* "*without iſſue, I give the ſaid premiſes unto my ſaid two* "*daughters and their heirs, equally to be divided between them.*" —The teſtator died in the life-time of *Ann Bulver*, having left the ſaid *Jeffrey*, his only ſon and heir at law, who, after death of *Ann Bulver*, entered upon the premiſes, and ſuffered a recovery thereof, to the uſe of himſelf in fee, and afterwards conveyed them to the defendants. He died in 1778, without having ever had any iſſue. Two of the leſſors of the plaintiff, were the two daughters of *Thomas Laming*, mentioned in the codicil to his will, and the third was a perſon to whom they had, in 1776, conveyed their intereſt expectant on the death of their brother.—Neither ſide thought it could be maintained that *Jeffrey* took an eſtate-tail. The words, "and in caſe he dies without *iſſue*," being tacked to the preceding clauſe, muſt mean the ſame thing as, "and in caſe he dies without *children*." But, for the defendants, it was contended, that both the limitations over were contingent remainders in fee; and, for the plaintiff, that the firſt was a contingent remainder in tail, and the ſecond a veſted remainder in fee. SED PER CURIAM: We have no doubt but that both are contingent remainders. There are no expreſſions to reſtrain the ſenſe of the word "*heirs*," in the limitation to *Jeffrey*'s children. If *Jeffrey* had children, the teſtator meant to give them an eſtate in fee. Upon the contingency of his not having any, he meant the eſtate to go immediately to his daughters in fee. The word "*heirs*," in the limitation over to the daughters, certainly does not mean "*heirs of the body*," and we cannot give

Goodright, Leſſee of Docking, *et al. v.* Dunham *et al.* Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 264.

give the ſame words two different ſenſes in different parts of the ſame will.—Poſtea to the defendants.

Denn, *ex dim.* Balderſton, *v.* Balderſton, Ea. Ter. 15 Geo. 3. B.R. *Cowp.* 257.

The teſtator, *George Balderſton*, made his will, and deviſed as follows: "I give to my ſon, *Thomas Balderſton*, 200l. to "be paid to him by my executrix hereinafter named; alſo I "give to my wife, *E. B.* and her heirs for ever, all my houſes "at the eaſt end of Newborough-ſtreet, in S. I alſo give to "her, and her heirs for ever, my two tenements in Long-"weſt-gate and Cooke-row, in S. aforeſaid; *alſo I give to my "three ſons*, George, William, *and* Gillis, *and to their heirs "for ever*, my houſe at the end of the apple-market, in S. "aforeſaid, and my cloſe in Falſgrave, *as tenants in common, "and not as joint-tenants*, when they come at age of twenty-"one years, and the rents and profits of them to be received "by my executrix till that time, and employed for their "maintenance, education, and benefit, during their minority, "and as any of them come at age, their ſhare of the rents and "profits thereof to be received by them; alſo I give to my "wife, my houſe at the upper end of Newborough-ſtreet, in "S. aforeſaid, now in my occupation, with all the furniture "thereto belonging, during her natural life, a proper part of "the accruing profits or rents thereof to be applied for the "maintenance and education of my three daughters, *Iſabella*, "*Elizabeth*, and *Janet*, to whom, and their heirs for ever, I "give the ſame, after the deceaſe of my ſaid wife, as tenants "in common, and not as joint-tenants. MY WILL FUR-"THER IS, and I do hereby order and direct, that *if* ANY *of "my abovenamed children ſhall happen to die before they come "of age of twenty-one years, and without lawful iſſue, then "their property and ſhare in* ANY *of the above bequeathed "premiſes, ſhall be equally divided among the reſt of my ſurvi-"ving children, ſhare and ſhare alike.*" *Thomas*, the eldeſt ſon, was of the age of twenty-one years at the time of making the will, and two of the younger ſons, viz. *George* and *Gillis*, died under the age of twenty-one years, leaving the other younger ſon, *William*, ſurviving. THE QUESTION was, Whether *William*, the ſurviving younger ſon, was entitled to the whole of the houſe at the eaſt end of the apple-market in S. and the cloſe in Falſgrave, or the ſaid *Thomas* and the daughters, or any of them, were entitled to any ſhares and parts thereof? Ld *Mansfield*, CH. J. delivered the opinion of the Court:—The queſtion turns upon the conſtruction of the clauſe by which the premiſes are deviſed over, upon the contingency of ANY of the children dying before the age of twenty-one years, and without lawful iſſue.—One conſtruction contended for was, that it is a ſubſtitution of the eſtate deviſed to *the three ſons, as between them*; and again, as a ſubſtitution of the eſtate deviſed to the *three daughters, as between them*: but that conſtruction cannot be maintained from the words, becauſe the teſtator

teſtator expreſsly joins both the deviſes together; for he ſays, "their ſhare in *any* of the bequeathed premiſes;" ſo that he manifeſtly blends them together. — The next doubt was, Whether *Thomas*, the eldeſt ſon, was to be included or excluded? Upon the *contingency* that is put in the clauſe in queſtion, namely, "*if any of my abovenamed children* ſhall happen to die before twenty-one," *Thomas* muſt be excluded, becauſe he was of age at the time of making the will, therefore he could not be meant by that part of the clauſe.—The next doubt on the conſtruction was, Whether *the reſt of my ſurviving children* ſhould mean thoſe only who might die before twenty-one, or whether it ſhould mean ALL the teſtator's ſurviving children? And, after ſome doubt, we are at laſt unanimouſly of opinion, that theſe words, *the reſt of my ſurviving children*, take in *all the ſurviving children*, and, conſequently, include the eldeſt ſon.

Goodtitle, Leſſee of Winckles, *v.* Billington, *et al.* Tr. Ter. 21 Geo. 3. B.R. 2 *Doug.* 753.

The teſtator, *Bernard Chevall*, made his will, in which there was this deviſe: "Next, I give and deviſe unto my ſaid "loving wife, *Elizabeth Chevall*, and unto my daughter, "*Anne Chevall*, all that my meſſuage, tenement, or farm, &c. "viz. (the premiſes in queſtion), to hold the ſaid meſſuage, "tenement, or farm, &c. unto my ſaid wife, *Elizabeth Che-* "*vall*, and unto my daughter, *Anne Chevall*, for and *during* "*the term of their natural lives, and the life of the longer liver* "*of them*, in equal proportions, ſhare and ſhare alike. BUT, "*in caſe my ſaid daughter*, Anne Chevall, *ſhould happen to* "*marry, and have iſſue of her body lawfully begotten*, then, and "in that caſe, *after the deceaſe of my ſaid wife*, I give and "deviſe all and ſingular the ſaid meſſuage, tenement, or farm, "&c. *unto my ſaid daughter*, Ann Chevall, *and to her heirs* "*and aſſigns for ever*. BUT, *if my ſaid daughter ſhould happen* "*to die ſingle, and unmarried, and without iſſue* of her body "lawfully begotten, then, and in that caſe, I give and deviſe "all and ſingular the aforeſaid premiſes laſt abovementioned, "*unto my ſaid wife*, Elizabeth Chevall, *and to her heirs* "*and aſſigns for ever.*" *Elizabeth Chevall* died, after the teſtator, on the 30th of June, 1775. *After her death*, Ann Chevall *ſuffered a recovery of the premiſes in queſtion, and deviſed them to the defendants*. She afterwards died unmarried. The leſſor of the plaintiff was the brother and heir at law to *Elizabeth Chevall*. THE QUESTION was, *Whether the limitation over to Elizabeth Chevall*, and her heirs, *was barred by the recovery ſuffered by Ann Chevall?* For the plaintiff it was contended, that it was not; for that it was either an *executory deviſe*, and not too remote in its creation, or a *veſted remainder*, after eſtates for life to *Elizabeth* and *Ann Chevall*, and the ſurvivor, and a *contingent* eſtate-tail to *Ann Chevall*. For the defendants it was contended, that, whether the daughter took at firſt an eſtate-tail, or only an eſtate for life, the remainder

remainder over to the widow was barred by the recovery. If ſhe took an eſtate-tail, the caſe was clear; but, if ſhe only took an eſtate for life, then, it was ſaid, that the limitation to the widow was upon a contingency with a double aſpect; it was a concurrent remainder in fee, created in the alternative, with a contingent remainder in fee to the daughter; and, a recovery having been ſuffered by the tenant for life, every body was barred but the heir at law, which the daughter herſelf was in this caſe. It was alſo meant to argue, that, if the limitation to the widow ſhould be held to be an executory deviſe, yet it ought to be conſidered as limited on an indefinite failure of iſſue, and, therefore, too remote; BUT Lord MANSFIELD, Ch. J. ſaid, it was impoſſible to maintain that poſition, for that the words clearly confined the failure of iſſue to the time of the daughter's death. Lord MANSFIELD, Ch. J.—It is perfectly clear and ſettled, that, *where an eſtate can take effect as a remainder, it ſhall never be conſtrued to be an executory deviſe, or ſpringing uſe.* Here, the firſt limitation is to two perſons and the ſurvivor, ſo that a preceding freehold will be in the ſurvivor, and the eſtate over is limited on a contingency, upon which a remainder may depend. It is to the daughter and her heirs (not iſſue), if ſhe ſhould marry and have iſſue. and it muſt have taken effect after the death of the ſurvivor, There is another contingency, on the event of the daughter dying unmarried, and without iſſue (not on failure of her iſſue), and, upon that event, the limitation is to the widow in fee. But the tenant for life, by the recovery, has barred the contingent remainders.—The poſtea to the defendants.

Doe, *ex dim.* Helen Comberbach *et al.* *v.* Sir R. Perryn, Mic. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 484.

If an eſtate be deviſed to *B.* the wife of *A.* for life, remainder to truſtees to preſerve, &c. remainder to the children of *A.* and *B.* and their heirs for ever, to be divided among them equally, and if but one child, to ſuch only child, and his, or her, heirs for ever, and for default of ſuch iſſue, remainder over; and at the death of the deviſor *A.* and *B.* have no child, the eſtate limited to their children is a contingent remainder in fee, which on the birth of a child, will veſt in that child, ſubject to open and let in thoſe who may be born afterwards; and the remainders over will be defeated by that eſtate becoming veſted. In ſuch a caſe the words, "for default of ſuch iſſue," mean "for default of ſuch children."—The teſtator, *James Comberbach*, being ſeiſed in fee, by will (after bequeathing a leaſehold eſtate to *R. Perryn*, during his term and intereſt therein, and all his perſonal eſtate, in the manner therein mentioned), deviſed the premiſes in queſtion "to his niece *Dor. Comberbach*, wife "of his nephew *James Comberbach*, for life, for her ſepa-"rate uſe, with a power of leaſing for any term, not ex-"ceeding ſeven years, in poſſeſſion, reſerving the moſt im-"proved rent; remainder to truſtees, to preſerve contingent "remainders,

" remainders, REMAINDER TO ALL AND EVERY THE " CHILDREN OF *Dor. Comberbach*, BEGOTTEN OR TO BE " BEGOTTEN ON HER BODY, BY HIS NEPHEW *James* " *Comberbach*, AND THEIR HEIRS FOR EVER, to be equally " divided between and among such children (if more than " one), share and share alike; but if only one child, then " to such only child, and his, or her, heirs for ever; and " for default of such issue to *James Comberbach* for life, " with power of leasing as before; remainder to trustees to " preserve contingent remainders, and from and after the " decease of the survivor of *James Comberbach*, and *Dor.* " his wife, without issue as aforesaid, to and among all and " every the children of his nephew *Roger Comberbach*, and " of *B. Perryn*, respectively begotten or to be begotten by " them, on the body, or bodies, of their respective wives, " and to his niece *Eliz. Adams*, and to the heirs of such " children of *E. Adams* respectively, in manner following; " namely, one third part or share thereof (the same to be " divided into three equal shares or parts) to the child or " children of his nephew *R. Comberbach* who should be " living at his [the devisor's] decease, and if more than one, " to be divided among them equally share and share alike, " and to the heirs of such child and children respectively; " one other third part thereof to the child and children of " his nephew *B. Perryn*, and who should be living at the " time of his [the devisor's] decease, and to be divided " among them (if more than one), share and share alike, " and to the respective heirs of such child and children of " the said *B. Perryn*; and the other remaining third part, to " his niece *Eliz. Adams*, and the heirs of her body lawfully " to be begotten; remainder to his own right heirs for " ever; with like power of leasing to *R. Comberbach*, and " *B. Perryn*, during the minority of their children, and to " *Eliz. Adams* respectively, as they should be in actual pos- " session, as was before given to *Dorothy Comberbach*; re- " mainder to his own right heirs for ever." The devisor died in September, 1737, leaving *Roger Comberbach*, his nephew, and heir at law; who was also the heir at law of *J. Comberbach*, and of the children of *James* and *Dorothy Comberbach*; and under him, the lessors of the plaintiff claim.—*James Comberbach*, and *Dorothy* his wife were married in the life-time of the devisor, but had not any issue at the time of his death; though, afterwards, in December, 1739, they had a daughter, who died in June, 1740; and in November, 1741, another daughter, who died in October, 1761, without issue; and a son in January, 1742, who died in June, 1761, without issue. *James Comberbach* died in 1784, and *Dorothy* in May, 1786. *Elizabeth Adams* died soon after the devisor, without having been married, and without

without doing any act to deſtroy the eſtate tail, limited to her by the will. The defendant claimed as one of the children of *B. Perryn.*—THE QUESTION was, WHETHER *the children of* Dorothy Comberbach *took a fee under the will in queſtion?* For the defendant, it was contended, 1ſt, That *Dorothy*'s children only took an eſtate-tail under the will; or, 2dly, If they took a fee, the limitation over to the children of *B. Perryn* took effect on failure of iſſue of *Dorothy* at the death of the ſurvivor of *Dorothy* and *James Comberbach.* Lord KENYON, Ch. J.—The grounds on which this caſe has been argued on the part of the defendant, are thoſe on which we proceed in giving our judgment, namely, what is the general intention of the deviſor, and whether he has uſed words ſufficient in law to carry that intent into execution. In doing this we are not to proceed on conjecture, but on the words of the will; from the whole of which we are to endeavour to extract the fair meaning. There is no doubt but that legal formal words may be controlled by the context of the will: but we ought not to reject the legal meaning of thoſe words, unleſs we are clear that, in ſo doing, we give effect to the deviſor's intention. Two points have been made for the defendant; 1ſt, that the limitation to the children of *Dorothy Comberbach* only created an eſtate-tail; and, 2dly, but even if it gave them a fee, it was not to veſt in thoſe children on their reſpective births, but to remain in ſuſpenſe till the death of the ſurvivor of *James* and *Dorothy Comberbach.* And if the defendant be right in either of theſe points, he is entitled to our judgment.—But in the firſt place, do theſe words confer an eſtate tail, or a fee, on *Dorothy*'s children? The words are "To all and "every the children of *Dorothy*, begotten, or to be begot-"ten, on her body by *James Comberbach*, and their heirs "for ever; and for default of ſuch iſſue, &c. then over." Now words more emphatical cannot be uſed to create a fee, than "to *A.* and his heirs for ever." Undoubtedly thoſe words may be controlled by ſubſequent ones; and were properly ſo in the caſe of *Ives* v. *Legge*, in *Canc.* 1743. becauſe there the limitation was to his daughter, *and the children of her body begotten, and their heirs*, and afterwards to a perſon who might by poſſibility have been heir to thoſe children. That ſufficiently explained the intention of the deviſor, becauſe there could not be a failure of heirs general while the remainder-man, or any of his deſcendants, were living. But that caſe differs from the preſent, becauſe there the limitation over was "in default thereof," namely, heirs; and here "*in default of* iſſue," which is referrible to children. And we may expound one part of the will by another; now this deviſor knew what words were proper to convey an eſtate tail; becauſe, in creating the limitation to *Elizabeth Adams*,

*Adams*, he used a form of technical expression peculiar to the creating of an estate tail. And if this exposition wanted any further argument in aid of it, it may be drawn from the clause giving the power of leasing. The power of leasing given by the statute to tenants in tail only continues during the existence of the estate tail, and does not bar the remainder-man or reverstioner. Now here the devisor intended to give a power of leasing which should govern the whole estate; and therefore during the infancy of the children of *R. Comberbach* and of *B. Perryn* the power is given to their parents, and to *Elizabeth Adams* herself; but no such power is given to the children of *Dorothy*, because it was not necessary. This shews that he intended to give a larger estate to *Dorothy*'s children than to the other two sets of children: but I do not rely much on that minute circumstance. Then it was said that the children of *Dorothy* were the primary objects of the devisor's bounty, and that the other devisees should not take till there was a failure of those children; but the defendant's construction does not meet that idea; for if they took only an estate-tail, and some of those children had died without issue, their shares would have gone over to the remainder-man, that is, would have gone away from the rest of the children, as there is nothing in the devise to create cross-remainders between them. Therefore I think it is infinitely too much for us, in construing this will, to say that these words only gave an estate-tail to *Dorothy*'s children; if we were to say so, we must proceed on conjecture only, against the express words of the will.—Then if they took a fee, is there any thing in the will to limit it to such as were living at the time of the death of the survivor of *Dorothy* and *James?* And here I again refer to the language which the devisor has used in other parts of the will. *The devise to the children of Dorothy is* TO THEM AND TO THEIR HEIRS FOR EVER: but in other parts of the will, where he intended that the limitations should be confined to such children as were living at any particular time, he used express words to that effect. *Else* v. *Osburn*, *Père Wms.* 387. does not apply to the present; for that only decides that where there is a limitation to *A.* for life, and afterwards to an uncertain number of persons who might come *in esse*, that remainder shall only be vested in those who are in existence at the determination of the particular estate. Then it was said by the defendant, that if the estate vested in a child of *Dorothy*, born in the devisor's life-time, the limitations over could not take effect at all: but it is found by the case that *Dorothy* had no child either at the time of making the will, or of the devisor's death. So that there is nothing to distinguish this case from *Goodright* ex dim. *Docking* v. *Dunham*, *ante* 200, and that of *Laddington* v. *Kime*, 1 *Salk.* 224.

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The clear intent of the deviſor was that the children of *Dorothy*, if any, ſhould take a fee; and if ſhe had no children, then that the remainders over ſhould take effect; but *Dorothy* had children, by which the limitations over were defeated. Therefore the title is properly derived to the leſſors of the plaintiff. As to what the deviſor would have ſaid, had he looked to the event of *Dorothy*'s children dying in the life-time of their parents, it is unneceſſary to conſider. ASHHURST, J.—Wherever a fee is created by poſitive words in a will, it can only be defeated by ſubſequent words equally plain, or by neceſſary implication. *The operation of this will is, that the limitation to* Dorothy's *children was contingent till they were born; but it became veſted on the birth of the firſt child, ſubject, however, to be diminiſhed in quantity, as other children of* Dorothy *ſhould be born: and, on the birth of* Dorothy's *firſt child, the ſubſequent limitations were defeated.* Then the only queſtion is, whether there is any thing in the will to ſhew that the children of *Dorothy* muſt neceſſarily be confined to children living at the time of the deceaſe of their parents: but no words are uſed in the will, from which ſuch an inference muſt neceſſarily be drawn; and it is clear, by the ſubſequent parts, that, if ſuch had been the deviſor's intention, he knew how to expreſs himſelf. BULLER, J.—In this will the deviſor has uſed the words heirs, heirs of the body, children, and iſſue, and having uſed them all, we are bound to ſay that he underſtood the meaning of each, and we cannot ſubſtitute one for the other, unleſs by unavoidable and neceſſary conſtruction, in order to make ſenſe of the will. But no ſuch neceſſity exiſts in this caſe. Children and iſſue, in their natural ſenſe, have the ſame meaning: but not ſo the word "heirs;" and unleſs we are compelled, in order to make ſenſe, to ſay that "children" and "heirs" are ſynonymous, we are bound to ſay that "heirs" do not mean "children." It has been argued, from different parts of the will, that heirs muſt mean heirs of the body; becauſe a remainder is limited to the deviſor's right heirs, after the limitation to the children of *R. Comberbach* and *B. Perryn*, and their heirs, and to *Elizabeth Adams*, and the heirs of her body, and that the word heirs, in the limitation to *Dorothy*'s children, muſt have the ſame meaning as the word "heirs," in the limitation to the other two ſets of children. But the limitation to the children of *R. Comberbach* and *B. Perryn*, and to *Elizabeth Adams*, in tail, is, to them reſpectively in manner following, namely, as to two thirds to the children and their heirs generally, and as to the other third part, to *Elizabeth Adams*, and the heirs of her body; and the remainder to the deviſor's right heirs, muſt mean the remainder expectant on the determination of the eſtate given to *Elizabeth Adams* in tail; and cannot refer to the other

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two thirds which were given in fee. The words "dying without issue," have been frequently held to mean, "without issue at the time of the death of the party," in cases of personal property, but not in limitations of freehold estates. The reason why this has not been decided in limitations of freehold estates, is, that courts of law always lean in favour of the vesting of estates; and, therefore, on such a limitation as the present, they have said that the estate shall vest on the birth of a child, and without waiting for the death of the parents; which rule is not attended with any inconvenience to the children, because where the estate is limited to a number of children, it shall vest in the first, and afterwards open for the benefit of those who shall be born at a subsequent period. But if this were held not to vest till the death of the parents, this inconvenience would follow, that it would not go to grandchildren; for if a child were born, who died in the life-time of his parents, leaving issue, such grandchild could not take, which could not be supposed to be the intention of the devisor. The case of *Wellington* v. *Wellington*, *ante* 176, proceeded on the same ground. But the case of *Keene* dim. *Pinnock* and wife v. *Dickson*, *M.* 24 *G.* 3. B.R. *ante* 194, is nearly similar to the present: there the devise was to *G. Pinnock* for life, remainder to her first and other sons in tail general, *and for default of such issue* MALE, remainder over; and it was contended at the bar that the word *male* might be rejected, but the Court said they could not do it, but held that the remainder over was a contingent devise only on the event of there never being a son, and if there were a son ever born, though he died, the remainder over was void. In that case a son was born, who died during the life of *G. Pinnock*, on the birth of whom, the estate vested in him, and the limitation over was void.—GROSE, J. Agreed.—Postea to the plaintiff.

*A.* devised to *B.* for life, remainder to *C.* for ninety-nine years, if he should so long live, remainder to the heirs of the body of *C.*: the remainder to the heirs of the body of *C.* was held a contingent remainder, and not an executory devise, and was defeated by *C.*'s surviving *B.* there being no preceding estate of freehold to support it.—The testator, *George Mussel*, being seised in fee, by will, "devised them "to his wife *Elizabeth* for life, remainder to his son *Ebe*- "*nezer Mussel*, for the term of ninety-nine years, if he "should so long live, and from and after the several deceases "of his wife and son, *to the heirs of the body of Ebenezer*: "but his will was, that it should not descend entirely unto "his [*Ebenezer*'s] eldest son, but that he [*Ebenezer*] might, "by deed or will, devise, limit, and appoint, the same to, "and for the benefit of all his children that should be liv- "ing at his decease; and if he should make no such limita-

Doe, *ex dim.* Mussell v. Morgan. Tr. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 763.

" tion or appointment, then that the ſame ſhould be equally
" divided among all and every the ſon and ſons, as tenants in
" common, and the ſeveral heirs of the body and bodies of
" ſuch ſon and ſons, with benefit of ſurvivorſhip among the
" ſons, and if there ſhould be but one ſon, to that ſon only;
" in default of ſuch iſſue to the daughters, with like limi-
" tations; with divers remainders over." The teſtator, *George Muſſell*, died. The widow entered, and died, October, 1741. *Ebenezer* entered, and, in 1752, having then only one daughter, by leaſe and releaſe, conveyed the premiſes, in contemplation of a marriage between *Morgan* and the ſaid daughter, to the uſe of the huſband for life, remainder to the wife for life, remainder to the iſſue of that marriage. *Ebenezer* afterwards married, and had iſſue the leſſor of the plaintiff, and died in 1764. The defendant is the ſurviving iſſue of the marriage between *Morgan* and *Elizabeth Morgan*. THE QUESTION was, WHETHER *the deviſe to the iſſue of* Ebenezer *was good by way of executory deviſe, or was a contingent remainder?* if the *former*, the plaintiff was entitled to recover: but if the *latter*, it was deſtroyed on the death of the tenant for life, during *Ebenezer's* life, for want of a particular eſtate to ſupport it. Lord KENYON, Ch. J.—If ever there exiſted a rule reſpecting executory deviſes, which has uniformly prevailed without any exception to the contrary, it is that which was laid down by Lord *Hale*, in the caſe of *Purefoy* v. *Rogers*, 2 *Saund.* 388. that, " *where a contingency is limited to depend on*
" *an eſtate of freehold, which is capable of ſupporting a re-*
" *mainder, it ſhall never be conſtrued to be an executory deviſe,*
" *but a contingent remainder only, and not otherwiſe.*" Now that rule applies to, and muſt govern, the preſent caſe. In *Hopkins* v. *Hopkins*, *Caſ. Temp. Talb.* 44. where there was a deviſe to truſtees in truſt for *S. Hopkins*, the ſon of *John Hopkins*, for life, remainder to his firſt and other ſons in tail male, remainder to the other ſons of *John Hopkins* ſucceſſively, with like remainders to their firſt and other ſons, &c.; remainder to the firſt and every other ſon of his daughter *Sarah*, remainder to the firſt and every other ſon of *Anne Dare* in tail male, remainder to his own right heirs; and *S. Hopkins* died in the deviſor's life-time, without iſſue; *John Hopkins* had no other ſon; and no other remainder-man was *in eſſe* at the time of the deviſor's death but a ſon of *A. Dare*; the queſtion was, Whether, by *Samuel's* death in the deviſor's life-time, the ſeveral limitations between him and *Dare* were not become void; or, whether the intermediate limitations ſhould not enure, by way of executory deviſe, to any other ſon he might thereafter have? Lord Chancellor *Hardwicke* ſaid, " It ſeems to be allowed
" that if things had ſtood at the deviſor's death as they did
" [illegible]

" at the time of making the will, the limitation in queſtion " would have been a remainder, by reaſon of *Samuel*'s " eſtate, which would have ſupported it: ſo is the caſe of " *Purefoy* v. *Rogers*; and limitations of this kind are never " conſtrued to be executory deviſes, but where they cannot " take effect as remainders." And in that caſe, it was expreſsly decided to be an executory deviſe, on the ground o *Samuel*'s death in the life-time of the deviſor. This point, therefore, has been too long ſettled to be now over-ruled.—Poſtea to the defendant.

Doe, *ex dim.* Bean, *v.* Halley, Mic. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 5.

Under a deviſe to *A.* for life without impeachment of waſte, remainder to his eldeſt ſon, and the heirs of ſuch eldeſt ſon; *and in default of iſſue male* of *A.* then to *B.* &c. *A.* takes an eſtate for life, remainder to his eldeſt ſon in tail, remainder to himſelf in tail.—The teſtator, *S. Fielding*, being ſeiſed in fee of the premiſes in queſtion, deviſed them to his " nephew, *Michael Halley*, and his aſſigns, *for and during the " term of his natural life*, without impeachment of waſte, " and from *and after his deceaſe, to the eldeſt ſon of his ſaid " nephew*, M. Halley, *lawfully to be begotten, and to the heirs " of ſuch eldeſt ſon*, upon condition that ſuch eldeſt ſon be " chriſtened and called by the name of *Fielding*; AND IN " DEFAULT OF ISSUE MALE of his ſaid nephew, unto his " nephew *S. Bean*, and his aſſigns, for his life, without " impeachment of waſte; and from and after his deceaſe, to " his eldeſt ſon lawfully begotten, or to be begotten, and his " heirs, provided ſuch eldeſt ſon be chriſtened and called by " the name of *Fielding*; and *for want of ſuch iſſue* to his " (the deviſor's) own right heirs." On the death of the deviſor, *M. Halley* entered, and, on the 16th and 17th of January, 1787, by leaſe and releaſe, he conveyed the premiſes in queſtion to *J. Lockall*, to make him tenant of the freehold, in order that a recovery might be ſuffered to the uſe of *M. Halley* in fee; and afterwards a recovery was ſuffered, in which *M. Halley* was vouchee. In January, 1797, *M. Halley* died, never having had any iſſue male, leaving the defendant his heir at law. Lord KENYON, Ch. J.—On the firſt reading of this will I formed a ſtrong opinion, which has been confirmed on further conſideration, that, taking the whole will together, it was evidently the deviſor's intention, that all the ſons of *M. Halley* ſhould take before *S. Bean* and his iſſue, and that neither *S. Bean*, or any of his children, ſhould take until all the male iſſue of *M. Halley* were extinct. The caſe that has preſſed moſt upon me is that of *Loddington* v. *Kime*; but in deciding this caſe, I deſire to be underſtood as not breaking in upon the authority of that caſe at all. Though there was ſome difference of opinion in that caſe between two great judges, Lord Ch. J. *Treby* and Mr. J. *Powell*, the principal point there

decided was this, that *where there is a contingent remainder with a double aſpect, the deſtruction of the particular eſtate deſtroys ſuch remainder.* The ſame point was alſo determined in *Doe* v. *Longmire*, with the propriety of which deciſion I alſo agree: but the preſent caſe is different from either of thoſe.—In *Robinſon* v. *Robinſon*, 1 *Burr.* 38. this poſition is clearly eſtabliſhed, that in the conſtruction of a will we muſt firſt look to the general intent of the deviſor, and give effect to that; and if there be a ſecondary intent which interferes with it, we are to reconcile the whole as far as we can, but, at all events, to give effect to the general intention. In that caſe the ſpecial intent was defeated; the firſt limitation was to *L. Hicks for life, and no longer*; nothing, therefore, could be more clear, than that the deviſor only intended to give him an eſtate for life: yet, ſeeing that that particular intent was inconſiſtent with the deviſor's general intent, which was, that the whole line of male heirs of *L. Hicks* ſhould take, the Court thought that they ought, in conſcience and in law, to effectuate that general intent. That caſe was a ſtronger caſe than the preſent, for, by our deciſion here, we ſhall not violate any particular intent of the deviſor. Here the limitations are to *M. Halley* for life, remainder to his eldeſt ſon and his heirs (in fee, it is ſaid by the plaintiff's counſel, but to that I do not agree); and in default of iſſue male of *M. Halley*, then over. It is a clear rule, acted upon at leaſt from Lord *Vaughan*'s time, that *where there is a deviſe to* A. *and his heirs for ever, and a ſubſequent deviſe to any perſon who, by poſſibility, may be his heir, the word* "HEIRS" *muſt be conſtrued* "HEIRS OF THE BODY," *and* A.*'s eſtate reduced to an eſtate tail:* here, therefore, if we were conſtruing theſe words only, we ſhould ſay, that the limitation to the eldeſt ſon, and his heirs, is reduced by the ſubſequent words, in "default of iſſue male of *M. Halley*," to an eſtate tail, for he could not die without heirs general, ſo long as there were any deſcendants of *M. Halley*, unleſs the father married again, and had iſſue of the half blood; and even that would not get rid of all difficulty, for the ſubſequent limitation is to *S. Bean*, who was heir of the deviſor, and (though it is not ſo ſtated, yet probably) he was within the reach of the words, "heirs of *M. Halley*." But in deciding this caſe, I will not abandon the general rule recogniſed and acted upon in *Robinſon* v. *Robinſon*. *We have our choice of two conſtructions to effectuate the deviſor's general intent*; either to give *an immediate eſtate-tail to* M. Halley, *which would violate the particular intent of the deviſor*, or (and to which conſtruction I incline) to ſay, that *M. Halley* took an eſtate for life only, *remainder in tail to his eldeſt ſon, remainder in tail to the father, in order to let in all his iſſue male.* And, though the father could not bar the eſtate tail to his eldeſt ſon, by ſuffering a recovery,

recovery, yet by coming in as a vouchee under a double voucher, he might bar all the remainders over. I have considered this case to the utmost, and am of opinion, that this recovery barred the remainders over, and that the defendant is entitled to our judgment.—ASHHURST, J. concurred in opinion with Lord *Kenyon*.—GROSE, J. also agreed with Lord *Kenyon*, that the way to give effect to every part of the will was to decide, that the father took an estate for life, remainder in tail to his eldest son, remainder in tail to the father, so that any children that *M. Halley* might have had, even by a second *ventre*, might have taken.—LAWRENCE, J. was also of the same opinion.

Doe, *ex dim.* Davy, *v.* Burnsall, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 30. Burnsall *v.* Davy, *et al.* Hil. Ter. 38 Geo. 3. C.B. 1 *Pul. & Bos.* 215.

The testator, *David Burnsall*, by his will, gave and devised as follows: "I do hereby give, devise, and bequeath, all and "every my freehold and leasehold estates, and all other my "estates whatsoever, both real and personal (subject and "chargeable as therein mentioned), after payment and discharge "of all my debts, legacies, and my funeral and testamentary "charges and expences, and the expences in and about "executing this my will, *unto my niece*, Mary Owstwick, "*otherwise* Ellard, *and the issue of her body lawfully to be* "*begotten, as tenants in common (if more than one)*; *but, in* "*default of such issue, or being such, if they shall all die under* "*twenty-one years, and without leaving lawful issue of any of* "*their bodies, then I devise the same unto my cousin*, Peter Davy, "*and the issue of his body lawfully to be begotten, as tenants in* "*common (if more than one)*; *but, in default of such issue, or* "*being such*, IF THEY SHALL ALL DIE UNDER THE AGE "OF TWENTY-ONE YEARS, *and without lawful issue of any* "*of their bodies*, remainder over." *Mary Owstwick*, the niece, died without ever having had any issue; but she and her husband, soon after the testator's death, entered upon the freehold estate, and suffered recoveries, and levied fines thereof to the use of such persons, and for such estates, as they should appoint; and for default of appointment, to the use of *Joseph Ellard*, for the joint lives of himself and his wife; and, after the decease of either, to survive for his or her life, with remainder to the heirs and assigns of *Joseph Ellard* in fee.

Doe, *ex dim.* Davy, *v.* Burnsall, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 30.

Upon this will in the court of B.R. TWO QUESTIONS were made, on a case reserved on the trial of this ejectment, viz. 1st, Whether *Mary Owstwick* took an estate-tail, or for life? If the latter only, 2dly, Whether the remainder to the lessor of the plaintiff were a contingent remainder, and, in that case, defeated by the destruction of the particular estate before the contingency happened? And it was contended for the plaintiff, that she took only an estate for life, and that the remainder to the lessor of the plaintiff was vested, and not

contingent. Lord KENYON, Ch. J.—The whole depends on the laſt point made. I agree that the limitation to *M. Owſtwick* was for life only, and that the limitation to her children was to them as purchaſers; and it certainly is ſufficient to carry to them ſome quantity of eſtate. If the plaintiff's counſel had ſucceeded in proving, that there was nothing to be collected from the will, to ſhew that the children were only to take for life, then, according to the caſe of *Roe* v. *Grew*, in *Wilſon* (1), the Court would have endeavoured to convert the eſtate to *M. Owſtwick* into an eſtate tail, in order to effectuate the intention of the deviſor. It has been argued, that the words in the will are only ſufficient to give an eſtate tail to her children; but I think there is enough in the will to carry a fee to them. There are the prefatory words, "all his freehold and leaſehold eſtates," which will carry the fee, if it appear to have been the intention of the deviſor, that they ſhould have that effect; the word "eſtates" alſo will, *ex vi termini*, carry a fee. In order to diſcover the deviſor's intention, conſider what was his ſituation when he made his will: he had a niece, who would probably become the mother of children, and he gave an eſtate for life to that niece, and then an eſtate to the children which that niece might have; if the will had ſtopped there, the children would have taken a fee; but the deviſor then gave the eſtate over; "but in default of ſuch iſſue, or if they ſhould all die under the age of twenty-one, *and* without leaving iſſue, &c." There is no doubt, indeed, but that a word of conjunction in a will has been conſtrued in the diſjunctive, and *vice verſâ*, a diſjunctive word conſtrued in the conjunctive, where it has been neceſſary to give effect to the deviſor's intention; but unleſs there be ſomething in the will, from which it is to be collected, that the deviſor did not uſe ſuch words in the grammatical ſenſe; the grammatical conſtruction muſt prevail. In the preſent caſe, the word uſed is a conjunctive word, *and*; now, by conſtruing that word "in its proper ſenſe," we ſhall give effect to his intention. The deviſor ſeems to have reaſoned thus: "if the children of my niece live to attain the age of twenty-one, when they will be qualified to diſpoſe of this property prudently, I give it to them in fee; if they happen to die under twenty-one, and without leaving iſſue, then I will conſider to whom I can beſt diſpoſe of the eſtate, and in ſuch an event, I will give it to my collateral relations." *That brings the preſent caſe within that of* Loddington *v.* Kime, Salk. 224. *which is the leading caſe upon this*

(1) 2 *Wilſ.* 322. *ante*, 106.

*ſubject*,

*subject, and converts all the subsequent limitations into contingent remainders: those depended on the particular estate given to the niece; and she having destroyed this particular estate before they could take effect, they consequently fell to the ground.* Perhaps the devisor was not aware that the niece could destroy the estate given to her children; but the plaintiff's argument goes to admit that she had that power; and it is a necessary consequence of our putting such a construction on the will as will best effectuate the intention of the devisor. In determining the present case I proceed on the words of the will, giving legal effect to every word contained in it; and they all lead to this conclusion, that this was a contingency with a double aspect: if *M. Owstwick* had any children, the estate was limited to them in fee; if she had no children, *or* if she had any, and they died under twenty-one, and without issue, then it was to go to the lessor of the plaintiff. But all these rested in contingency; and the particular estate of freehold, by which they were supported, having been destroyed before they were capable of taking effect, they were also destroyed with it. PER CUR.—Postea to the defendant.

Afterwards on a case sent from the court of Chancery on the same will, the questions for the opinion of the court of C.B. were, 1st, What estate and interest the said *Mary Owstwick*, otherwise *Ellard*, took under the testator's will, and the recoveries and fines in the testator's freehold estates? 2dly, What estates the said *Mary Owstwick*, otherwise *Ellard*, took under the testator's will, in the said testator's leasehold estates? 3dly, What estate the defendant, *Peter Davy*, took under the said will in the testator's freehold estates? 4thly, What estate the defendant, *Peter Davy*, took under the said will in the testator's leasehold estates?—EYRE, Ch. J. The only words in this case which raise any difficulty in my mind are these, "if they shall all die under the age of twenty-one years;" if they were omitted it would be a simple case. There were two branches of the testator's family on whom, being the principal objects of his bounty, he intended to settle his property in succession, and on failure of whom, he intended that it should go over to *Peter Davy*. He devises first, to *Mary Owstwick*, and secondly, to the issue of her body: if the first taker died without issue, he meant that the estate should go to another person; again, if the first taker left issue, and they all died without issue, the objects of the testator's bounty in his own family being gone, the property was to go over. This being clearly the intention, how is it to take effect? If it were not for the words "*if they shall all die under the age of twenty-one years*," I should be of opinion, that this must be construed to be an estate for life to *M. O.* remainder in tail to her issue as purchasers, with cross-remainders to every one of that family, and then over to the next branch.

Burnsall *et al.* v. Davy. Hil. Ter. 38 Geo. 3. C.B. 1 *Pul. & Bos.* 215.

But I am at a loss to know what to do with those words. If I were perfectly satisfied with the rejection of the word "AMONGST," in *Doe* v. *Applin*, see p. 130, *supra*, I would reject them, and consider this as a devise over, in case the issue of *M. O.* should die without leaving lawful issue of any of their bodies.—BULLER, J. I incline to think that it will be impossible to reject the words, "IF THEY SHALL ALL DIE UNDER THE AGE OF TWENTY-ONE YEARS." There is a circumstance attending this will, which might give reason to suppose that the testator had something of a legal understanding. Suppose that he knew for how long a time he could tie up his property? By the words of the will, the estate is given to *Mary Owstwick*, and the heirs of her body, as *tenants in common*, if more than one; now "tenants in common" can only apply to the issue, for she and one of the issue could never take as tenants in common; the power of leasing given to *M. O.* while in possession confirms me in my opinion that she was to take an estate for life only, and that the whole estate was to go to her issue after her death. Possibly the testator reasoned thus: "I will give an estate for life to *M. O.* with an estate tail to her children till they arrive at twenty-one, and then a fee, at which time the law will give them a fee by means of a common recovery." If this construction be right, the remainder to *Peter Davy* is contingent; for it does not solely depend on the determination of the preceding estate. If a child of *M. O.* had attained the age of twenty-one, and afterwards died without issue, the estate would have gone to *Peter Davy*, for the contingency must happen before the estate can vest at all. With respect to the leasehold property it is perfectly clear, that it cannot be touched by fine or recovery, CURIA ADVISARE VULT.—AND NOW, PER CURIAM: We are of opinion, 1*st*, That under the will of this testator, *Mary Owstwick*, otherwise *Ellard*, took an estate for life in the testator's freehold estates, with contingent remainders to the other persons mentioned in the said will, which contingent remainders were barred by the fines and recoveries levied and suffered by *Mary Owstwick*, by force whereof, *Mary Owstwick* became seised of an estate in fee in the said estates.—2*dly*, That *Mary Owstwick* took an estate for life in the said testator's leasehold estates.—3*dly*, That under the said will, *Peter Davy* took an estate for life in remainder, in the said freehold estates, on the contingency therein expressed, which estate with all the subsequent limitations were afterwards barred by the fines and recoveries suffered by *Mary Owstwick*.—4*thly*, That under the said will, *Peter Davy* became absolutely entitled to the testator's leasehold estates on the death of *Mary Owstwick*, without issue.

Doe *ex dim.* Heneage *v.* Heneage,

The testator, *Thomas Heneage*, being seised in fee, devised the premises in question to his brother, *George Heneage*, and to

to *William Taylor*, and their heirs, *&c. in trust*, as to part of the premises, to the use of his wife, *Catherine Heneage*, for life, in lieu of her dower; remainder to trustees for a term of 500 years, upon certain trusts which never took effect (and which term hath been since duly surrendered by the trustees); remainder as to the part before limited to the said *Catherine*, and also as to the parts whereof no use was thereinbefore limited, "to the use of his son, *George Fieschi Heneage*, "by his first wife, for life; remainder to the use of the said "*George Heneage* and *William Taylor*, and their heirs, *during* "*the life of the said G. F. Heneage*, in trust, to preserve the "contingent uses and estates thereinafter limited, *nevertheless* "*to permit the said* G. F. Heneage *to receive the rents, &c.* "*thereof during his life*; remainder to the use of the first and "other sons of *G. F. Heneage* successively in tail male; re- "mainder to the use of the devisor's son *Thomas*, by his "then wife, for life; remainder to trustees to preserve con- "tingent remainders; remainder to the first and other sons of "the said *Thomas Heneage* (the son) successively in tail male; "remainder to the use of the devisor's third and other sons, "successively in tail male; remainder to the devisor's right "heirs in fee." IN WHICH WILL IS CONTAINED THE FOLLOWING PROVISO: "Provided always, and my will is "expressly, that in case it shall happen that my said son, "*G. F. Heneage*, or any son or sons of his, to whom the said "manors, &c. thereinbefore mentioned are limited as afore- "said, shall ever inherit, or take by descent, or by any gift, "grant, or devise, or otherwise, become seised in possession for "his or their life or lives, or for any greater estate, of the "whole or so much of the real estate of my said brother, "*George Heneage*, as shall exceed the yearly value of the "estate by this, my will, limited in use to him and them by "100l. by the year, that then and from such time as my said "son, *G. F. Heneage*, or any son or sons of his, shall so in- "herit, or take by descent, gift, grant, or devise, or other- "wise become seised in possession of such, or so much of the "said real estate of my said brother, *George Heneage*, as afore- "said, for the term of his or their natural life or lives, or "of any greater estate, all and every the use and uses, limit- "ations, and estates, hereinbefore created and declared of "and concerning the said manors, &c. hereinbefore men- "tioned, to and for, or in favour of my said son, *G. F.* "*Heneage*, or any son or sons of his, so coming into pos- "session of such and so much of my said brother's estates "as aforesaid, shall cease, determine, and be utterly void: "and in such case, my will and meaning is, that the next in "remainder, according to the uses of this my will, shall "succeed to, and have and enjoy my said estate hereby de- "vised, *as if my said son*, G. F. Heneage, *or any such son* "*or*

Mic. Ter. 31 Geo. 3. B.R. 4 Ter. Rep. 13.

" *or ſons of his, was, or were reſpectively dead;* any thing " hereinbefore contained to the contrary thereof in any wiſe " notwithſtanding."—*T. Heneage*, the deviſor, died in 1740; and his brother, *G. Heneage*, who was alſo ſeiſed in fee of ſeveral manors, &c. deviſed the ſame to the uſe of his nephew, the ſaid *G. F. Heneage*, for life, remainder to his firſt and other ſons, ſucceſſively in tail male, with divers remainders over, and with the reverſion to his own right heirs, and died in 1753; on which his nephew, *G. F. Heneage*, *entered upon the premiſes deviſed to him by his uncle's will, and which exceeded the yearly value of the eſtates above limited to him for life by his father's will by* 100l. *and upwards, by the year*, and continued in poſſeſſion till 1782, when he died, *leaving iſſue of his body, the defendant, his eldeſt ſon and heir, and the leſſor of the plaintiff, his ſecond ſon.* At the death of the ſaid *George Heneage*, the uncle, *G. F. Heneage*, had no ſon. But the defendant was born on the 21ſt of December, 1768, and the leſſor of the plaintiff on the 28th of September, 1771. He had alſo a ſon, named *George B. Heneage*, who was born on the 17th of March, 1767, and died the 10th of May, 1768, before the birth of the defendant. *Thomas Heneage*, (the ſecond ſon of the teſtator, *Thomas Heneage*, named in his will) died unmarried, and without iſſue, in the life-time of the ſaid *G. Heneage*, and the deviſor, *Thomas Heneage*, had no third or other ſon. *The ultimate limitation in the will of the ſaid* Thomas Heneage, *to his right heirs, was veſted in* G. F. Heneage, *as heir of his father*, Thomas Heneage, *at the time of the death of the ſaid* George Heneage, *the uncle.* Upon the death of *G. F. Heneage*, the defendant, his eldeſt ſon took by deviſe, and became and ſtill is ſeiſed in poſſeſſion in tail male of the eſtate of *George Heneage* (the brother of the ſaid firſtnamed deviſor, *Thomas Heneage*), under the will of *George Heneage*, and which eſtate of *George Heneage* exceeds the yearly value of the eſtate deviſed by the will of *Thomas Heneage* by 100l. by the year and more. Upon the death of *G. F. Heneage*, the defendant alſo entered upon the premiſes in queſtion, and is ſtill in poſſeſſion thereof, and hath never had any iſſue of his body. FOR THE DEFENDANT it was argued, that the event, which determined the particular eſtate of *G. F. Heneage*, alſo determined the ſubſequent limitations expectant upon it, no perſon being then in *eſſe* to take; and, conſequently, that the defendant was entitled as heir at law to the deviſor, his grandfather.—Lord KENYON, Ch. J. The general outline of the will, ſtripped of technical terms, is this; *the deviſor, who was a younger brother, left his eſtate to his eldeſt ſon for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail, with a proviſo that, if the larger eſtate ſhould deſcend from the elder branch of the family to his eldeſt ſon, his own eſtate ſhould go to the younger branch of his family:* that event did happen, the uncle's

uncle's estate descended to the devisor's eldest son. The argument used is, that notwithstanding such may have been the devisor's intention, he has not used proper limitations to give effect to it: and the objection is that, *the particular estate having been determined before the contingent limitations could take effect, those limitations were defeated.* But that objection depends on the not giving effect to one of the most important limitations in the will, namely, that to the trustees to preserve contingent remainders *during the life of G. P. Heneage*; those are the common words inserted in every limitation of this kind; and there is nothing in this will to induce us to imagine that the devisor intended that the estate limited to the trustees should not continue during the whole natural life of his eldest son. Unless therefore the defendant can obliterate those words from the will, or shew that they cannot have any effect, there is an end of his claim: but most unquestionably their estate did continue during the eldest son's life. It is not necessary to decide here who was entitled to the rents and profits after *G. F. Heneage* succeeded to his uncle's estate, and before he had a son born; it is sufficient for the determination of this case, that the trustees had a right of entry during the whole of *G. F. Heneage*'s life, and were to receive the rents and profits, for some purpose.—Postea to the plaintiff.

## *Devise, with a Condition annexed.*

A conditional limitation cannot be implied, unless necessary to effectuate the intention of the testator.—*William Wykes*, being seised in fee of the estate in question (subject only to a mortgage of part thereof), made his will and devised (amongst other things), "in case he should die without issue, that after "the death of his wife the premises should go to his sister, "*Dorcas Wykes*, for life; and after her decease, unto his "nephew, *Ambrose Saunders*, and the *heirs male of his body*, "lawfully begotten; and the *heirs male of their bodies*, lawfully "begotten; and for want of such issue, unto the heirs male "of the body of his sister, *Dorcas Wykes*, and the heirs male "of their body, lawfully begotten; with remainder to his "wife and nephew's godson, *Ambrose Corrie* (the lessor of the "plaintiff), and the heirs male of his body, lawfully begotten; "and the heirs male of their body, lawfully begotten; re-"mainder to the heirs of the body of his nephew, *Ambrose* "*Saunders*; remainder to the heirs of the body of his sister, "*Dorcas Wykes*; remainder to his kinsman, *Robert Ekins*, and "the heirs male of his body in tail male; remainder to his "own right heirs for ever: PROVIDED ALWAYS, *and this* "*devise is expressly upon* THIS CONDITION, *that whenever it* "*shall happen that the said mansion-house and said estates, after* "*my*

Gulliver, *ex dim.* Ambrose Corrie, Clerk; and also on two several demises of the same person, by the name of Ambrose Wykes, Clerk; *v.* Shuckburgh Ashby, esq. *et al.* Mic. Ter. 7 Geo. 3. B.R. 4 *Burr.* 1929. 1 *Black. Rep.* 607.

" *my wife's deceaſe, ſhall deſcend or come unto any of the perſons* " *hereinbefore named,* [that] *the perſon or perſons to whom the* " *ſame from time to time ſhall deſcend or come,* [*that he or they*] " *do, or ſhall then change their ſirname, and take upon them* " *and their heirs the ſirname of* Wykes *only, and not other-* " *wiſe.*" BUT IN *this* PROVISO, THERE IS NO DEVISE OVER.—Yet there is another proviſo (which immediately follows) prohibiting *waſte*, without the conſent of the perſon to whom the premiſes *ſhall next come*; and in this latter proviſo, there is a *deviſe over* to the perſon who is, or ſhall be next entitled to the premiſes expectant upon the death of the waſter, of ſuch *part* of the eſtate upon which waſte ſhall be committed or ſuffered: and ſo, *toties quoties*, on every committing or ſuffering waſte by the perſon in poſſeſſion, without ſuch conſent as aforeſaid.—On the 9th of May, 1742, the teſtator died without iſſue, leaving his ſiſter, *Dorcas Wykes*, ſpinſter, and *Ambroſe Saunders* (the only ſon of *Sarah Saunders*, his other ſiſter, then deceaſed), his *co-heirs:* and his widow entered upon the eſtate, and enjoyed it till her death. And upon her death, which happened on the 16th of January, 1747, his ſiſter *Dorcas* entered and enjoyed till the 26th of December, 1756; when ſhe died without iſſue; and *Ambroſe Saunders*, who was then the teſtator's *ſole* heir at law, entered, and enjoyed till the 8th of October, 1765, when he died without iſſue; and the defendant, *Shuckburgh Aſhby* entered, and has (together with the other defendants, his tenants) been in poſſeſſion ever ſince.—On the 8th and 9th of February, 1759, the ſaid *Ambroſe Saunders*, being in poſſeſſion, executed indentures of leaſe and releaſe, and became vouchee in a common recovery, which was ſuffered in the Eaſter term following: but NEVER CHANGED HIS NAME OF SAUNDERS, NOR TOOK UPON HIM THE SIRNAME OF WYKES.—On the 17th of January, 1766, the leſſor of the plaintiff entered, for *breach of the proviſo*, by *Ambroſe Saunders*'s not taking the name of *Wykes*. —It appeared upon the trial, that *Ambroſe Saunders*, by indenture, dated 26th of October, 1757, had mortgaged part of the premiſes in queſtion.—The queſtion was, " Whether, on " caſe above ſtated, the plaintiff was entitled to recover, in " this ejectment, ſuch parts of the premiſes mentioned in the " declaration, as are not compriſed in the ſaid indenture of " 26th of October, 1757, or any part thereof?"—The caſe was very elaborately argued, and Lord MANSFIELD, Ch. J. after ſtating the caſe, obſerved, that the only foundation of the plaintiff's title was, " that the *eſtate tail was to ceaſe* upon " *Ambroſe Saunders*'s not taking the ſirname of *Wykes*; and " that, for want of his taking ſuch ſirname, it *went over* to the " *next in remainder.*"—The whole of this caſe is a queſtion of *conſtruction*; provided the intention of the teſtator be not contrary to law.—And with a view to effectuate the intent of the

the teſtator, it is certain, that a condition *may* be conſtrued into a limitation. In the preſent caſe, *firſt:* this is *not* a condition *precedent*. It cannot be complied with inſtantly; it is "to take the name for themſelves and *their heirs*." Now many acts are to be done, in order to oblige the heirs to take it: ſuch as a grant from the king, or an act of parliament. It is not, therefore, a condition *precedent;* but, being penned *as* a condition, it muſt be a condition *ſubſequent*. It cannot be a *limitation:* for the next proviſo (againſt waſte) ſhews, that the teſtator knew how to limit over, when he thought proper to do ſo. And in *that* caſe, he did think it proper to do it: and therefore *that* proviſo is turned into a limitation.—As to any *implication* of a limitation upon the firſt proviſo, the Court cannot intend or imply what does not appear to be the teſtator's intention. And no ſuch intention of the teſtator appears in this caſe: rather the contrary: and yet it is ſaid, "that the *eſtate tail* ſhall *ceaſe*; and it ſhall go over to the "next taker, by implication." But there is no caſe or authority produced in ſupport of ſuch implication. *Skyrne* v. *Bond*, 1 *Rol. Abr.* 412. Tit. Cond. pl. 412, and *Thomas*'s caſe, 1 *Rol. Abr.* 411, are both of them contrary to it. A condition annexed to an eſtate tail, can never be meant to be compulſory: becauſe the teſtator muſt know, that the tenant in tail could bar it the very next term. Therefore this condition could not be intended by the teſtator to be compulſory, ſo as to bar the eſtate tail, which he had given to *Ambroſe Saunders*. On this will, it is clear that the teſtator did not mean the eſtate tail to ceaſe: for the condition is impoſed perſonally upon every heir—"The perſon or perſons "to whom the eſtate ſhall, from time to time, deſcend or "come." Therefore, the teſtator meant to paſs over only the particular perſon breaking the condition, and to impoſe the forfeiture upon him, or them, perſonally; but never meant that the whole eſtate tail ſhould ceaſe. Now it is a limitation void in law, "that an eſtate tail ſhall ceaſe in part, "and not in the whole." The caſe of *Jermyn* and *Arſcot* (4 *Leon* 83, 1 *Ander.* 186. 2 *Ander.* 7. *Moore*, 364. and 1 *Rep.* 85.) is in point. It would be a limitation void, therefore, in itſelf, even if it could be implied. It is not neceſſary to enquire, whether the heir at law can take advantage of this condition, or not: it is enough that the preſent plaintiff cannot claim. It is plain to me that he cannot: and I am clear that the teſtator had no ſuch meaning, as has been ſuggeſted and ſuppoſed on the part of the plaintiff. As to the queſtion, "Whether the condition was broken, or not?"—In ſuch a caſe (of ſo ſilly a condition as this is), the Court would, perhaps, incline againſt the rigour of the forfeiture. But as to this I give no opinion. The plaintiff, who inſiſts ſo ſtrictly upon this being a forfeiture of the eſtate, has certainly

tainly no pretence to any favour from the Court. However, in this caſe, there is no need to meddle with the queſtion about the forfeiture: for the recovery was well ſuffered; and, therefore, the plaintiff has no title.—*Yates*, J. This is certainly not a condition precedent. The queſtion then is, "Whether it be a conditional limitation?" I am clearly of opinion it is not. Doubtleſs it is not an expreſs limitation: and an implication of one can only be made, in order to effectuate the teſtator's intention; and muſt be a neceſſary implication to that purpoſe. Now this would not be ſo. Excluſive of this recovery, all the deviſes would take effect according to the teſtator's intention, without ſuch an implication. And the Court will not make an implication, to ſupport an idle intention, beneficial to nobody: nor ſhall ſuch an implication be made upon a limitation after eſtates tail.—*Aſton*, J. Whether this be a condition, or a recommendation, yet the rules of making implications do not hold in the caſe now before us. I take it to be a condition ſubſequent; and, as ſuch, barred by the common recovery.—*Hewitt* J. If this be conſidered as a condition, it is collateral and ſubſequent, and would be deſtroyed by the recovery. Such a proviſo as this is, ſhall operate as a limitation, where there is a deviſe over; and alſo in ſome caſes where the deviſe is to the heir. The latter is an implied conditional limitation: and this caſe muſt be of that ſort, if it were a limitation at all. But here the intention of the teſtator appears to be contrary to ſuch implications. Such an implication would defeat the iſſue: whereas he intended that they ſhould be the next takers, in caſe of a breach; not that they ſhould ſuffer by it. However, there is no authority that ſuch an implication of a deviſe over, can be made after a deviſe in tail. As to its being only a recommendation, I find no caſe in the books about recommendations: and I ſhall not enter into the queſtion, "Whether this is to be conſidered as a mere re-" commendation, or as a condition."—He concluded with ſaying, that this condition, or whatever elſe it may be called, is not ſuch a limitation as will carry the eſtate over to the next remainder-man, upon breach of the condition enjoined: and, therefore, the plaintiff, who is that next remainder-man, and only claims as being ſo, can have no title to recover.—Poſtea to the defendant.

Long *v.* Dennis, Ea. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2052. 1 *Black. Rep.* 630.

A deviſe on condition precedent, that if *A.* marries without competent fortune, or without conſent of truſtees, the iſſue ſhall not inherit, is performed by having a portion only, without conſent.—*Robert Ballyman*, being ſeiſed in fee-ſimple, duly made his will, &c. dated the 11th of March, 1727; and thereby deviſed unto *Richard Clarke*, and *Peter Kerſlake*, their heirs and aſſigns, all that his meſſuage, tenement, or farm, called Parke, &c. upon truſt, to pay the yearly

yearly rents and profits thereof, by quarterly payments, to his son *Robert Ballyman*, during his said son's natural life: and from and after his decease, the trustees and their heirs were to stand seised of the premises: to the use of such woman as should be his wife at the time of his death, during the term of her natural life, for her jointure; *subject to the proviso or condition next in the said will particularly mentioned and expressed*; and from and after the deaths of his said son *Robert*, and such woman as should be his wife at the time of his death, then in trust to and for the use and behoof of the first son of the body of the said *Robert*, his son, lawfully to be begotten, and the heirs of the body of such first son lawfully issuing; *subject, nevertheless, to the said proviso or condition*; and for want of such issue, to the second, third, fourth, fifth, and all and every other son and sons of the body of his said son *Robert*, lawfully to be begotten, and the heirs of their several bodies severally, respectively, and successively issuing, as they should be in seniority of age and priority of birth, &c.; *subject to the said proviso or condition*; and for want of issue male of the body of his said son *Robert*, then to the use and behoof of all and every the daughter and daughters of his body, lawfully to be begotten, and the heirs of their several bodies; *subject to the said proviso or condition*; and for want of such issue, then to the use and behoof of his [own] two daughters, *Hannah Ballyman* and *Elizabeth Ballyman*, their heirs and assigns for ever. Provided always, and it was his very will, true intent, and express meaning, "*That in case his said son* Robert *should* "*marry with any woman, not having a competent marriage-*" *portion*; OR *without the consent and approbation of the said* "*trustees, their heirs or assigns, in writing under their hands* "*and seals, to be executed in the presence of two or more cre-*" *dible witnesses, first had and obtained*; that then his said "trustees, and their heirs and assigns, immediately after the "death and decease of his said son *Robert*, should stand and "be seised of the said messuage and tenement, or farm, call-"ed Parke, with the appurtenances, to and for the only "use and behoof of his said two daughters, *Hannah* and "*Elizabeth*, and their heirs for ever; any trust, use, be-"quest, limitation, or devise thereof, to or to the use of his "said son *Robert*, or to such woman as should be his wife "at the time of his death, or to the heirs of the body of "the said *Robert*, or any other trust, use, limitation, be-"quest, or devise, or any other thing in that his will con-"tained, to the contrary thereof in any wife notwithstand-"ing." And his *will, true intent*, and *meaning*, was, and he did *declare*, "that the said proviso or condition therein-"before expressly mentioned, was NOT *intended* by him, "*nor to be construed or taken* to be IN TERROREM; but a

"CON-

" CONDITION, *for want of performance whereof, in every* " *reſpect*, the ſaid lands, called Parke, ſhould *in no caſe* be " *veſted* in ſuch *wife* of his ſaid ſon *Robert, nor the heirs of* " *that marriage*, but (on the contrary) that his ſaid truſtees " and their heirs ſhould be ſeiſed of the ſaid premiſes, to the " *only* uſe and behoof of his ſaid *two daughters and their* " *heirs*, in manner aforeſaid." The teſtator died ſeiſed, on the 18th of October, 1730. *Robert Ballyman*, the ſon, married *Mary Stephens*, on the 28th of May, 1739. In January, 1765, he died; and was buried the 29th day of the ſame month, leaving the ſaid *Mary*, his widow, and one daughter, called *Maria*, both now living: which ſaid *Maria* married the ſaid *Abraham Dennis*, the defendant. *Hannah Ballyman*, one of the ſaid teſtator's daughters and deviſees named in his will, died in the month of October, 1751, in the life-time of her ſaid ſiſter *Elizabeth*. The ſaid *Elizabeth*, the other of the teſtator's daughters and deviſees, on the 6th day of May, 1732, married with the ſaid *Richard Clarke*; and had iſſue, by him, *Mary* their daughter, baptized the 17th of April, 1734, now wife of *William Hurley*. The ſaid *Richard Clarke*, and *Peter Kerſlake*, the two truſtees, were both living, at the marriage of the ſaid *Robert Ballyman* with *Mary Stephens*. The ſaid *Kerſlake* died in November, 1740: and the ſaid *Clarke* died in February, 1748. The ſaid *Elizabeth*, the wife of the ſaid *Clarke*, ſurvived him and alſo the ſaid *Hannah* her ſiſter; and died in December, 1754, leaving the ſaid *Mary*, her only child and heir at law; who, on the 29th day of June, 1761, married with the ſaid *William Hurley:* which ſaid *William Hurley*, and *Mary* his wife, are the leſſors of the plaintiff. The ſaid *Hurley* and his wife, in right of the ſaid *Mary*, as heir at law of the ſaid *Elizabeth*, her mother, claimed title to the ſaid meſſuage, tenement, farm, and premiſes, under the ſaid proviſo in the ſaid teſtator's will; alleging, " That the ſaid *Mary Stephens* was a woman of no " circumſtances, and had not a competent marriage-portion " at the time of her marriage with the ſaid *Ballyman* the " ſon; and that they were married without the conſent of " the ſaid truſtees, firſt had according to the intentions and " directions of the ſaid teſtator's will." In purſuance thereof, the leſſors of the plaintiff brought an ejectment for recovering poſſeſſion of the premiſes; and, on the trial, the jury found—" *That the ſaid* Mary Stephens, *at the time of* " *her marriage with the ſaid Robert Ballyman*, had a com- " petent marriage-portion; *but that the ſaid* Robert Bally- " man *married her* without any conſent or approbation of " the ſaid truſtees named in the ſaid will;" and, thereupon, found a verdict for the plaintiff, ſubject to the opinion of this Court upon the following queſtion—" Whether the

leſſors

leſſors of "the plaintiff have a title to recover the ſaid premiſes." PER CURIAM:—Conditions in reſtraint of marriage are odious; and are, therefore, held to the utmoſt rigour and ſtrictneſs. They are contrary to ſound policy. By the Roman law, they are all void.—Conditions precedent muſt previouſly exiſt. Therefore, in theſe there can be no liberality, except in the conſtruction of the clauſes.—But, in caſes of conditions ſubſequent, it has been eſtabliſhed by precedents, that where the eſtate is not given over, they ſhall be conſidered as only *in terrorem.* This ſhews how odious ſuch conditions are: for, in reaſon and argument, the diſtinction between being or not being limited over, is very nice; and a clauſe can carry very little terror, which is adjudged to be of no effect. Though, to be ſure, the reaſoning will not hold. If the eſtate is given over, ſuch a condition can not be got over.—This is undoubtedly a condition precedent: it muſt have been performed before the ſon could take; before his intereſt could veſt.—The conſtruction muſt be, to veſt the eſtate, "in caſe his ſon married a "woman with a competent fortune, or had the conſent and "approbation of his truſtees to marry a woman without "one." The meaning is—"that in either event, it ſhall "veſt." The performance of either part of the alternative veſts the eſtate. And it is no forfeiture, unleſs he had broken both parts of it. Here is no objection to the marriage. And one of the truſtees is become one of the deviſees over. Therefore, a cauſe of objection ought to be ſhewn: otherwiſe, it ſhall be conſidered as if his conſent was with-holden without reaſon. The conſequence is, that the poſtea muſt be delivered to the defendant.

Doe, Leſſee of Watſon *et al.* v. Shipphard, Hil. Ter. 19 *Geo.* 3. B.R. 1 *Doug.* 75.

Under a deviſe of land—to truſtees to pay 20l. of the rents and profits to the teſtator's daughter, and the reſt to her huſband, and the whole rents and profits to the huſband after the daughter's death; and, in caſe the daughter ſhould ſurvive her huſband, then (the land) to the uſe of the daughter for life; and, after her death, to the uſe of her ſon in tail, then to the heirs of the body of the huſband, by the daughter, then to the heirs of her body, then to the heirs of the huſband;—the daughter dying before her huſband, the limitations over ſhall not take effect, the contingency not being confined to her life-eſtate, but affecting all the other limitations, and operating as a condition precedent.—*John Hewit,* being ſeiſed in fee, by his will, deviſed as follows; viz. "all "his meſſuages, tenements, lands, and hereditaments, in "Eſſex, to four truſtees and their heirs (one of whom, "named *Charles Shipphard,* was the defendant), upon ſpe-"cial truſt and confidence, that they ſhould, *out of the rents* "*and profits thereof, levy and raiſe the ſum of* 20l. *and pay* "*the ſame to* Rachel Shipphard, *his daughter, and then wife*

" *of* Thomas Shipphard, *annually, during her natural life,*
" *by four quarterly payments, to her ſeparate uſe*; and, upon
" the farther truſt and confidence, that they ſhould pay and
" diſpoſe of all *the reſidue of the rents and profits, as alſo of*
" *the whole rents and profits thereof, after the deceaſe of his*
" *ſaid daughter, to the uſe of the ſaid* Thomas Shipphard, *for*
" *the term of his natural life*; AND, IN CASE MY SAID
" DAUGHTER RACHEL SHOULD HAPPEN TO SURVIVE
" THE SAID THOMAS SHIPPHARD, HER HUSBAND, then,
" upon truſt and confidence, that they, the ſaid truſtees, ſhall
" ſtand and be ſeiſed, of all and every my ſaid meſſuages,
" lands, tenements, and hereditaments, to the ſeveral uſes,
" intents, purpoſes, and upon the ſeveral truſts, hereinafter
" mentioned, viz. *to the uſe and behoof of my ſaid daughter*
" Rachel, *for and during her natural life*; and, from and
" after the deceaſe of my ſaid daughter, *then to the uſe and*
" *behoof of my grandſon*, Hewitt Shipphard, *ſon of the ſaid*
" Thomas *and* Rachel Shipphard, *and the heirs of his body,*
" *and, for default of ſuch iſſue, then, to the uſe and behoof of*
" *the heirs of the body of the ſaid* Thomas Shipphard, *begotten*
" *or to be begotten on the body of the ſaid* Rachel, *his wife,*
" *and, for default of ſuch iſſue, then to the uſe and behoof of*
" *the heirs of the body of the ſaid* Rachel, *my daughter, by any*
" *other huſband*, and in default of ſuch iſſue, then to *the uſe*
" *and behoof of the ſaid* Thomas Shipphard, *and his heirs for*
" *ever.*"—On the teſtator's death, *Thomas Shipphard*, his
ſon-in-law, entered upon all the deviſed premiſes, *and held*
*them till the time of his death. But* Rachel, *his wife, died*
*in the life-time of her huſband.* The huſband died, leaving
*Hewitt Shipphard*, his only ſon and heir at law, who enter-
ed and enjoyed till his death. *Hewitt Shipphard*, died in-
teſtate, and without iſſue. *Charles Shipphard*, the defendant,
and ſurviving truſtee, *was the eldeſt brother, and heir at law,*
*of* Thomas Shipphard, *and alſo the eldeſt uncle, and heir at*
*law, on the part of the father, of Hewitt Shipphard. John*
*Watſon*, and *Mary*, the wife of *John Powell*, two of the
leſſors of the plaintiff, were nephew and niece, and heirs at
law of the teſtator, and alſo heirs at law, on the part of the
mother, of *Hewitt Shipphard.*—Lord MANSFIELD, Ch. J.
The queſtion is, WHETHER *the limitations over are to take*
*effect in the event which has happened, of* Thomas Shipphard,
*the huſband, having ſurvived his wife, the teſtator's daugh-*
*ter?* Now there are no expreſs words limiting the eſtate
over on that event, and yet it is plain that it was foreſeen
by the teſtator, for he gives the rents and profits to the huſ-
band, after the death of the wife. The teſtator then pro-
ceeds to ſay, " and in caſe my ſaid daughter *Rachel* ſhould
happen to ſurvive the ſaid *Thomas Shipphard* her huſband,
then upon truſt," &c. The Court may ſupply the omiſſion
of

of expreſs words, if they find a plain intent, but unleſs that is the caſe, they cannot do it; and, upon full conſideration of the whole of this will, we do not find there is ſufficient for us to gather ſuch intent, ſo as to warrant us in ſupplying the omitted words. Gueſſes may be formed, but that is not enough. Perhaps, *quod voluit non dixit.* We cannot make a will for the teſtator. Conjectures may be made both ways. There may be a reaſon why the teſtator might not intend the limitations over to take place, except in the event of the daughter's ſurviving her huſband, viz. to ſecure the eſtate in tail to his grandſon, *Hewitt Shipphard*, againſt any preference his daughter might ſhew to her iſſue by any ſubſequent huſband. If ſhe did not ſurvive him, there could be no danger of that ſort, as the eſtate would deſcend to *Hewitt Shipphard.*—PER CURIAM: Judgment for the plaintiff.

Doe, *ex dim.* Dean and Chapter of Weſtminſter, *et al. v* Freeman and Wife, Mic. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 389.

Under a deviſe to a wife for life, *provided ſhe remains a widow*, but in caſe ſhe marries a ſecond huſband, then *to* J. S. *when he ſhall attain his age of twenty-three years*, the wife has an abſolute eſtate till *J. S.* is twenty-three, though ſhe marry before.—The teſtator, *William Warraker*, by his will, deviſed as follows: "I give, will, and deviſe unto my loving "wife, *Sarah Warraker*, all that my copyhold meſſuage or "tenement wherein I now dwell, with the appurtenances "thereto belonging, ſituate in Harpenden, at the time of my "deceaſe, for *and during the term of her natural life*, PROVID-"ED *ſhe remains a widow, and does not marry a ſecond huſband*; "*but if in caſe ſhe marries a ſecond huſband, then I give*, will, "and deviſe the ſaid copyhold meſſuage, or tenement, and all "and every the appurtenances as above mentioned, unto my "nephew, *John Surry*, ſon of my late ſiſter, *Elizabeth Surry*, "lately deceaſed, *when he ſhall attain his full age of twenty-"three years*, to have and to hold unto him and his aſſigns "for ever."—*Sarah Warraker*, the widow, married the defendant; and *John Surry*, one of the leſſors of the plaintiff, and the deviſee named in the will of the teſtator, had not attained the age of twenty-three years. THE QUESTION for the opinion of the Court was, Whether the leſſors of the plaintiff, or any of them, were entitled to recover in this action?—And for the leſſors of the plaintiff it was contended, that the eſtate, which was deviſed to *Sarah Warraker*, *determined upon the marriage with her ſecond huſband*, it being given to her on condition of her continuing a widow; and that it either veſted immediately in *John Surry*, the nephew, or it deſcended to the heir at law till *John Surry* attained his age of twenty-three years. ASHHURST, J.—It is a ſettled principle, that limitations in reſtraint of marriage are not to be favoured. Wherever an eſtate is given to a widow for life, provided ſhe ſhall not marry, unleſs there be a deviſe over *immediately*, it

is merely *in terrorem*. In the preſent caſe there is a deviſe over; but that cannot be extended farther than the words of that deviſe, which are, "to my nephew, *John Surry, when he ſhall attain his full age of twenty-three years.*" According to the true conſtruction of the will, it is a deviſe to the wife during her widowhood, and for ſo much longer time as till the teſtator's nephew ſhall be twenty-three years of age.—Taking it not to veſt till the nephew comes of age, there is no chaſm to be ſupplied by interpoſing the heir at law, and the inconvenience of the eſtate being in abeyance in the interim, is by thoſe means prevented. And it ſeems to have been the teſtator's intention, that the widow ſhould continue in poſſeſſion till the nephew took it. BULLER, J.—The intention of the teſtator is extremely clear; if the widow did not marry, ſhe was to enjoy the eſtate for her life; if ſhe did marry, ſhe was then only to have it till the nephew attained his age of twenty-three, when he was to take it.

## *Void Deviſes.*

Lade, bart. v. Holford, eſq. *et ux. et al.* Tr. Ter. 3 Geo. 3. B.R. 3 *Burr.* 1416. 1 *Black.* 428.

On a caſe from the court of Chancery, it appeared that "Sir *John Lade*, bart. by his will, dated the 17th of "Auguſt, 1739, deviſed his manors, &c. to four truſtees, "and their heirs; and likewiſe all his leaſeholds and copy-"holds, and perſonal eſtate, to be laid out in the purchaſe of "land; UPON TRUST, and to the USE of his couſin, JOHN "INSKIP, in ſtrict ſettlement; with divers remainders over, "in ſtrict ſettlement." In 1740, the teſtator died. After his death, *John Inſkip* took the ſurname of LADE; in February, 1751, he attained his age of twenty-one; in 1756, the ſaid JOHN LADE (afterwards Sir *John Lade*, baronet), attained his age of twenty-ſix, and married *Ann Thrale*; in 1759, he died, leaving his wife *enceinte* of the now plaintiff, Sir *John Lade*, baronet.—In the will there is a PROVISO, "That ſo often as, and during ſuch time as, the perſon who, "for the time being (in caſe the teſtator had not otherwiſe "directed), would have been entitled *in poſſeſſion* as tenant for "life, or tenant in tail, ſhould be UNDER *the age of* twenty-"ſix years, *then the truſtees were to enter, and receive all the "rents and profits of the real, and all the intereſt and produce of "the perſonal eſtate*; out of which they were to allow, for "the *maintenance* of ſuch tenant for life, or tenant in tail, "ſums particularly ſpecified; and all the *reſt* was to ACCU-"MULATE, and be laid out in the purchaſe of land, and "ſettled to and upon the *ſame* truſts and uſes."—On the part of the infant it was inſiſted, that he being TENANT IN TAIL, the *proviſo* of limitation to the truſtees, "to *take from* "*him*

"*him* the profits of the eſtate, for the purpoſe of *accumu-*
"*lation*," was contrary to the policy of the law, and there-
fore VOID.—The defendants, who claimed under limita-
tions in remainder, inſiſted, it was a *good legal* limitation, and
that the *truſt*, for which it was created, *ought not* to make it
void; therefore, *till* his age of twenty-ſix, the infant could
*only* be allowed, for maintenance, the ſums ſpecified in the
will. THE QUESTION was, WHETHER *the defendant*,
Roſe Fuller, *the heir at law of the ſurvivor of* Anna Lade,
John Fuller *the elder*, Hugh Offley, *and* John Fuller *the*
*younger, the truſtees named in the will of the ſaid Sir* John Lade,
*the teſtator, did, upon the birth of the preſent plaintiff, Sir*
John Lade, *take* any *and* what *eſtate in the premiſes deviſed,*
*by* VIRTUE OF THE PROVISO *in the will of the ſaid teſtator?*
PER CURIAM: We are of opinion that *Roſe Fuller*, the
heir at law of the ſurviving truſtee in the will of Sir *John*
*Lade, did* NOT *take* ANY *eſtate* in the premiſes deviſed, by
*virtue* of the PROVISO in the will of the ſaid teſtator.

*Jonathan Rudſdell*, ſciſed in fee of a freehold eſtate of 103l. *per annum*, ſoon after his marriage made a ſettlement, by deed poll, dated the 30th of January, 1744, whereby he grants to *Benjamin Collyer* an annuity of 50l. iſſuing out of particular lands and tenements, to hold to the ſaid *Benjamin Collyer*, his heirs and aſſigns, to the uſe of his wife, *Mary Rudſdell*, and her aſſigns, for her life; and, after her deceaſe, to the uſe of all and every of his children, on the body of his ſaid wife lawfully begotten, or to be begotten (other than an eldeſt or only ſon), as tenants in common, and not as joint-tenants, and their heirs and aſſigns ſeverally, for ever; *and for default of ſuch children, to the uſe of his right heirs for ever.* On the 20th of July, 1754, the ſaid *Jonathan Rudſdell, having then iſſue by the ſaid* Mary, *his wife, only one child*, a daughter, named *Suſannah*, who was born in May, 1748, made his will, and thereby, after noticing the ſettlement, deviſed to his ſaid daughter, *Suſannah*, upon ſeveral contingencies; ſome of them depended upon his wife's ſurviving him, and being left with child; one of them was as follows: BUT, *provided my ſaid dear wife*, Mary Rudſdell, BE NOT LEFT WITH CHILD *by me at my deceaſe, I then give and bequeath unto my dear daughter*, Suſannah Rudſdell, *if ſhe outlives her ſaid mother*, Mary Rudſdell, THE WHOLE *of my real and perſonal eſtate, at her mother's death, for her to diſpoſe of as ſhe pleaſes, when ſhe arrives at the age of twenty-one years.* The will then proceeds with many deviſes over. *After the making this will, the ſaid* Jonathan Rudſdell *had three more children by his ſaid wife*, Mary, viz. *Mary*, born in Auguſt, 1755; *Jonathan*, in September, 1757; and *Benjamin*, in March, 1760. The teſtator, *Jonathan Rudſdell*, ſurvived his ſaid wife, and died in the beginning of the year 1768, leaving his children beforenamed.—He was then

Rudſdell v. Rudſdell, Mic. Ter. 12 Geo. 3. B.R. 5 *Burr.* 2806.

seised in fee simple of the estates comprized in the deed poll of the 30th of January, 1744. *Susannah*, the eldest daughter, after the death of her father (in May, 1768), attained her age of twenty-one years.—In Easter term, 1769, *Jonathan Rudsdell*, the eldest son of the testator, born after the will, brought his bill in the court of Chancery, by his next friend, against the said *Susannah*, the daughter born before the making of the will, and *Mary* and *Benjamin*, the two younger children, and the personal representative of the father, on the ground *that the father, at the time of making his will, had only one child, the defendant*, Susannah; *and that the plaintiff, and the defendants*, Mary *and* Benjamin Rudsdell, *being all born afterwards, made such an alteration in the circumstances of his family, as ought to be deemed a revocation of his will; that it appeared from the will, that the testator intended only to dispose of his real and personal estate upon the contingencies therein mentioned, and that none of such contingencies, and upon which alone the disposition thereby made was intended to take place, ever happened; and that, therefore, either the said will should be considered as revoked by such alteration of circumstances, or that the said* Jonathan Rudsdell *ought to be considered as having died intestate, such will having been intended to take effect only upon events which never happened.*—The cause coming on to be heard, the Lord Chancellor ordered, that a case should be made for the opinion of the judges of this court, on the will of the said *Jonathan Rudsdell*, upon the following question: "WHE-"THER THE PLAINTIFF, *Jonathan Rudsdell*, IS ENTITLED "TO ALL, OR ANY, AND WHAT PART OF THE REAL "ESTATES DEVISED BY THE SAID WILL?" AND THE JUDGES CERTIFIED, that they were of opinion, that the testator having left several children besides his daughter, *Susannah*, the contingency upon which the real estate, or any part thereof, was devised to her, has not happened; and, therefore, that the said estate descends to *Jonathan*, the plaintiff, as heir at law, subject to the annuity of 50*l. per annum*, provided for the younger children, under the deed of settlement.

Proctor *v.* The Bishop of Bath and Wells, Thomas Moore, an infant, and Richard Goldsborough, and Edward Moore, his Guardians, Mic. Ter. 34 Geo. 3 C B *in quare impedit.* 2 *Wilson. Black* 358.

*A.* devises an advowson to the *first or other son of* B. *that should be bred a clergyman, and be in holy orders*, in fee; but in case *B.* should have *no such son*, then to *C.* in fee. Both devises are void, as depending on too remote a contingency; therefore, though *B.* dies without having had a son, the heir at law of the devisor, and not *C.* is entitled.—The testatrix, *Mary Proctor*, being seised of an advowson, made her last will and testament, and gave and "*devised unto the first or* "*other son* of her grandson, *Thomas Proctor, that should be* "*bred a clergyman, and be in holy orders*, and to his heirs and "assigns, all her right of presentation to the said rectory, "&c. *But in case her said grandson, the said* Thomas "Proctor,

" Proctor, *ſhould have no ſuch ſon*, then ſhe gave and deviſed " the ſaid right of preſentation unto her grandſon, the ſaid " *Thomas Moore*, his heirs and aſſigns, for ever." *Thomas Proctor died without having ever had any ſon.* THE QUESTION was, Whether the deviſe to *Thomas Moore* could take effect as an executory deviſe, ſince it was clear that it could not create a contingent remainder, there being no particular eſtate to ſupport it?—THE COURT were very clearly of opinion, that the firſt deviſe to the ſon of *Thomas Proctor* was void, from the uncertainty as to the time when ſuch ſon, if he had any, might take orders; and that the deviſe over to *Moore*, as it depended on the ſame event, was alſo void, for the words of the will would not admit of the contingency being divided, as was the caſe in *Longhead* v. *Phelps*, 2 *Black.* 704; and there was no inſtance, in which a limitation after a prior deviſe, which was void, from the contingency being too remote, had been let in to take effect: but the contrary was expreſsly decided in the Houſe of Lords, in the caſe of *The Earl of Chatham* v. *Tothill*, 6 *Brown Caſ. in Parl.* 451, in which the judges founded their opinion on *Butterfield* v. *Butterfield*, 1 *Vezey*, 134, conſequently, the heir at law of the teſtatrix was entitled.—Judgment for the plaintiff.

The teſtator, *W. Phillips*, deviſed thus: " To the Reve- " rend *Adam Aldridge*, late of Ameſbury, in Wiltſhire, but " now *preacher at the meeting-houſe* in Lyndhurſt, all, &c. " (deſcribing the premiſes), to hold to him, the ſaid *Adam* " *Aldridge*, *for and during his natural life only*, on this expreſs " condition, that he do and ſhall, without delay, after my " deceaſe, ſettle and convey the ſame to truſtees, to take " place at his deceaſe, *for the uſe and ſupport of the preaching* " *of the word of God at the meeting houſe at Lyndhurſt afore-* " *ſaid for ever*; and in caſe ſuch preaching ſhould be diſcon- " tinued, I direct the ſame to be applied towards a ſchool, " for teaching the poor children of Lyndhurſt aforeſaid, " for ever." It was contended for the leſſor of the plaintiff, who claimed the premiſes as heir at law, that not only the limitation ſubſequent to the defendant's life-eſtate, but that the life-eſtate alſo, was void, by the 9 *Geo.* 2. c. 36, as being a deviſe to a charitable uſe. BUT THE COURT thought the point too clear for diſcuſſion; for that, *though the ſubſequent limitation was void, the defendant's life-eſtate was clearly good.* That the religious perſuaſion of the defendant raiſed no ground of objection to his taking the eſtate; and that the deviſe over to the ſchool, in caſe the preaching ſhould be diſcontinued, only related to the limitation after the defendant's death.

Doe *ex dim.* Phillips, *v.* Aldridge, Ea. Ter. 31 Geo. 3. B R. 4 *Ter. Rep.* 264.

*A.* deviſed to *B.* and the heirs of her body; and for default of ſuch iſſue, then over; *B.* died in the life-time of *A.* and then *A.* by a codicil, confirmed the will: held that the heir of

Doe *ex dim.* Turner and Wife, and Ward *v.* Kett

Ea. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 601.

*B.* took nothing, though it appeared that *A.* knew of the death of *B.* and of the birth of her son, before the making of the codicil.—The testatrix, *N. Goddard*, "devised to her grand-"daughter, *Elizabeth Foldsom, and the heirs of her body, law-"fully to be begotten*; and for default of such issue, to *E.* "the wife of *J. Ward*, for life, remainder over." It also contained a proviso, to restrain the devisees from levying a fine, or suffering a recovery. After the making of the will, *E. Foldsom* married *J. Kett*, and, *in the life-time of the devisor, died*, leaving a son, the present defendant. *The devisor knew of the birth of the defendant, and of the death of his mother, immediately after those events happened*; and afterwards made a codicil to her will, for the purpose of appointing a new executor, concluding thus: "And I do hereby declare, that my said will in writing, bearing date, &c. and this codicil, which I will shall be added to, and deemed part thereof, do contain my last will and testament." FOR THE PLAINTIFF it was contended, that the devise to *Elizabeth Foldsom*, and the heirs of her body, became void, by the death of *Elizabeth* in the devisor's life-time; and that nothing passed by the codicil to her children. FOR THE DEFENDANT it was argued, that though the devise to *E. Foldsom* herself was void, in the event that had happened, the children of *E. Foldsom were entitled under the codicil.* Lord KENYON, Ch. J.—Nothing can be better established than that, if there be a devise to *A.* and his heirs, or to the heirs of his body, or to *A.* in tail, and *A.* die in the life-time of the devisor, the devise is void. In this case, the testatrix devised to *E. Foldsom*, and the heirs of her body; she, therefore, must have taken as a purchaser, and would, in the event of her surviving the devisor, have had the power of suffering a recovery, and her children must have taken by descent; whereas this is an attempt, on the part of the defendant, to make them take as purchasers, which would alter the course of descent. Then it has been argued, that this differs from former cases, on account of the proviso which was inserted in the will, to prevent the tenants in tail suffering a recovery: *but that was an impotent attempt by the devisor, for it is not permitted to a party to give an estate to another, and deprive that other of the legal consequences annexed to it.* With regard to the codicil; it would operate as a republication of the will for many purposes, such as that of passing lands purchased after making the will, but not so as to alter the will. Now, supposing the devisor had, by his will, given an estate in tail to *E. Foldsom*, and had, after *E. Foldsom*'s death, republished it by a codicil, that would not have altered the meaning of the words in the will; and the words here used are equivalent to those. If this codicil were sufficient to pass the estate to the representatives of *E. Foldsom*, there never would be a lapsed legacy when there was a republication

republication of the will, but it would always go in favour of the executors of the legatee deceased.—THE OTHER JUDGES CONCURRED.

*S. Counsell* gave certain monies in the funds to trustees, in trust for *S. Counsell*, daughter and only child of her late husband, deceased, then of the age of twelve years, "*until* "*she should attain twenty-one, and when and so soon as she* "*should attain that age, then upon trust to pay and transfer* "*the same to S. Counsell*, her executors, &c. to and for their "own use and benefit; *and in case S. Counsell* SHOULD DIE "UNDER TWENTY-ONE, LEAVING ANY CHILD, *or child-* "*ren, of her body, lawfully begotten*, then in trust for all and "every such child and children, who should live to attain his "or their age or ages of twenty-one, and to be equally "divided between them. BUT IN CASE *S. Counsell* SHOULD "DIE UNDER TWENTY-ONE, WITHOUT LEAVING ANY "CHILD, or children, or being such, they should all die "under twenty-one, then in trust for her three nieces, "*Mary, Ruth*, and *Sarah Ogle*." *S. Counsell*, the daughter, married *B. Doo*, attained the age of twenty-one, and had two children living at the time of her death, which happened in the life-time of the testatrix. The two children of *S. Counsell*, the younger, were the plaintiffs in the suit; and *Ruth* (formerly *Ruth Ogle*), the survivor of the three nieces of the testatrix, and her husband, were the defendants. FOR THE PLAINTIFFS it was argued, that the children were entitled under the will; for it was undoubtedly the intention of the testatrix, that her grand-children should take before her nieces, as the three objects of her bounty were: 1st, her daughter; 2dly, her grand-children; and, 3dly, her nieces. Lord KENYON, Ch. J.—Nothing can be more clear than the words of this will. The devise is to *S. Counsell*, when she shall attain the age of twenty-one, and if she shall die under twenty-one, leaving children, then to those children; but she did not die under that age, and therefore nothing can pass to the grand-children. If this event had occurred to the testatrix, most probably she would have provided for it, and given the money to the grand-children: but, as she has not done so, we cannot make a will for her. Nothing is given to the grand-children, but upon an event which did not happen.—ASHHURST, J. of the same opinion. BULLER, J.—There is a distinction in some of the cases, *Willing* v. *Baine*, 3 *Père Wms.* 113, and a case there referred to, between words giving a remainder over, and an original devise; in those cases the devise was good, not as a remainder over, but as an original devise; but here was no original devise to the grand-children, but on an event which did not happen.—GROSE, J. agreed. Lord KENYON, Ch. J. then said, that, as this was a case from the court of Chancery, the form

Doo, *et al.* v. Brabant, *et al.* Tr. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 706.

form of the case must be altered, as in *Sabbarton* v. *Sabbarton*, *Cas. Temp. Talb.* 245. before the Court could certify to the Lord Chancellor; for, that as it now stood, of a limitation of money, they could not take judicial notice of it. And the case having been altered accordingly, in which it was stated as a limitation of a term of years, the following certificate was sent by this Court: "*We are of opinion, that the plaintiffs took no estate whatever in the said leasehold premises, by virtue of and under the said will of the said* Sarah Counsell; *the events upon which the limitation, under which they claim, was to take place, not having happened.*"

John Southey Somerville v. Mary Lethbridge, the Honourable Hugh Somerville, Henry Fownes Luttrell, William Southey, Robert Southey, Thomas Southey, John Southey and Sarah Periam, Hil. Ter. 35 Geo 3 B.R. & *Ter. Rep.* 213.

Under a devise of lands to trustees in fee, in trust for *A.* (an infant), for ninety-nine years, if he shall so long live, and, after that term, to his first, second, third, and fourth sons, and the issue male of their bodies, for the like term of ninety-nine years, as they shall be in seniority of birth; and in default of such issue male in him or them, then to *B.* and the issue male of his body, for the like term of ninety-nine years; and in default of such issue male, then to the right heirs of the devisor. *A.* takes an estate for ninety-nine years, determinable with his life, and, upon his death, his first son takes a like estate; but the subsequent limitations to his other sons, and to *B.* are void. — The testator, *Canon Southey*, being seised and possessed of freehold, copyhold, and leasehold estates, devised "all the rest of his estates and "lands, both in possession and reversion, and all his reputed "manors and fee-simple estates, and all other his copyhold "and leasehold estates, not before devised, to the defendants, "*Hugh Somerville* and *H. F. Luttrell*, and the survivor, &c. "in fee, in trust to preserve contingent remainders; and as "to all his fee-simple, copyhold, and leasehold estates, in the "parishes of Fitzhead, &c. and elsewhere, in the county of "Somerset (except the annuity thereinbefore given to *S. Periam*, and the leasehold estate given to *William* and "*Hannah Southey*), *in trust to and for the use of his great "nephew*, J. S. Somerville (*the plaintiff*), *for the term of "ninety-nine years*, if he should so long live, *and, after that "term, to the use of the first, second, third, and fourth sons of "the said* J. S. S. *and the issue males of their bodies lawfully "begotten, for the like term of ninety-nine years, as they should "be in seniority of birth*; *and in default of such issue male in "him or them, then to the use of his kinsman*, John Southey, "*and the issue male of his body lawfully begotten, for the like "term of ninety-nine years*; *and in default of issue male of him, "then to his brother*, Robert Southey, *and the issue male of "him for the like term*; *and in default of issue male of him, "then to his brother*, Thomas Southey, *and the male issue of "him for the like term*; *and in default of issue male of him, to "the devisor's right heirs.*" THE QUESTIONS were,

FIRST,

FIRST, What eſtate the plaintiff, *John Southey Somerville* (1), took under the will of the deviſor in his freehold, copyhold, and leaſehold eſtates, reſpectively? SECONDLY, What eſtate the firſt ſon of the plaintiff will take under ſuch will? THIRDLY, Whether the ſecond, third, and fourth ſons of the plaintiff will take any and what eſtates under ſuch will? FOURTHLY, Whether any other ſons of the plaintiff will take any and what eſtates under ſuch will? FIFTHLY, What eſtate the defendant, *John Southey*, takes under the ſaid will? SIXTHLY, Whether the iſſue male of *John Southey* can take any and what eſtates under ſuch will? SEVENTHLY, What eſtates the defendants, *Robert* and *Thomas Southey*, take under the ſaid will; and whether their iſſue male can take any and what eſtates under the ſaid will? EIGHTHLY, Whether *Hugh Somerville* and *H. F. Lutrell* took any and what eſtate under the ſaid will? PER CURIAM: We are of opinion, that *Hugh Somerville* and *Henry Fownes Luttrell* took *a fee-ſimple* in the freehold and copyhold eſtates, according to their reſpective natures, *and the abſolute intereſt* in the leaſehold eſtates, deviſed to them by the will of the teſtator, *Cannon Southey, ſubject, however, to the truſts of the ſaid will*; and that none of the ſubſequent limitations are limitations of uſes executed by the ſtatute. If the ſubſequent limitations had been limitations of uſes executed by the ſtatute, we are of opinion that *John Southey Somerville* would have taken an eſtate for a term of ninety-nine years, determinable with his life in the freehold and copyhold eſtates of the teſtator, and in his leaſehold eſtates, if they ſhould ſo long continue; and that, upon his death, his firſt ſon would take a like eſtate for a term of ninety-nine years, determinable with his life in the freehold and copyhold eſtates, and in the remainders of the leaſehold eſtates; and that the ſeveral ſubſequent limitations to the ſecond, third, and fourth ſons of the ſaid *John Southey Somerville*, and the limitation to the defendant, *John Southey*, and his iſſue male, and the limitations to *Robert* and *Thomas Southey*, and their iſſue male, would be void; and that the other ſons of the plaintiff, *John Southey Somerville*, would not take any eſtate under the teſtator's will.

The teſtator, *John Poad*, made his laſt will and teſtament in writing, *and thereby gave and deviſed unto his ſiſter*, Eſther Rogers, *her heirs and aſſigns for ever, the ſaid farm and tenement, with the appurtenances.* And the ſaid *John Poad*, by his ſaid will, declared, that *his will further was, that what eſtate and effects he had thereby given to his ſaid ſiſter, ſhould*

Goodill *v.* Brigham, Hil. Ter. 38 Geo 3. C.B. 1 *Pul. & Buſ.* 192.

(1) Though it was not directly ſtated in the caſe, that *J. S. Somerville* had no children when the will took effect, that circumſtance appeared from the different dates, he being a minor and unmarried.

*be*

*be fully veſted in her, notwithſtanding her coverture,* AND THAT SHE MIGHT GIVE, SELL, AND DISPOSE OF THE SAME, *as ſhe ſhould think proper; and alſo give acquittances and other diſcharges, ſo as not to be under the control of her own huſband, the ſaid* C. Rogers, *which ſaid huſband ſhould not intercede or meddle with any of the eſtate, or effects, thereby given to his ſaid ſiſter.* The ſaid *C. Rogers*, and *Eſther* his wife, by virtue of the ſaid will, entered into the ſaid farm and tenement with the appurtenances, and became ſeiſed thereof in their demeſne, as of fee in right of the ſaid *Eſther*, and being ſo ſeiſed &c. *C. Rogers, and* Eſther *his wife, by leaſe and releaſe, conveyed the premiſes to* P. Merry, *in fee.*—The queſtion was, Whether *Eſther Rogers* could convey the premiſes in diſpute, without levying a fine, the eſtate by the words of the will having been given to her in fee, *with a power to diſpoſe of it, without the control of her huſband?*—EYRE, Ch. J. It ſtruck me on reading this caſe, that it would be very difficult to ſuſtain the conveyance in queſtion: and when it was admitted in argument, that this was *a deviſe in fee-ſimple, with a power ſuperadded*, I did not comprehend how that could be. But the power is inconſiſtent with ſuch an eſtate. If we trace back the nature of uſes, it will be clear that this cannot be conſidered as a power. Powers are the modifications of the uſes of that eſtate, which a man has to diſpoſe of; and great latitude is allowed in making thoſe modifications. If a man employ the proper means, he may create all kinds of powers that are conſiſtent with, and within the extent of, his fee-ſimple; and until his fee-ſimple is exhauſted, I know of no power, no diſtribution (provided it do not violate the rules of law), which could not be ſupported: as far as that goes, the doctrine of powers is very intelligible. *The power which any one creates muſt be exerciſed over his own eſtate; but when it has been exerciſed over that eſtate, to the extent of that eſtate, that is, when he has given away the whole fee-ſimple, and the whole uſe of the fee-ſimple too, it ſeems to me that he is* functus officio. What remains for him to do? All which he does beyond that, goes to ſay in what manner the fee-ſimple ſhall be enjoyed by the donee, and is matter of direction intended by the donor, to control all the rules of law. *When a deviſor gives an eſtate to a* feme covert, *and attempts to relieve her from the diſability ariſing from her coverture, his eſtate being exhauſted, the law muſt control her enjoyment of it.* It is true that *he may modify her enjoyment of the eſtate, as far as is within the uſe of the eſtate, as if he make a conveyance in fee to truſtees, and direct that the wife ſhall have the eſtate to her ſole and ſeparate uſe, and make a ſubſequent declaration to ſuch uſes as ſhe ſhall appoint, the uſes will wait upon that declaration, and as ſoon as any ſtep has been taken to execute the power,* the

*the uſes will receive that direction, from the appointment which he intended that they ſhould receive.* In that caſe, the appointment under the power, will enure as a limitation of thoſe uſes which he had a right to limit. But the preſent caſe ſeems quite beyond the ſcope of a power and of all the rules of law, which have prevailed with reſpect to the execution of powers. *The deviſor has given a fee-ſimple to the wife, to be enjoyed by her to her ſole and ſeparate uſe:* what does the law ſay? *The law ſays that a* feme covert *cannot take an eſtate to her ſole and ſeparate uſe.* The deviſor ſhould have taken the neceſſary ſteps to carry his intent into effect: he ſhould either have deviſed the eſtate to truſtees, with the uſes waiting on what he might authorize her to do, or he ſhould not have given her the whole fee: in either of which caſes, this power might have been well executed. This appears to be the ſtate of the caſe on principle; and, on authority, there is nothing which goes to eſtabliſh that where there is a direct conveyance of an eſtate in fee-ſimple, any uſe can be grafted upon it; much leſs an uſe of this nature, the object of which is to enable a *feme covert* to do, what, by law, ſhe is diſabled from doing. All powers which can be given, muſt be part of the uſe of the fee-ſimple, and the moment that uſe is exhauſted, there can be no ſuch thing as annexing ſome new uſe, beyond all which the party himſelf had to give.—Judgment for the plaintiff.

Hodgſon and his Wife *v.* Ambroſe *et al.* Ea. Ter. 20 Geo. 3. B R. affirmed *in Dom. Pro.* 1 *Doug.* 339, 345.

The teſtatrix, *Suſan Jolland*, being ſeiſed in fee, by will, deviſed in the following words:—" I give and deviſe unto " the reverend *William Arnold*, &c. and *Iſaac Pennington*, " &c. and their heirs, all that my manor of H. &c. and alſo " all that my other farm, called D. &c. and alſo all other " my manors, meſſuages, lands, and tenements, whatſoever, " &c. to hold *the ſame unto the ſaid* William Arnold, *and* " *Iſaac Pennington*, and their heirs, to ſuch uſes, and upon " ſuch truſts, as are hereinafter mentioned: that is to ſay, " to the uſe and behoof of my dear ſiſter *Elizabeth*, the wife " of Mr. *John Belchier*, and her aſſigns, for and during the " term of her natural life; and after the determination of " that eſtate, to the uſe of the ſaid *William Arnold* and *Iſaac* " *Pennington*, and their heirs, during the life of the ſaid " *Elizabeth Belchier*, upon truſt, to ſupport and preſerve " contingent remainders, &c.; and, from and after her de- " ceaſe, then to the uſe and behoof of the heirs of the body " of the ſaid *Elizabeth*, lawfully iſſuing; and, for want of " ſuch iſſue, then to the uſe and behoof of my dear ſiſter, " *Catharine Jolland*, ſpinſter, and her aſſigns, for and during " the term of her natural life: and from and after, &c." (with the ſame limitations, and in the ſame words, as before, to the truſtees, for the life of *Catharine Jolland*, and, after her death, to the heirs of her body); " and, for want of " ſuch

" ſuch iſſue, then to the uſe and behoof of my own right " heirs for ever."—*Elizabeth Belchier*, the firſt deviſee, died in the life-time of the teſtatrix, leaving one daughter, *Catharine Belchier*, one of the defendants. The teſtatrix afterwards died, without altering her will.—The queſtions ſtated for the opinion of this Court, on the above caſe, were; 1. Whether *Catharine Belchier*, the daughter of *Elizabeth Belchier*, took any, and what eſtate, under the will of *Suſan Jolland?*—2. What eſtate *Catharine Jolland* took under the ſaid will?—When the caſe came on to be argued, Lord *Mansfield* aſked, Whether it was meant to contend, ſuppoſing the deviſe to *Elizabeth Belchier* would have been an eſtate tail, in the event of her ſurviving the teſtatrix, that, in the event which had taken place (of *Elizabeth*'s death happening before that of the teſtatrix), her iſſue could take by purchaſe?—And it was anſwered, That the caſe of *Goodright* v. *Wright* (1), was againſt that point: and *Buller*, J. mentioned *Hutton* v. *Simpſon*, 2 *Vern.* 722. as a prior caſe exactly of the ſame ſort.—Lord MANSFIELD: This is the common caſe of a remainder after an eſtate tail, where, if the firſt eſtate never takes place, the remainder veſts in poſſeſſion immediately. With regard to the queſtion, Whether the interpoſition of truſtees to preſerve contingent remainders, ſhall vary the rule of law (which ſays, that *where, in the ſame inſtrument, there is a limitation to the anceſtor for life, and one to his heirs, general or ſpecial, the heirs ſhall not take by purchaſe)?* whatever our opinion might be upon principle and authorities, if the point were new, we all think, that, ſince this is literally the ſame caſe with *Coulſon* v. *Coulſon*, 2 *Strange*, 1125. 2 *Atk.* 246, 247, 250. (2), and that has ſtood as law for ſo many years, it ought not now to be litigated again. It would anſwer no good purpoſe, and might produce miſchief. The great object, in queſtions of property, is certainty; and if an erroneous or haſty determination has got into practice, there is more benefit derived from adhering to it, than if it were to be overturned. Many eſtates may be enjoyed under

(1) *B. R. H.* 1717. 1 *P. W.* 397. Deviſe to *A.* and his iſſue, remainder to *B.* and his iſſue, remainder to the heirs of *A.* *A.* dies in the life-time of the teſtator, without iſſue. *B.* dies alſo in the life-time of the teſtator, leaving a daughter, who was alſo heir of *A* Held by *Parker*, Ch. J. and the whole Court, that the daughter took nothing, either as the iſſue of *B.* or as the heir of *A.* though it was argued, that, in the events which had happened, ſhe might take by purchaſe under the deſcription of *A.*'s heir. *S. C.* at more length, 1 *Str.* 25.

(2) The deviſe in *Coulſon* v. *Coulſon*, was as follows:—*Robert Bromley* deviſes to his grandſon, *Robert Coulſon*, and his aſſigns, for his life, natural, the reverſion of land expectant on the death of the deviſor's fifter; and from and after the determination of the eſtate for life of the ſaid grandſon, then to truſtees, during the life of his grandſon, to preſerve contingent remainders; and from and after the death of his grandſon, unto the heirs of his body lawfully begotten, and to be begotten; with divers remainders over,—AND THE COURT were clear, that this was an eſtate tail in the grandſon.

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the authority of *Coulſon* v. *Coulſon*, the titles to which would be ſhaken, if the deciſion in that caſe were to be over-ruled; and the caſe is ſo generally known among conveyancers, that it is impoſſible there ſhould be many held under the contrary conſtruction, becauſe, if there were, they would have been controverted.—BULLER, J. It was a long time before I could reconcile myſelf to the determination in the caſe of *Coulſon* v. *Coulſon*; but now I am not clear, that, even if the queſtion were quite new, I ſhould not be of the ſame opinion, which the Court then entertained. If a teſtator make uſe of legal phraſes, or technical words only, the Court are bound to underſtand them in the legal ſenſe. They have no right nor power to ſay, that the teſtator did not underſtand the meaning of the words he has uſed, or to put a conſtruction upon them, different from what has been long received, or what is affixed to them by the law. But if a teſtator uſe other words, which manifeſtly indicate what his intention was, and ſhew to a demonſtration that he did not mean what the technical words import, in the ſenſe which the law has impoſed upon them, that intention muſt prevail, notwithſtanding he has uſed ſuch technical words in other parts of the will. Lord *Hardwicke* truly ſaid, in *Bagſhaw* v. *Spencer* (1)—" there " can be no magic or particular force in certain words, more " than others; their operation muſt ariſe from the ſenſe they " carry."—And I ſay, that ſenſe can only be found, by conſidering the whole will together. There is no rule better eſtabliſhed, than that the intention of a teſtator expreſſed in his will, if conſiſtent with the rules of law, ſhall prevail. That is the firſt and great rule in the expoſition of all wills; and it is a rule to which all others muſt bend. It ſays, " If conſiſtent with the rules of law;" but it muſt be remembered, that thoſe words are applicable only to the nature and operation of the eſtate or intereſt deviſed, and not to the conſtruction of the words. A man cannot, by will, create a perpetuity; he cannot put the freehold in abeyance; he cannot limit a fee upon a fee; nor make a chattel deſcendible to heirs; nor prevent a tenant in tail from ſuffering a recovery. But the queſtion, whether the intention be conſiſtent with the rules of law or not, can never ariſe, till it is ſettled what the intention was. This can only be diſcovered, by taking the whole will together. If it be apparent, I know of no caſe that ſays, a ſtrict legal conſtruction, or a technical ſenſe of any words whatever, ſhall prevail againſt it; except that of *Perrin* and *Blake* (2). And I have no difficulty in ſaying, that I do not look upon that caſe as ſuch; nor, if ever a ſimilar caſe ſhould ariſe, ſhall I think myſelf bound by it,

(1) 1 *Ves.* 142. 2 *Atk.* 246, 570. 577. (2) Vide p. 103, *ſupra.*

but

but ſhall conſider the queſtion as if that caſe never had exiſted; for the moſt that can be ſaid of it is, that, as far as it reſpects any rule of law, there were the opinions of ſix judges againſt ſix (1).—If the intention does not plainly appear, I agree, that the legal ſenſe of the words muſt prevail, and, on that ground, I ſhould be ſtrongly inclined to ſay, in the preſent caſe, even if the deciſion in *Coulſon* v. *Coulſon* had never taken place, that *Catharine Jolland* took an eſtate tail; for the teſtatrix has uſed nothing but legal words. *The deviſe is to* A. *for life*, remainder to truſtees to ſupport contingent remainders, *remainder to the heirs of the body of* A. If there had been no deviſe to truſtees, the caſe would be ſo plain, that no man could doubt about it. What then is the nature of ſuch deviſe to ſupport contingent remainders? It is a legal and technical limitation, the peculiar language of conveyancers. The effect of this ſort of limitation, in a deed, is ſettled. There it is not ſufficient to turn words of deſcent into words of purchaſe. The teſtatrix has not ſhewn, by any other words, that ſhe meant to uſe the technical expreſſions in a different ſenſe from what the law has put upon them; and, therefore, the legal ſenſe muſt prevail. This diſtinction was expreſsly recognized by Lord *Northington*, in a caſe of *Auſtin* v. *Taylor* (2).—It ſeems to me to be falſe logic, to put a different ſenſe upon any words, from what, in general, they import to bear, by mere inference from the words themſelves, unexplained by any others; though, if other words manifeſt the intent, I know of no law that ſays, the intent ſhall not prevail. But whatever might have been my opinion on the ſubject, if neither *Duncombe* v. *Duncombe*, 3 *Lev.* 437. nor *Coulſon* v. *Coulſon*, had ever exiſted, yet, after thoſe deciſions, and the great length of time, during which they have been conſidered as law, I look upon them as landmarks, which ought never to be removed, nor ſhaken.—Per Curiam: "If *Elizabeth* would have taken an eſtate "tail, in caſe ſhe had ſurvived the teſtatrix, we think, by "her dying before the teſtatrix, it is a lapſed deviſe, and "*Catharine*, the daughter of *Elizabeth*, can take nothing. "As to the queſtion, Whether *Elizabeth* would have taken "an eſtate tail, whatever our opinions might be, if the caſe "were new, we think, as the caſe of *Coulſon* v. *Coulſon*, is "literally the ſame, the preciſe queſtion ought not to be again "litigated; and by that authority we are bound to ſay, in "the words of the certificate in that caſe, that, as it appears "that there is, after the determination of the eſtate for life

(1) Lord *Manſfield*, *Aſton*, J. and *Willes*, J. in B.R. and *De Grey*, Ch J. *Smythe*, Baron, and *Blackſtone*, J. againſt *Yates*, J. in B.R. and *Parker*, Ch. Baron, *Adams*, Baron, *Gould*, J *Perrot*, Baron, and *Nares*, J.

(2) He cited this caſe from a MS. note.

"to

" to *Elizabeth Belchier*, a deviſe to *William Arnold* and *Iſaac* " *Pennington*, and their heirs, for and during the life of " *Elizabeth Belchier*, we are of opinion, that *Elizabeth* " *Belchier*, if ſhe had ſurvived the teſtatrix, would have " taken an eſtate for life in the premiſes deviſed to her, not " merged by the deviſe to the heirs of her body, but by that " deviſe an eſtate tail in remainder would have veſted in the " ſaid *Elizabeth*. Conſequently *Catharine Belchier*, the " daughter of *Elizabeth*, took no eſtate under the will of " *Suſan Jolland*, but *Catharine Hodgſon*, late *Catharine Jol-* " *land*, took an eſtate for life, in all the deviſed premiſes, not " merged by the deviſe to the heirs of her body, but, by that " deviſe, an eſtate tail in remainder veſted in the ſaid *Ca-* " *tharine Jolland*."

Hamilton White v. Warner, leſſee of Richard White, B. R. Mic. Ter. 22 Geo. 3. in error from K. B. in Ireland, 1 *Doug.* 344. n. 4. 6 *Ter. Rep.* 518.

The teſtator, *Richard White*, by his will *(inter alia)*, deviſed as follows: " All the reſt and reſidue of his eſtate in Bantry, not ſettled on his eldeſt ſon *Simon*'s marriage, and not thereby deviſed to his ſon *Hamilton*, and all his right, title, and intereſt, in the manor, towns, and lands of Bantry, with all the appurtenances thereof, together with all remainders and reverſions of the ſettled lands, he gave *to his eldeſt ſon*, Simon White, *and the heirs of his body, lawfully begotten; and for default of iſſue* of his ſaid ſon, *Simon*, he deviſed his ſaid ENTIRE ESTATE AT BANTRY *to his ſon* Hamilton White, *and the heirs of his body, lawfully begotten, and for default of iſſue of Hamilton*, then he deviſed HIS ENTIRE ESTATE OF BANTRY *to his daughter*, M. Longfield, *for life*, and *after her deceaſe, to the heirs of her body, lawfully begotten*, remainder to his own right heirs." *Simon White*, the eldeſt ſon, died in the life-time of the deviſor, on the 2d of September, 1776, leaving iſſue, *Richard White* (the defendant in error), and three other ſons and one daughter; the deviſor, who knew of his death, afterwards died on the 27th of September, 1776, *Hamilton White*, his ſecond ſon, being then unmarried, and about thirty-five years of age.—Lord *Mansfield*, Ch. J. Our wiſh is to ſupport the plaintiff below, and I have endeavoured to diſtinguiſh this out of the reaſon and letter of the authorities. For no one can doubt that the intent of the deviſor is otherwiſe defeated. This will was intended as a continuation of a family ſettlement on the marriage of the deviſor's eldeſt ſon; and it is impoſſible to ſuppoſe he had an idea that the iſſue of his eldeſt ſon could be ſet aſide for his ſecond ſon. If this matter had been taken up as *res integra*, the intention of the deviſor might have had weight: but this is in a matter of real property, and the point is ſo well ſettled, and the letter and reaſon of the authorities are ſo clear, that it is impoſſible to ſhake them even if they were more erroneous than any one can ſuppoſe them to be. *The caſe of the deviſee's dying before the deviſor happens every day; and many titles depend*

*upon it.* It is proper, therefore, to ſee what is the eſtabliſhed law. Lands at common law were not deviſable; and though they were deviſable in ſome places by cuſtom, yet very little is to be found as to deviſes of land in the books before the ſtatute of wills. But in perſonal bequeſts it is ſettled, that if a man give to a legatee, as the will does not ſpeak till the teſtator's death, if the object of his bounty die in his life-time, the bequeſt is lapſed; for none can claim in his right who had nothing himſelf; and there muſt be a perſon in eſſe, in whom it may veſt. *Brett* v. *Rigden*, *Plowd.* 345. is the firſt caſe after the ſtatute of wills; that was a deviſe to *A.* and his heirs: the Court held this lapſed by the death of *A.* in the life-time of the deviſor, becauſe the heir was no object of the deviſor's bounty; and this was only a mode of giving a fee to the principal; the word *heir* only denoting the quantity of the eſtate. *Hartop*'s caſe, *Cro. Eliz.* 243. was the next; this was an eſtate tail, with remainders over; originally, perhaps, a diſtinction might have been made between that and the former caſe. In caſe of a deviſe in fee, the heir can be no object; but in the caſe of an eſtate tail, he claims *per formam doni*, and the iſſue is part of the object of the deviſor's bounty. But the authorities put them on the ſame footing; and the reaſon is material to attend to, becauſe every man claiming under a will muſt claim as a purchaſer; and unleſs he take it, his heir cannot. It is admitted that if this had been a deviſe to a ſtranger, this would have been the law. But a diſtinction is contended for, where the deviſe is to the heir at law in tail, with a remainder over, and a deviſe to a ſtranger; and that there is no caſe where the deviſe has been to the heir at law. I doubt this, for *Hutton* v. *Simpſon*, 2 *Vern.* 722. ſeems the caſe of an heir at law: and there is no diſtinction between an heir and co-heirs: both being diſinherited. In *Packman* v. *Cole*, 2 *Sid.* 53, 78. and in *Ambroſe* v. *Hodgſon*, p. 237, *ſupra*, there was an heir. But if this diſtinction were admitted, how is the heir to take? If the implication be this, that ſo long as *A.* has iſſue, *B.* ſhall not take; this holds in the caſe of a ſtranger: and there is an end of the heirſhip if he take by the will. So if it be this, that nothing ſhall go to the ſecond deviſee until failure of iſſue of *A.* but that the eſtate ſhall deſcend to the heir at law, *quouſque*, this will hold equally if the deviſee be a ſtranger. The laſt ground, and perhaps the beſt, is, that the event overturns the whole will, and that the heir ſhall take, not being diſinherited by expreſs words. But this is begging the queſtion, for he is diſinherited by the expreſs words of the will; by giving *Simon* only a qualified eſtate, it is ſaying, he ſhall take nothing by deſcent. It is therefore impoſſible to get over the letter or reaſon of the authorities, or to make any diſtinction in favour of the heir. The dictum of *Popham*, in *Fuller* v. *Fuller*, *Cro. Eliz.* 423. is extrajudicial; and

and he puts it in a way not ſupported by the counſel here, for he would have none of the ſons diſinherited. And there is another ſaying of his there, which is palpably wrong, as to a deviſe to a dead man and his heirs, that the land ſhall go to his heirs. Upon every ground, therefore, the judgment muſt be reverſed.—WILLES, J. and ASHHURST, J. of the ſame opinion.—BULLER, J. The event in this caſe was not provided for. In *Goodright* v. *Wright*, it was fully ſettled that the words "*heirs*," &c. are a deſcription of the eſtate of the firſt taker. I am inclined to think *Hartop*'s caſe that of an heir at law; he was a brother, nor do I think the *melius inquirendum* was on the ground ſuggeſted; for if there were any diſtinction between the heir and a ſtranger, the Court could not have given the judgment they did, without firſt knowing whether he was actually heir. As to *Popham*'s opinion, it was not intended to be confirmed by Lord *Macclesfield*, in *Goodright* v. *Wright*; 1 *Stra.* 25. 1 *Pr. Wms.* 307.; for he ſays it is miſtaken in expreſs words; and it was only mentioned to ſhew, that allowing that dictum, it did not apply to the caſe then before the Court: beſides, ſo material a diſtinction is not even noticed in *Pr. Williams*. There does not appear on the face of the will, an intent not to diſinherit the heir at law; for by the will the remainder-man is preferred to the iſſue of the firſt taker. As to implication, it is a difficult thing to imply a deviſe, where there is an expreſs one to the contrary, and the thing not within the contemplation of the deviſor. Nor is the will to be altered by the event. But the rule of law is, that if any part of a will can take effect, it ſhall; here the remainder may: but according to the conſtruction put on the caſe for the defendant, no part can. I doubt whether the caſe put at the bar is correct; for a deviſe on failure of iſſue, and *not till then*, would ſtill be a remainder, and take effect immediately if the prior deviſe were removed. Judgment of K.B. in Ireland reverſed (1).—Poſtea to the defendant.

A deviſe to *Margaret* (an only child) for life, remainder to the firſt ſon of her body, "if living at the time of her death," and the heirs male of ſuch ſon, and for default of ſuch iſſue to the ſecond ſon of her body, "if living at the time of her death," and the heirs male of ſuch ſecond ſon, &c. and for default of ſuch iſſue male, remainder to *A.*; *Margaret* had one ſon, who died in her life-time, leaving a ſon; held that *Margaret* only took an eſtate for life, and that neither her ſon or grandſon took any eſtate, but that the remainder to *A.* took effect.—The teſtator, *Adam Bagſhaw*, being ſeiſed in fee of the premiſes in queſtion, after deviſing an ample eſtate

Denn, *ex dim.* Radclyffe v. Bagſhaw, *et al.* Hil. Ter. 30 Geo. 3. B R. 6 *Ter. Rep.* 512.

(1) The judgment of this Court was afterwards affirmed in *Dom. Proc.* May 6th, 1782.

to his nephew, deviſed unto his daughter, *Margaret Bagſhaw*, as follows: "All his eſtate, lands, tenements, and premiſes, "called Black Edge, in the pariſh of Hope, in the county of "Derby (being the premiſes in queſtion), for and during "the term *of her natural life*, and from and immediately "*after her deceaſe to the firſt ſon* of her body, IF LIVING "AT THE TIME OF HER DEATH," and the heirs male of ſuch firſt ſon; *and for default of ſuch iſſue to the ſecond ſon* of her body, IF LIVING AT THE TIME OF HER DECEASE, and the heirs male of ſuch ſecond ſon; and ſo to the third, fourth, &c. and every other ſon and ſons of the body of the ſaid *Margaret*, and their heirs male, as they ſhould ſeverally and reſpectively follow in ſeniority of age, and priority of birth: AND FOR DEFAULT OF SUCH ISSUE MALE, *to his ſaid nephew*, Richard Bagſhaw, *and the heirs male of his body*; and for default of ſuch iſſue, to his ſaid nephew, *William*, and the heirs male of his body; and for default of ſuch iſſue, to his ſaid nephew, *John*, and the heirs male of his body; and for default of ſuch iſſue, to his own right heirs. *Margaret Bagſhaw* (the only daughter and heir at law of the teſtator) entered on the premiſes in queſtion, and afterwards married *Robert Radclyffe*. *They had iſſue, one ſon*, the father of the leſſor of the plaintiff, *which ſon died in the life-time of the ſaid* Margaret, in 1783; *Robert Radclyffe*, the grandfather, having died in 1749. *Richard* and *William Bagſhaw*, two of the deviſor's nephews mentioned in the will, both died without iſſue, in the life-time of *Margaret*; and ſhe alſo died in November, 1786. At the time of her death, the leſſor of the plaintiff was an infant; *and* John Bagſhaw, *the other nephew of the deviſor*, entered and poſſeſſed himſelf of the premiſes in queſtion: and in Hilary term, 1787, he ſuffered a recovery thereof, and died in 1792; and under him the preſent defendants claim. The leſſor of the plaintiff was the heir at law of *Margaret Radclyffe*, and of the deviſor, and came of age in December, 1794.—THE QUESTION was, What eſtate the deviſor's daughter, *Margaret*, or her ſon, took on the one part, and the deviſor's nephews on the other? And for the plaintiff it was contended, that it clearly appeared from the deviſor's ſituation with reſpect to his family, and from the whole of his will, that his general intent was, that the limitation over to his nephews ſhould never take effect until all the male deſcendants of his daughter were extinct. And it was argued, that that intention might be effected either, 1ſt, By converting the life eſtate of the daughter into an eſtate tail; or 2dly, By conſtruing the limitation to the firſt ſon of *Margaret* to be an eſtate tail, veſting when he came *in eſſe*, and liable to be deveſted by his dying in the life-time of *Margaret*, without leaving iſſue male.—On the behalf of the defendant, it was contended, that *Margaret* took only an

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eſtate for life, and that the remainder to her ſon was upon a contingency which never happened, namely, his ſurviving his mother.—Lord KENYON, Ch. J. This ſeems to me to be one of thoſe caſes in which I find my wiſhes in oppoſition to what I am bound judicially to decide. If I could make, inſtead of conſtruing this will, I ſhould ſay that the nephews of the deviſor are ſo amply provided for in the former part of this will, that they ought not to inſiſt on diſinheriting the heir at law, which they will do by enforcing this will: but I am not at liberty to indulge my wiſhes upon the ſubject. We muſt conſider this caſe in the ſame light, as if the ſon of *Margaret* had attained the age of twenty-one in his mother's life-time, and had joined with his mother in ſuffering a recovery; the defendant's counſel has ſhewn the inconvenience of determining that the conſtruction contended for by the plaintiff ought to prevail, for then the intention of the deviſor would have been wholly defeated. Here correct and technical expreſſions are uſed, and no lawyer could have introduced more formal words in the limitations in this will, than the deviſor has uſed. In addition, the caſe of *Fuller* v. *Fuller*, *Cro. Eliz.* 423. is very ſtrong, where *Popham*, J. ſaid, if an eſtate be given to *A.* and the heirs of his body, and *A.* die in the life-time of the deviſor, the heir ſhould take as a purchaſer. But that point was well conſidered in the laſt caſe that came by writ of error from Ireland, *White* d. *White* v. *Warner*, *Dougl.* 344 [*n.* 4.] *ante*, p. 241. when all the judges were of opinion, that it was impoſſible to ſupport ſuch a poſition; that where the deviſor intended that one ſhould take under the will by purchaſe, and another by deſcent from him the order could not be reverſed, and that if the former died in the life-time of the deviſor, the latter could not take as a purchaſer; and in that caſe, the remainder over took effect to the excluſion of the iſſue of the firſt deviſee. So in the caſe of *Hodgſon* v. *Ambroſe*, *Dougl.* 340. (*ante*, 237), where Lord *Manſfield* ſaid, "The words, *and for want of ſuch iſſue*, mean the ſame thing as, *and after ſuch eſtate tail*; and this is the common caſe of a remainder after an eſtate tail, where, if the firſt eſtate never take place, the remainder veſts in poſſeſſion immediately." If by accident the perſon, who was to take as tenant in tail under a will, die in the life-time of the deviſor, the remainder over takes place immediately. Therefore, in oppoſition to our wiſhes, but in conformity with all the caſes upon the ſubject, we are of opinion, that the leſſor of the plaintiff is not entitled to recover.

The teſtatrix, *Mary Wilkinſon*, had under a ſettlement an eſtate for life, with a power to diſpoſe of 1000l. if *John Wall*, or any iſſue of his, ſhould be living at her death, out of a term of 500 years, veſted in *Langford* and *Daintree*, with remainder to *John Wall* for life, and then to his child-

Doe *ex dim.* Veſſey, *v.* Wilkinſon, *et al.* Hil. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 209

ren in tail, with remainder to herself in fee. Having this intereſt, ſhe, by her will, recited the ſettlement, and by virtue of the power gives the 1000l. in caſe *John Wall* or any iſſue of his ſhould be living at her death, to her ſon-in-law, *Allwood Wilkinſon*, ſubject to ſmall annuities and charges. Then there is this clauſe in the will: "And in "caſe neither the ſaid *John Wall*, nor any iſſue of his, "ſhall be living at the time of my deceaſe, by which event "the premiſes will devolve upon me and my heirs, then I "give the ſame to *Langford* and *Daintree*, for 500 years, "to raiſe the ſaid ſum of 1000l. and the further ſum of "1000l. to be divided amongſt different relations. And "from and after the expiration, or other ſooner determina-"tion of the ſaid term, and ſubject thereto, *I give the pre-"miſes to my mother, for life, remainder to my daughter, in "fee*: but if my daughter ſhall die before 21, and without "iſſue, then *I deviſe the ſame to my ſon-in-law* A. Wilkin-"ſon, *in fee*, he paying, within ſix months after he ſhall "come into and be in poſſeſſion thereof, ſeveral legacies." The reſt of her eſtate, both real and perſonal, ſhe gives to her daughter, her heirs, executors, &c. *John Wall* ſurvived the teſtatrix, but is ſince dead without iſſue; and the daughter of the teſtatrix died an infant, and without iſſue.—The queſtion was, Whether, by the event of *John Wall's* ſurviving the teſtatrix, the whole will become void, as to the remainder in fee? Or, Whether *A. Wilkinſon* is now entitled to it?—Three points were contended for on the part of the plaintiff. 1ſt, That the teſtatrix thought ſhe had no power of diſpoſing of the fee, unleſs *John Wall* died without iſſue in her life-time. 2dly, That if ſhe did know ſhe had a power of diſpoſing of the fee, ſhe never intended to give it, unleſs it fell into poſſeſſion during her life. 3dly, That by conſtruction, the contingency of *John Wall's* dying without iſſue in her life-time, which is expreſsly annexed to the term, muſt neceſſarily be extended to the fee, and therefore the deviſe is void.—THERE BEING A DIFFERENCE OF OPINION ON THE BENCH IN THIS CASE,—GROSE, J. began. The queſtion is, Whether the eſtate, for which this ejectment is brought, paſſed as deviſed under the will of the teſtatrix, to the defendant, *Iſaac Wilkinſon*, in right of *Allwood Wilkinſon, or to the plaintiff, as heir at law of the teſtatrix, or of her daughter*. To defeat the heir, it muſt appear to be the clear intention of the teſtatrix, collected from the will, either by expreſs words, or neceſſary implication, that the deviſee ſhould take. Does it then appear, under the circumſtances that have happened, to be the clear intention of the teſtatrix, that this eſtate ſhould paſs to *A. Wilkinſon*? She had an eſtate for life, with a remainder in truſtees for 500 years, to enable them, in caſe *John Wall*,

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or any of his iſſue, ſhould be living at her death, to raiſe 1000l. and pay the ſame at the end of ſix months after her death, to ſuch perſons as ſhe, by deed or will, ſhould appoint. Then ſhe had a further remainder in fee, expectant upon the determination of an eſtate for life, in *John Wall*, and of an eſtate tail in his ſons and daughters. Her relations were her mother, daughter, ſon-in-law, *A. Wilkinſon*, the perſon under whom the defendant claims, her aunt, *Ann Veſſey*, her couſin, *Martha Veſſey*, her brother-in-law, *Richard Wilkinſon*, the truſtees, *John Veſſey*, grandſon of *Ann Veſſey*, the children of *Sarah Radford*, daughter of her aunt, *Ann Veſſey*, and three other daughters of *Ann Veſſey*. With this intereſt, and theſe relations, ſhe made her will; in which ſhe recites truly the power veſted in her of raiſing 1000l. and, under that power, in caſe *J. Wall*, or any iſſue of his body, ſhould be living at the time of her deceaſe, deviſed to truſtees this 1000l. for the benefit of *Ann Veſſey*, *Martha Veſſey*, her truſtees, and her brother-in-law, in the manner deſcribed in her will. Then having diſpoſed of this term in caſe it ſhould exiſt, ſhe proceeded to diſpoſe of the fee ſimple of the eſtate, in caſe that ſhould devolve upon her. Now let us look more accurately into her intereſt in this eſtate, and ſee what the intereſt veſted in her was. *There was veſted in her a remainder in fee expectant on the determination of an eſtate for life in* John Wall, *and of an eſtate tail in his ſons and daughters.* This remainder might be veſted in poſſeſſion at the time of her death, or it might veſt after her death, in her heir, or deviſee, at ſome remote period of time. *It was in her power to deviſe the eſtate whenever it ſhould veſt, or to diſpoſe of it only in caſe it ſhould be veſted in her at the time of her death; in which latter caſe the eſtate, if it did not veſt before her death, would be undeviſed, and go to her heir at law.* Did ſhe then mean to diſpoſe of it in the latter caſe only, namely, if it ſhould veſt in poſſeſſion before her death? Or did ſhe mean to diſpoſe of it to her deviſees, let it vest when it might, at any remote period of time, whenever that might be, that is, when the eſtate for life and the eſtate tail ſhould be ſpent? Here I read again the words of the deviſe, which are very material: "And in caſe neither the ſaid *J. Wall*, nor any iſſue of his body, ſhould happen to be living at the time of my deceaſe, by which event the ſaid manor, &c. will devolve upon me and my heirs, then I give, &c. unto the ſaid truſtees, to raiſe the ſaid ſum of 1000l. immediately after my deceaſe, &c. and in further truſt, to raiſe 1000l. within ſix months next "after my deceaſe," &c. Then ſhe deviſed to her mother, for life, to her daughter in fee, but if ſhe died before twenty-one, without iſſue, then to *A. Wilkinſon*, in fee. Theſe being the words of the deviſe, let us conſider whe-

ther they are applicable to, or denote, a diſpoſition of an intereſt or remainder that ſhould veſt at any remote period of time, or that ſhould be veſted in poſſeſſion before her, the teſtatrix's, death. The will poſitively ſays in direct words, "in caſe neither the ſaid *J. Wall* nor any iſſue of his body "ſhould happen to be living at the time of my deceaſe, then "I give," &c. Now here the contingency is directly and clearly without any ambiguity expreſſed. *The contingency on which they were to take was, that of neither* J. Wall *nor any of his iſſue being* alive at her deceaſe; *not on his dying without iſſue at any remote period of time.* This is expreſs and direct: and as the words are clear, plain, and admit of no ambiguity, before I can conſent that the operation of them ſhall be controlled, I muſt be convinced that her intention was different, and that ſhe did not mean what ſhe has expreſsly ſaid. It ſeems to me, that the intention to be collected from theſe words is confirmed by what follows: the firſt truſt on this contingency was, that the truſtees ſhould immediately after her deceaſe raiſe the ſaid ſum of 1000l. by a term ſubſtituted for and in lieu of the former term; and the money was applicable to the ſame purpoſes. It is called the ſaid ſum of 1000l. which proves that this was in lieu of the other ſum; and it was to be raiſed immediately; how could it be raiſed immediately, unleſs the contingency was that of *J. Wall* and his iſſue ceaſing before her death? And the 1000l. with lawful intereſt from her death, is to be paid within ſix months after her deceaſe. This clearly was upon the idea of the intereſt being veſted in poſſeſſion before her death. Then the next proviſion is, that the truſtees levy a further ſum of 1000l. When is this 1000l. to be raiſed? Not at any future time whenever the remainder may happen to veſt in poſſeſſion, but within ſix months after her deceaſe; 200l. of which is payable to the children of *S. Bradford*, who ſhall be then living, namely, within ſix months after her deceaſe. It is impoſſible to conceive that ſhe meant to give the children of *S. Bradford* this 200l. when the eſtate tail ſhould at ſome future time be ſpent; if this had been her idea, ſhe would have expreſſed it in very different language, and given it to them if living, or their repreſentatives if dead, when the eſtate ſhould veſt; but, on the contrary, ſhe conſidered it as a ſum which would at a certain time after her death become payable. The ſame obſervation is alſo applicable to the legacies given to the daughters of *Ann Veſſey*. The next obſervation that ariſes is upon the deviſe of the fee ſubject to the term. Firſt, the eſtate is given to her mother, who probably at that time was an old woman, for life: it is true it might be ſo deviſed, and well deviſed; but in the way in which it is deviſed, it is much more probable that the teſta-

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trix conſidered herſelf as giving an eſtate which would be veſted before her death, than an eſtate which under circumſtances might never veſt at all. She then gave the fee to her daughter, and in caſe ſhe ſhould die before twenty-one, to *A. Wilkinſon*, his heirs and aſſigns, he or they paying 100l. to each of the truſtees, and eight others, within ſix months after *A. Wilkinſon*, or his heirs or aſſigns, ſhould come into poſſeſſion. The obſervation here is as before, that ſhe did not give it to them or their repreſentatives, but ſpeaks of them as perſons who, if living, were certainly to take within ſix months after the death of the mother, and the daughter under twenty-one. Theſe are the obſervations upon the diſpoſitions in the will, which ſatisfy me that *the teſtatrix's real intention was, what ſhe has declared in words: that the contingency on which the mother, daughter, and* A. Wilkinſon, *were to take, was, in caſe neither* J. Wall *nor any of his iſſue ſhould be living at the time of her death; and that it was not in her contemplation to diſpoſe of it in caſe* J. Wall *and his iſſue ſhould die at any future period of time after her death, namely, when the eſtate tail in the children of* J. Wall *ſhould be ſpent*, and therefore I am of opinion that the eſtate in queſtion deſcends to the leſſor of the plaintiff, and that he is entitled to judgment.—BULLER, J. differed in opinion, and aſſigned his reaſons at large. But ASHHURST, J. agreed with GROSE, J. that there ſhould be judgment for the plaintiff.—The plaintiff claims as heir at law, which title muſt prevail, unleſs it is defeated by any diſpoſition made by the will of *Mary Wilkinſon*; and that will depend on the conſtruction of her will. In the conſtruction of wills, the Court has only a right to determine what the teſtator meant to do, and has actually done, upon the circumſtances in his contemplation at the time of making the will; and has no right to conſider what the teſtator might probably have done, had certain circumſtances been propounded to him, which he did not think of at the time of making the will. For this would not be putting a conſtruction upon the will made, but making a will for him. *Courts of law have always ſo far favoured the title of the heir at law, as to lay it down as a rule, that he ſhall not be diſinherited but by a plain intention, and not by probable intention.* Were we at liberty to enter into probable intention, it certainly is very likely that had the teſtatrix been reminded that there were other contingencies, upon which her power of diſpoſing might ariſe, as well as on the contingency of her brother *John* being dead, without iſſue, before her death, and had been aſked how ſhe would diſpoſe of it in that event, it is very probable ſhe might have made a diſpoſition in ſubſtance, nearly the ſame as ſhe has done upon the only contingency ſhe had in view at the time of making her will. This, on the firſt argument, ſtruck us ſo forcibly, that we were much

much disposed to have determined the case in favour of the defendant's claim: but I am very glad it has been argued a second time, as, upon more mature consideration, I am satisfied that this would have been an exposition of the will for her upon the contemplation of circumstances, which did not occur to the testatrix herself when she made her will. But suppose the Court were disposed to go this length, could we at any rate give a full effect to the testatrix's intention in every particular? Now this, I apprehend, we clearly could not do. For it was as much her intention to give the second 1000*l.* to the persons named in the will as the objects of her bounty, whenever she disposed of the estate, as to give the estate itself. The first 1000*l.* which she had the power of disposing of under the settlement, she has disposed of, and the term came *in esse* immediately on her death, and *Allwood Wilkinson* became entitled to the money within six months after her death. The second term, under which alone the second 1000*l.* could be raised, is expressly limited on this condition, "*and in case* J. Wall, *or any of his issue, are not living at my death, then I give and devise,*" &c. Now that being the express condition on which the second term was to have arisen, and that contingency having not happened, the term can never arise. The consequence of which would be, that some persons who were the objects of her bounty would be totally deprived of the benefit intended, and those who took the estate would have a greater benefit than was intended them; for they would take the estate discharged of this 1000*l.* So that even if we were to put the construction upon the will contended for by the defendant's counsel, we could not effectuate the intention of the testatrix. The truth is, the testatrix either did not know or advert to the circumstance of the estate coming to her disposal by any other event, than *John Wall*'s dying without issue in her life-time. This is plain by the limitation of the term, and the circumstance of the second 1000*l.* being made payable within six months after her death. It was competent to her, to have disposed of the estate in another event which has since happened; but she has not done it; though she probably would have done it, had she thought of it. *This is the chance which the law gives to the heir at law. He has a right to take advantage of the slips and omissions in a will, and we cannot take it from him.* I agree with my brother *Grose*, that there must be judgment for the plaintiff.—Per Curiam, postea to the plaintiff.

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*Oates ex dim. Wigfall v. Brydon et al.* Ea. Ter. 6 Geo. 3. B R. 3 *Burr.* 1895.

The testatrix, by virtue of a power in her marriage settlement, made a will, wherein, after divers pecuniary legacies, &c. (some of which legacies are to the three children of

of *Thomas Brownhill*; and others, to the four children of *Samuel Water*;) devised as follows: "I give to *Samuel* "*Wigfall*, my dear and loving husband, the house where "we now dwell, together with the stable, and all other ap- "purtenances thereunto belonging, for and during the term "of his *natural life*; and, after his decease, I give the said "house and stable, with all appurtenances, *unto the said* "*Samuel Warbleton*, my brother, *if* then alive, for and "during the term of his natural life; and, after his decease, "*I give the said house and stable, with the appurtenances, unto* "*the said children of my cousins*, Thomas Brownhill *and* "Samuel Water, *or such of them as shall be then living, share* "*and share alike*. And *if* it happen, that the said *Samuel* "*Warbleton* be *not* living at the decease of the said *Samuel* "*Wigfall*, then my mind and will is, that the said house and "stable, with the appurtenances, be DIVIDED AMONGST "*the said children* of my cousins, *Thomas Brownhill* and "*Samuel Water, as aforesaid*. And also all the *rest* of my "estate, which is *not herein or hereby before by me given or* "*disposed of*, I do give unto the said *Samuel Wigfall*, my "husband." THE QUESTION was, Whether this house and stables were given to the seven children only during their lives, or as tenants in common? PER CURIAM: There must be something, by way of limitation, to shew the intention of the testatrix, otherwise 'tis for life only: but few ordinary people make the distinction between land and personal property. Here the testatrix directs the house and stable to be divided amongst the seven children, in case her brother dies before her husband; that is, they must be sold, and the produce divided. We are, therefore, of opinion, that upon the whole of this will there is enough to shew, that the testatrix intended the value of this house and stable to be divided amongst the seven children.

## Dilapidations.

AN action for dilapidations of a prebendal house may be maintained by a succeeding prebendary against his predecessor.—This was an action on the case for dilapidations, when a verdict was found for the plaintiff, subject to the opinion of the Court. The defendant held one of the prebends of the cathedral church of Ely for fifteen years, and was, during that time, seised of the prebendal-house thereunto belonging, with the appurtenances. On the 27th of February, 1787, the defendant resigned the said prebend, and was succeeded therein by the plaintiff. At the time of the said resignation, the said prebendal-house, with the appurtenances,

Radcliffe *v.* D'Oyly, Tr. Ter. 28 Geo. 3. B R. 2 *Ter. Rep.* 630.

tenances, was out of repair, and the ſum neceſſary to put the ſame into tenantable repair was 167l. of which ſum the materials would coſt 116l. and the workmanſhip 51l. King *Charles* the Second, by letters patent of the eighteenth year of his reign, and in the year 1666, gave to the chapter of Ely a body of ſtatutes, the ſixteenth chapter of which provides, that the receiver ſhall examine the houſes of the dean and prebendaries, and ſee what repairs are wanting; and, if they do not repair when called upon, the receiver is to order the repairs, and to deduct the expence of it out of their ſtipends; and then the ſtatute provides, *that the materials ſhall be found by the church*, ſuch as ſhall be thought neceſſary in the judgment of the dean.—The prebendal houſes have been uſually repaired in the manner pointed out by this chapter. No application has been made to the dean, or treaſurer, for any materials, or allowance, in reſpect to the repairs in queſtion, by either the plaintiff, or the defendant; nor have any materials been provided, or allowance made towards the ſame. THE QUESTION for the opinion of the Court was, Whether the plaintiff was entitled to recover, and how much? FOR THE PLAINTIFF it was contended, firſt, that a prebendary as ſuch is liable, by the general law, to the ſame ſuits for dilapidations, as any other eccleſiaſtical perſon; and, ſecondly, that the ſtatutes by which the church of Ely is regulated make no alteration in the common law right. FOR THE DEFENDANT it was inſiſted, *firſt*, that this action does not lie againſt the defendant, as a prebendary of the church of Ely, becauſe no caſe can be found, in which an action by a prebendary againſt his predeceſſor, for dilapidations, has been entertained in a court of law; *ſecondly*, but if it do, the plaintiff can only recover damages in this caſe, to the amount of the workmanſhip. PER CURIAM: With reſpect to the law of this queſtion, namely, whether an action on the caſe will lie againſt a prebendary for dilapidations, there can be no doubt about it. The form of declarations in theſe kind of actions is very material, in a caſe where no direct determinations can be found one way or the other, for the form of legal proceedings is evidence of what the law is. And we find the form, for a century paſt, to be in this caſe, that all *prebendaries*, rectors, vicars, &c. are bound, by law, to keep their houſes in repair; and, indeed, it is an obligation on them, both in point of morality and of policy, that their ſucceſſors ſhould not ſuffer by the neglect of their predeceſſors; and, therefore, the late incumbent, or his executors, muſt make good to the ſucceſſor any damage which he may thus ſuſtain. It is certainly true, as the defendant's counſel has ſtated, that in times paſt a conſiderable doubt had been entertained, whether this ſort of action could be maintained at all againſt eccleſiaſtical perſons. But the action is now grown into common uſe; and, ſince the time

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of *Levinz* (*Jones* v. *Hill.* 3 *Lev.* 268.) it has not been doubted, but that the action lay againſt prebendaries, as well as againſt any other eccleſiaſtics. And there is no diſtinction whether the action be brought againſt the executor of the former incumbent, or againſt the former incumbent himſelf, who has other preferment: and, therefore, they ſhould have required the defendant to repair during his incumbency. But the plaintiff may now call upon the dean and the receiver to ſupply the materials, for no time is limited, within which the application is to be made; the words of the ſtatute are general; neither is there any diſtinction taken between the caſes of a vacancy and incumbency: as, therefore, the church has been guilty of a neglect, it is not reaſonable that they ſhould be excuſed from furniſhing the materials out of the fund appropriated for the purpoſe. And it will be no anſwer for them to ſay, that the plaintiff is entitled to recover for dilapidations, either in the ſpiritual or common law courts; for it muſt be conſidered againſt whom he is entitled to recover; and if the dean and chapter furniſh the materials neceſſary for the repairs, he will have no right to call on the predeceſſor for the amount of thoſe materials.—Verdict for the plaintiff for 5l.

## Diſpenſation.

The King *v.* The Biſhop of Litchfield and Coventry and Clive, Cl. Hil. Ter. 15 Geo. 3. C.B. 2 *Black.* 969.

On a diſpenſation to hold two eccleſiaſtical benefices, the diſtance, by the temporal law, is immaterial.—In *quare impedit*, the queſtion on the iſſue joined was, Whether the two benefices were more than thirty miles apart, and thereby the diſpenſation wholly void? On the trial it was proved, by an actual meaſurement, that the diſtance, from church to church, was forty-eight miles, and upwards; and from pariſh to pariſh, forty-three miles. But that, by computation in the country, the two livings were but twenty-nine miles diſtant, and this was the uſual method of computing diſtances upon ſuch diſpenſations. Of which opinion was Baron *Burland*, who tried the cauſe, and a ſpecial jury, who found a verdict for the defendant. On a motion for a new trial, the cauſe ſhewn againſt making the rule abſolute was, that the diſtance of the pariſhes is a matter merely regulated by the canons of the church (1), which may be directory in

(1) The allowable diſtance, by the canons of 1571, was twenty ſix miles; by thoſe of 1584, 1587, 1603, thirty miles, *Gibſ. Cod.* 911. Yet, in 29 *Eliz.* (A D. 1587) a diſpenſation was granted to hold the rectory of Horton, co. Lincoln, with that of Staines, Middleſex; and upon ejectment for the glebe, in order to try the validity of the diſpenſation, no objection was made to the diſtance between the two benefices; but the operation of diſpenſation was held to be vain and ineffectual, as coming too late, viz. after inſtitution to the ſecond living.—*Digby's* caſe, 4 Co. 78.

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ſuch caſes to the archbiſhop; but it is taken no notice of in the ſtatute of diſpenſations, nor ever called into queſtion in the king's temporal courts; and that the iſſue was, therefore, immaterial. AND THE COURT being clearly of opinion, that, by the temporal law, the diſtance of the churches was immaterial, diſcharged the rule.

## Diſſenters.

Rex v. Wroughton, eſq. *et al.* Ea. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1683.

ON ſhewing cauſe againſt an *information for a miſdemeanour*, in *obſtructing divine ſervice* in the pariſh-church of Pewſey, and groſsly inſulting the rector, Mr. *Townſhend*. It appeared that Mr. *Townſhend* was a well-wiſher to the *methodiſts*; that he had admitted one of them into his pulpit; and Mr. *Wroughton*, a juſtice of peace reſiding in his pariſh, diſapproved of it, and ſtrenuouſly oppoſed it.—Lord MANSFIELD declared that he always underſtood, "that a preacher muſt have a *licenſe* from "the biſhop of the DIOCESE *wherein* he ſo preached;" and "that a licenſe from the biſhop of a *particular* "dioceſe would not give the perſon authority to preach "in *every* dioceſe, nor in any *other* dioceſe." Indeed, this is very ſeldom diſputed; but if it be diſputed, he took it to be *in ſtrictneſs* ſo, by the canons.—In the preſent caſe, he thought the Court ſhould not interpoſe, upon the application of Mr. *Townſhend* (the rector), becauſe he had *ſuppreſſed* truth, and thereby *miſrepreſented* the caſe; and alſo for another reaſon, viz. that Mr. *Townſhend* was going out of the way of the general and uſual courſe of celebrating divine ſervice in the eſtabliſhed church. Again, there was an *inhibition*, which had been obtained againſt Mr. *Townſhend*, from the biſhop of the dioceſe, who had commiſſioned Mr. *Wroughton* to ſee it complied with. Further, Mr. *Townſhend* himſelf behaved improperly, by particularly marking Mr. *Wroughton*, and preaching perſonally at him in his ſermon. And it ſeemed to him, that the *blow* complained of was not a blow ſtruck Mr. *Townſhend* by Mr. *Wroughton* (as is charged upon him), but an *accidental* bruſhing him with his finger. Therefore, there is no reaſon for the Court to interpoſe in an *extraordinary* way in this caſe, as it is circumſtanced.—Otherwiſe, I would have it underſtood, in general, that *methodiſts* have a right to the *protection of this court*, if interrupted in their decent and quiet devotion; and ſo have *diſſenters* from the eſtabliſhed church likewiſe, if ſo diſturbed. Mr. Juſtice WILMOT agreed, and added, that he took the law about *licenſes* to be as Lord *Mansfield* had ſtated it; it muſt be a licenſe from the biſhop of the *dioceſe* (though, in *practice*, it is not ſo uſed). *Strictly*, the biſhop of the dioceſe is

is to licenſe all who preach *in it*.—And YATES, J. added—"with *coſts*," becauſe he had *ſuppreſſed the truth*.—ASTON, J. concurred.—Rule diſcharged, *with coſts*.

## Diſtreſs.

### *What Goods may be Diſtrained.*

IN an action in *replevin*, upon a *diſtreſs for rent*, the queſtion was, "Whether a gentleman's *chariot*, which ſtood "in a coach-houſe belonging to a *common* LIVERY-STABLE "*keeper*, was DISTRAINABLE *for rent due to the landlord* "*from the* LIVERY-STABLE *keeper*, for this coach-houſe, "which (together with the ſtables, &c.) he rented of the "landlord who diſtrained it?" It was argued, that no protection could be claimed for this carriage; 1ſt, Unleſs theſe coach-houſes were conſidered in the nature of common inns; or, 2dly, Unleſs it is for the public convenience, and neceſſary advancement of trade, to protect it in a livery yard.—1ſt, That they are not in the nature of a common inn, though called, in the pleadings, common and public coach-houſes, ſince the maſter of them is not bound to take in horſes and carriages, any more than the maſter of a public boarding-ſchool is bound to receive all boarders, or a common brewer, to ſerve all cuſtomers. That the right of putting up horſes and carriages in the one, ariſes from private contract; in the other, from authority of law: which is the ground of the protection extended to theſe houſes, by law. *Bro. Diſtreſs*, 57. 1 *Roll. Abr.* 668. *pl.* 12. *Co. Litt.* 47; for it would be abſurd to give me a right to put my horſes, &c. into the ſtables, and, at the ſame time, give the leſſor of the houſe a power to take them out. This diſtinction, between the private contract of the parties and the general authority of law, is warranted by the caſe of the Hoſteler, *Yelv.* 66. 2dly, Where goods, &c. are privileged, from neceſſity or public convenience, it is where it would be quite impracticable, or highly incommodious, to diſpoſe of or manufacture the goods at home; ſo corn, ſent to a mill or a market, cloth to a taylor's, ſtuff to a dyer's, &c. are protected from any diſtreſs; and had the plaintiff's carriage been ſent to a coachmaker's to be repaired, it might, for the time, have been privileged; but no neceſſity here: by hiring the coach-houſe (whether by the week, the quarter, or the year) he becomes an undertenant, and muſt be liable to the landlord's diſtreſs, as much as a man who hires an unfurniſhed room in a lodging-houſe, elſe the landlord might be defeated of that ſummary

Francis v. Wyatt, Tr. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1498. 1 *Black. Rep.* 483.

ſummary remedy which the law allows him, by the private contract of his tenant with a ſtranger. ON THE OTHER HAND it was urged, that many things are privileged from diſtreſs, on the ſcore of public convenience: that this was a public livery-ſtable, which was of great utility to the public; and, if horſes and carriages are not privileged therein, it will put an end to that branch of commerce. And for this were cited the caſes of goods reſorting to a fair, or market; the horſe bringing them; garments at a taylor's; wool, ſent to be ſpun; goods ſent by a carrier, or left at a common wharf; all which are privileged from diſtreſs; 7 *H.* 7. 2. *Noy.* 19. *Fitz. Abr.* Diſtreſs. *Co. Litt.* 47. *Cro. Eliz.* 546, 549. *Salk.* 249.—Lord MANSFIELD, and the judges *Wilmot* and *Yates* ſaw this queſtion in ſuch a light, with regard to the conſequences of it, and the inconvenience that might attend it, *even to the landlords, owners, and keepers* of theſe livery-ſtables *themſelves*, as well as to gentlemen who uſed them (in caſe this diſtreſs ſhould be *ſolemnly adjudged* a good one), that they intimated to the landlord (the avowant), who happened to be perſonally preſent, attending the event of this cauſe, that it might be well worth his while to conſider, whether it would be for his own intereſt to wiſh, "that "judgment ſhould be *formally* pronounced for him." Afterwards, in Eaſter term, 1765, 5 *Geo.* 3, the defendant moved for judgment, and judgment was given for him, upon the ground of its being part of the profits of the premiſes, which diſtinguiſhes it from the caſe of goods ſent to be manufactured, &c. And, indeed, adds Sir *James Burrows*, it ſeems extremely clear, that his chariot *was liable* to this diſtreſs; and that there is not the leaſt ſhadow of *legal* claim for an exemption.

Gorton, *et al. v.* Falkner, Hil. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 565.

Implements of trade may be diſtrained for rent, if they be not in actual uſe at the time, and if there be no other ſufficient diſtreſs on the premiſes.—The plaintiffs, being manufacturers of ſmall wares at Mancheſter, employed one *R. Minikin*, as a ſmall-ware weaver there, to make linen and cotton tapes for them; and for that purpoſe, in Auguſt laſt, lent him two looms, one for himſelf, and the other for his wife, to weave upon; and afterwards, in October laſt, on application by *Minikin*, lent him another loom. *Minikin* and his wife, worked upon two of the looms, and *Boardman* (*Minikin*'s journeyman) had been ſeen to work on one of them. The looms were uſed and worked upon in a part of a houſe in which *Minikin* reſided at Mancheſter, which was let to him by the defendant. For the uſe of the looms, *Minikin* was not to pay the plaintiffs any thing, but he was to work for the plaintiffs only. The caſe alſo ſtated, that it is cuſtomary at Mancheſter, for perſons in the ſmall-ware trade to lend their workmen looms to weave upon, without receiving any thing

thing for the uſe of ſuch as are for weaving linen or cotton tapes; but it is common for workmen to pay for the hire of ſuch as are for weaving worſted tapes; and all the looms in queſtion were for weaving linen and cotton tapes. *Minikin being tenant to the defendant of part of his houſe, and rent being due for the ſame, the defendant diſtrained the looms, ſo lent to* Minikin *by the plaintiffs, for rent, upon the premiſes; and afterwards, according to the ſtatute, appraiſed and ſold the ſame.* At the time of the diſtreſs, there were no other goods upon the premiſes.—Lord KENYON, Ch. J. We may lay it down as a general propoſition, that at this time *all moveable chattels are diſtrainable, whatever may have been ſaid in ancient times to reſtrain the diſtreſs to thoſe things which partook of the profits of the ſoil:* now, not only living animals, but alſo inanimate things may be diſtrained. But to this general propoſition there are ſeveral exceptions; *ſome things are exempt from being diſtrained on account of the place; and others, on account of the things themſelves.* The anvil in the ſmith's ſhop, and the mill-ſtone, are privileged, 14 *H.* 8. 26. becauſe they are affixed to the freehold; and a temporary removal of the one out of the ſtock, or the latter out of the mill to be picked, is not ſufficient to deſtroy that privilege. In the caſe of *Francis* v. *Wyatt*, the queſtion was, Whether a livery-ſtable had the ſame privilege as a common inn, ſo as to protect a carriage ſtanding at livery; the Court thought that the ſame reaſon did not exiſt in both caſes, and therefore that the privilege of the common inn ſhould not be extended to a livery-ſtable. There are ſeveral other exemptions, which it is not neceſſary to ſtate particularly; they are all collected in 3 *Com. Dig.* 112, 113; from whence it appears, that *utenſils of trade are not liable to be diſtrained while they are in actual uſe*; one of the inſtances given, is that of an axe in a carpenter's hand; and this exemption is founded on good ſenſe; it is allowed not only for the convenience of trade, but for the preſervation of the peace. *Averia carucæ are alſo privileged, provided there be other ſufficient diſtreſs; but if not, they may be diſtrained.* Now in this caſe it is not ſtated that theſe looms were in actual uſe at the time of the diſtreſs, though they *had been uſed and worked upon*, which is too looſe and indefinite a finding, to warrant us in ſuppoſing that they were then in uſe; and it is ſtated, that there were no other goods upon the premiſes liable to the diſtreſs. Therefore, the diſtreſs was properly made.—ASHHURST, J. It is a general principle, that all chattels found in a perſon's houſe are liable to be diſtrained by the landlord. The foundation of this principle is, that, as the landlord is ſuppoſed to give credit to a viſible ſtock on the premiſes, he ought to have recourſe to every thing which he finds there. It is true, indeed, that there are ſome exceptions to the general rule, but this caſe

does not come within any of them. It does not appear from the facts ſtated in this caſe, that the looms were in work at the time of the diſtreſs; but it is ſtated, that there were no other goods liable to be diſtrained: and it *is a general rule that implements of trade may be diſtrained, if there be no other goods ſubject to a diſtreſs.*—BULLER, J. Whether goods be the property of the tenant or a ſtranger, is perfectly immaterial, provided they be on the premiſes, and be not privileged by law from a diſtreſs.—THE QUESTION therefore is, Whether theſe goods, which were on the premiſes, be privileged by law from being diſtrained? The caſe of *Simſon* v. *Harcourt*, in the Common Pleas, Mic. Ter. 18 *Geo.* 2. goes the whole length of deciding the preſent: and it is of great authority, becauſe it was twice argued at the bar, and Lord Ch. J. *Willes* took infinite pains to trace with accuracy thoſe things which are privileged from diſtreſs. [It was an action of trover for a ſtocking-loom, and there was a ſpecial verdict, ſtating, *that the plaintiff was poſſeſſed of a ſtocking-frame of the value of* 8*l. which he let to* John Armſtrong, *at* 9*d per week; that* Armſtrong *was, by trade, a ſtocking-weaver. That* Armſtrong *was indebted* TO THE DEFENDANT, *in* 53*l. for rent, and that, no other ſufficient diſtreſs being on the premiſes, the defendant diſtrained this ſtocking-frame for the rent in arrear, at a time when* Armſtrong*'s apprentice was uſing the ſame.* AND THE QUESTIONS were, 1ſt, Whether a ſtocking-frame has any privilege at all from being diſtrained?—2dly, If it have, Whether it may not be diſtrained, when there is no other ſufficient diſtreſs to be found?—3dly, Whether or not (when no ſufficient diſtreſs is to be found) it be privileged by being in actual uſe? WILLES, CH. J. There are five things which by the common law are not diſtrainable: 1ſt, *Things annexed to the freehold;* 2d, *Things delivered to perſons exerciſing their trade, as cloth in a taylor's ſhop*; 3d, *Hops and corn*; 4th, *Inſtruments of the plough*; 5th, *Inſtruments of trade.* The three firſt were abſolutely privileged; the two laſt only *ſub modo.* As to the 1ſt, they are not diſtrainable at this day; nor was corn diſtrainable before the ſtatute of *W.* and *M*; and the reaſon was, becauſe they could not be reſtored in the ſame plight they where in when taken. Beaſts of the plough were not diſtrainable, in favour of huſbandry, which is for the general good of the nation; and if they were diſtrained, the means of a perſon's livelihood would be taken away, which laſt reaſon holds for inſtruments of trade, *Co. Lit.* 47. *a. b.* This frame is certainly an inſtrument of trade. And we are of opinion, that it may be diſtrained when no other diſtreſs is to be found. This puts an end to the two firſt queſtions. The 3d is the only material one; and we are of opinion, that this ſtocking-frame was not diſtrainable, though not

not in actual uſe, becauſe it could not be reſtored in the ſame plight, for the ſtocking then weaving muſt neceſſarily be damnified; another reaſon is, becauſe when it is in the cuſtody of any perſon in actual uſe, it cannot be taken away without a breach of the peace, 1 *Inſt.* 47. *a.* There is a plain diſtinction in *Bracton*, and all the books, between *catalla otioſa*, and thoſe in actual uſe. 14 *H.* 8. *pl.* 6. *Cro. El.* 549. *Moore*, 214. There is but one caſe which looks the contrary way, viz. 1 *Sid.* 440. and even there a *quære* is made; and I am far from thinking that caſe to be law. For theſe reaſons, let the plaintiff have judgment.] Now the preſent caſe falls within the fifth claſs, which Ch. Juſtice *Willes* ſaid was only privileged *ſub modo*; they are only under the ſame protection as *averia carucæ*. The point in that caſe was, that the frame could not be diſtrained, becauſe it was in actual uſe at the time: and for the reaſon now given by Lord *Kenyon*, a diſtreſs could not be made under ſuch circumſtances, without a breach of the peace. As therefore the looms in this caſe were not in actual uſe at the time of the diſtreſs, I am of opinion, that the plaintiffs are not entitled to recover.—GROSE, J. In 1 *Inſt.* 47. utenſils of trade are claſſed together with *averia carucæ:* with reſpect to the latter, all the old authorities agree in ſaying, that they are only privileged from diſtreſs in caſe there are other goods liable to be diſtrained. 2 *Inſt.* 132. Then, implements of trade being put on the ſame footing, are entitled only to the ſame partial exemption.—Poſtea to the defendant.

## *Who may Diſtrain.*

The plaintiff, on the 5th and 6th of January, 1776, for a valuable conſideration, did, by leaſe and releaſe, convey to Sir *Michael le Fleming*, and *James Rodney*, and their heirs, certain lands to the uſe of *Nathaniel Pigot*, for 99 years, if he ſo long lived, on the truſts thereinafter mentioned, and ſubject thereto, to the uſe of the ſaid plaintiff for her life, with divers remainders over. The truſt of the term was declared to be, that the ſaid *Pigot* might yearly, during his life, receive and take thereout an annuity or rent of 250l. The defendant, as bailiff of *Pigot*, diſtrained for arrears, and it was objected by the plaintiff, that the 99 years' term being veſted in *Pigot*, he could not diſtrain upon lands in his own legal poſſeſſion, though he might bring an ejectment.—SED PER CUR. The plaintiff, during the 99 years' term, is by her own act and conſent a mere under-tenant to *Pigot*, at the rent of 250l. per annum, for which he paid a valuable conſideration; to this rent, a diſtreſs is incident by law, excluſive of the clauſe in the deed, ſo that there is no colour for the objection.

Fairfax, *v.* Gray, Mic. Ter. 10 Geo 3 C.B. 2 *Black.* 1326.

Burt *v.* Moore, Tr. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 329.

The plaintiff, *John Burt*, who was the occupier of an eſtate called Axe, by indenture, dated the 3d of December, 1791, demiſed to the defendant a dwelling-houſe, &c. and alſo all the milk and calves of twenty-two cows, provided and to be provided by *Burt*, and which ſhould, at the expence of *Burt*, run, be fed, and depaſtured, on certain grounds on Axe farm, [deſcribing them]; to have and to hold the ſaid dwelling-houſe, milk and calves of the ſaid twenty-two cows, from the 13th of February then next, for one whole year, yielding and paying therefore unto *Burt*, his executors, &c. 15*l.* &c. and *Burt* covenanted with *Moore (inter alia)*, that it ſhould be lawful for *Moore*, his executors, &c. to feed and depaſture the cows, from the 21ſt of April to the 12th of May, then next, on the great watered meadow, on Axe farm, *and that no other ſtock than the twenty-two cows ſhould feed and depaſture on the ſaid premiſes, during the term.* During the continuance of the term, and at ſuch times when the plaintiff had agreed not to turn other cattle into the cloſes mentioned; *other cattle*, to wit, ſeveral cows of the ſaid plaintiff, were found depaſturing in the cloſes; and the defendant diſtrained them ſo depaſturing, and impounded them.—THE QUESTION was, WHETHER a perſon who rents the milk of cows, which the owner covenants ſhall be fed in particular paſtures, can diſtrain cattle belonging to the owner, damage feaſant, in the ſame cloſes in which the cattle were to feed? —Lord KENYON, Ch. J. This demiſe of the dairy is a demiſe of the ſoil, and excluſive uſe of all the graſs that ſhould grow on the cloſes, particularly enumerated in the leaſe, to be taken, it is true, by the mouths of the plaintiff's cattle; but thoſe cattle were alſo demiſed to the defendant. If, inſtead of the plaintiff's cattle, the defendant had rented the dairy from ſome other perſon, the *ſola & ſeparalis paſtura* would undoubtedly have paſſed by ſuch a demiſe as the preſent, notwithſtanding it could only have been enjoyed in a particular manner. Otherwiſe, if a ſtranger were to turn his cattle on the land, what remedy would the perſon renting the dairy have, if he could not maintain an action of treſpaſs againſt ſuch ſtranger? I am perfectly ſatisfied that, although the defendant was reſtrained by the agreement to a particular mode of occupation, he is to be conſidered as the occupier of the land; and, being entitled to the ſole uſe of the land, is alſo entitled to maintain treſpaſs, or to juſtify diſtraining the plaintiff's cattle, damage feaſant, there.—ASHHURST, J. This is a demiſe of a dairy; of the ſole right of the enjoyment of certain cloſes, to the excluſion even of the leſſor himſelf.—BULLER, J. This action of treſpaſs under the circumſtances of the caſe is now for the firſt time brought before the Court. On theſe agreements, the remedy has uſually been on the covenant: but it does not follow that, becauſe the leſſee may maintain an action of covenant,

covenant, where there is a covenant in the deed, he cannot alſo maintain treſpaſs. There are various inſtances in which a party has one of two remedies at his election. The ſubſtance of this agreement is, that the defendant ſhould have the ſole and excluſive uſe and enjoyment of this land, together with a certain number of cows and a bull, for the uſe of thoſe cows to be fed on this ground. Then if the defendant has the ſole and excluſive right to the occupation of theſe cloſes, he may maintain treſpaſs againſt any perſon who infringes that right, or he may diſtrain cattle doing damage there.—GROSE, J. agreed.

A tenant holding over after the expiration of his term cannot diſtrain the landlord's cattle which were put upon the premiſes, by way of taking poſſeſſion. This was replevin, and the ſhort ſtate of the caſe was this: The defendant, who was only tenant from year to year, had regular notice to quit on the 21ſt of December, 1796, by force of which, the demiſe to him determined; after the 21ſt of December, the plaintiff entered, and put his cattle therein. But the defendant, as he had not quitted or given up the poſſeſſion of the premiſes to the plaintiff, or in any manner abandoned the poſſeſſion of the ſame in purſuance of the notice to quit; but on the contrary, continued to hold the poſſeſſion thereof; diſtrained the cattle.—PER CURIAM: Here is a tenant from year to year, whoſe term expired upon a proper notice to quit, and becauſe he holds over in defiance of law and juſtice, he now attempts to convert the lawful entry of his landlord into a treſpaſs. If an action of treſpaſs had been brought, it is clear that the landlord could have juſtified under a plea of *liberum tenementum*. If, indeed, the landlord had entered with a ſtrong hand to diſpoſſeſs the tenant by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term. There is not the ſlighteſt pretence for conſidering him as a treſpaſſer in this caſe; and therefore there muſt be judgment for the plaintiff.

Taunton, *v.* Coſtar, Mic. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 431.

A cuſtom that a tenant may leave his away-going crop in the barns, &c. of the farm, for a certain time after the leaſe is expired, and he has quitted the premiſes, is good, and *the landlord may diſtrain* the corn ſo left, for rent arrear, after *ſix months have expired* from the determination of the term.—Replevin, for taking corn on the 20th of September, 1784, at Peterchurch, in the county of Hereford.—Avowry and cognizance. *Locus in quo*, part of certain lands, &c. of which the avowant, *Delahay*, was ſeiſed in fee, and which he demiſed on the 2d of February, 1780, to one *William Beavan*, for one year, and ſo from year to year, as *long as both parties ſhould pleaſe*, at the rent of 168l. payable half yearly. *William Beavan* entered on the 3d of February, 1780, and continued in poſſeſſion till the 2d of February, 1784, *when the demiſe ended*.

Beavan, *v.* Delahay and Lewis, Ea. Ter. 28 Geo. 3. C.B. 1 *Hen. Black.* 5.

Within the pariſh of Peterchurch there is an ancient cuſtom, that every tenant and farmer of any lands, under any demiſe, from year to year, at the will of the parties, ſhall have to *his own uſe*, and reap at ſeaſonable and proper times, his *away-going crop*; that is, all the corn growing upon the ſaid lands, which, before the expiration of ſuch term, hath been ſown by ſuch tenant and farmer, upon any part of ſuch lands, being arable land, not exceeding one third part of the arable lands ſo held under ſuch demiſe, and which hath been left ſtanding and growing upon ſuch lands at the expiration of ſuch term; and alſo, that every ſuch tenant and farmer may *depoſit ſuch away-going crop, when reaped, in the barns and out-houſes, if any ſuch there be, parcel of ſuch demiſed premiſes convenient in that behalf, and threſh the ſame there, and keep the ſame in the grain there then ariſing, in ſuch barns and out-houſes, until the firſt day of May next, after the reaping of ſuch corn.* On the 1ſt of Auguſt, 1784, *William Beavan*, the tenant, reaped *his away-going crop*, and *placed and depoſited the ſame in the ſaid places in which*, &c. being the *barns and out-houſes*, parcel of the ſaid demiſed premiſes, and kept it there till the ſaid time when, &c. which was before the 1ſt of May next, after the reaping of the ſame, under the cuſtom:—rent arrear, diſtreſs, &c.—Plea in bar, proteſting no ſuch cuſtom, confeſſes that the demiſe ended on the 2d of February, 1784, but ſays that the ſaid goods and chattels were taken and diſtrained *after the expiration of ſix calendar months next after the end and determination of the ſaid demiſe*, &c.—To this there was a *general demurrer*.—IN SUPPORT OF THE DEMURRER, it was argued, that although the diſtreſs was taken after ſix months had elapſed from the determination of the demiſe, yet the landlord had a good right to diſtrain. And the caſe in *Keilway*, 96. *a.* was cited as an expreſs authority in point.—PER CURIAM: A few ſhort principles are ſufficient to determine the preſent caſe. If by tacit conſent of the landlord and tenant, the contract between them continues beyond the time for which they originally contracted, all the rights and properties belonging to the original contract, muſt alſo be continued. It has been often determined, that if there be a leaſe, and after the determination of it the tenant holds over, he muſt hold upon the terms, and be liable to all the conditions and covenants of the leaſe. The rights, therefore, of the landlord, muſt, in ſuch caſe, continue. Now it is not material, whether the intereſt and connection between the landlord and tenant be extended, by ſuch holding over, or by the operation of a cuſtom like the preſent (1).

If

(1) *Lewis* v. *Harris*, ſummer aſſizes at Hereford, before Chief Baron *Skynner*, 1778.—A diſtreſs was made in March, the term having ended the Candlemas twelve-

If *A.* be poſſeſſed of a quantity of land in a common field, with a right of common over the whole field; and *B.* hath alſo a right of common over the whole field; and they enter into an agreement, for their mutual advantage and convenience, not to exerciſe their reſpective rights for a certain term of years, and each party covenants to that effect. If, during the term, the cattle of *B.* come upon the land of *A.* he may diſtrain them, damage feaſant: and may in his replication (in anſwer to a plea pleaded by *B.* of his right of common, in bar of the cognizance of *A.*) ſet forth the ſpecial circumſtances of the agreement and covenants.—This was replevin for taking one gelding and three mares of the plaintiff, &c. &c.—*Cognizance*, that the *locus in quo was an open and common field*; that one *Anne Peters* was ſeiſed in fee of ten acres of land, being in, and parcel of the ſaid field; that on the 25th of March, 1790, ſhe demiſed the ſame to the defendant, *King*, for one year, and ſo from year to year, &c. &c. and acknowledged the taking the cattle, damage feaſant, &c. —Plea in bar, after admitting that the ſaid place, called Holt-Field, in which, &c. *was an open and common field*, and that the cattle were taken in the ſaid parcel of the ſaid field, &c. ſtated, that one *Robert Jervis* was ſeiſed in fee of a meſſuage, and ſixty acres of land, in the pariſh of Holt, &c. that he, and all thoſe whoſe eſtate he hath (preſcribing in a *que eſtate*), have had, and uſed, &c. common of paſture for all his, and their commonable mares and geldings, *levant* and *couchant*, &c. in, and over the *locus in quo* (ſpecifying the times of the year, and the mode of enjoying the common, with reference to the ſowing the field with corn), as belonging and appertaining to the ſaid meſſuage and land, with the appurtenances; that he demiſed the ſaid meſſuage, &c. to the plaintiff, for fourteen years; that the plaintiff entered, &c. and (according to the ſpecified terms of the preſcription) put the cattle in the declaration mentioned, being his commonable gelding and mares, *levant* and *couchant*, &c. into, and upon the *locus in quo*, &c. and that the ſaid cattle were, and continued, &c. until the defendant of his own wrong, &c. &c.—The ſecond

Whiteman, *v.* King, Mic. Ter. 32 Geo. 3. C.B. 2 *Hen. Black.* 4.

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twelve-month before; but it was during the time the wheat was in a barn, part of the demiſed premiſes, and alſo, *during the time allowed by the cuſtom of the country, to the off-going tenant to get in, and diſpoſe of his off going crop.* The plaintiff's counſel inſiſted, that it was bad by common law, and not within the ſtatute, 8 *Anne*, c. 14. *ſ.* 7.—But for the defendant, it was inſiſted that the tenant's right to theſe advantages was a continuance of his term in that part of the lands to which it extended; and was, as it were, an exteſcence of his term. Therefore the diſtreſs was during the term, though more than ſix months after it had expired in the reſt of the farm.—Chief Baron SKYNNER: The queſtion is new to me; I muſt reſort to the reaſon of the thing. The tenant entered originally, on part only, and could not have the benefit of the reſidue. During his right to continue, he was immediate tenant, and could have maintained treſpaſs, while his cuſtomary right continued.—A nonſuit was entered.

and third pleas varied in a few circumſtances of the preſcription, and ſtated, that *Robert Jennis* was ſeiſed of fifty acres of land, &c.—The fourth ſtated the manner of exerciſing the right of common. The replication, *as to the ſaid ſeveral pleas, &c. (inter alia)* ſet forth that the plaintiff, *Whiteman*, was *an occupier of half-year land* in the ſaid pariſh of Holt, in the ſaid county; and on the 1ſt of September, 1783, it was, by certain articles of agreement, made between the defendant, *King*, of the one part, and the plaintiff, *Whiteman*, and divers other perſons, being *owners and occupiers of half-year lands*, of the other part. After reciting *(inter alia)* that for the improvement of the land, in the ſaid open fields, it had been the practice for ſome years then paſt, by general conſent, to ſow ſeveral pieces of land, lying together in the ſame field (called a ſhift), and belonging to different occupiers, with turnips, whenever the ſaid lands came in courſe for that purpoſe, and to incloſe, and ſeparate the whole of the ſaid ſhift, from the next adjoining lands, with hurdles, lifts, or faggots, &c. that the turnips there growing might not be treſpaſſed upon, or promiſcuouſly fed, by the ſaid flock of ſheep, or great cattle going at large, but preſerved for a crop, for the uſe of each reſpective owner thereof; but ſome diſputes having then lately happened, on account of the proportion of fencing materials, which ought to be provided by each owner of turnips. It was agreed by, and between the ſaid plaintiff and defendant, and the ſaid other perſons, whoſe hands and ſeals were ſubſcribed, and ſet to the ſaid indenture, that for the conſideration in the ſaid articles of agreement mentioned, *all the ſaid half-year land, ſo occupied by them, ſhould yearly, and at all times of the year, during the ſaid term, be exempted, freed, and diſcharged from being fed and depaſtured, not only by, or with the ſaid flock of ſheep, or any other ſheep, belonging to the ſaid* Robert King *(the defendant), his executors, adminiſtrators, or aſſigns, but alſo by, or with the great cattle, going promiſcuouſly, or at large: and that the ſaid half-year land ſhould, during the ſaid term, in all reſpects be conſidered and uſed as whole-year land, and be ſeparately fed and depaſtured, by the ſheep and great cattle of the reſpective occupiers thereof, or ſuch as they ſhould take to paſture only.*—A covenant was next recited, that neither of the parties ſhould, nor would, during the ſaid term of twelve years, *turn any ſheep, or other cattle, looſe into, or permit them to go at large in the common fields, or on other half year lands, lying in the pariſh of Holt, aforeſaid, but feed*, and depaſture them upon the lands in his, or her reſpective occupations only, &c. and that at the ſaid time, when, &c: the *ſaid cattle in the ſaid declaration mentioned, were turned looſe, and going at large on the ſaid land of the ſaid* Robert King, *parcel of the ſaid common field, &c.* contrary to the ſaid articles of agreement,

&c.

&c. &c. To this replication, there was a general demurrer: and it was argued for the plaintiff, FIRST, that both parties had an equal right of common; and it was a clear rule of law, that though a commoner may diſtrain the cattle of a ſtranger, damage feaſant, yet he cannot thoſe of his fellow-commoner; for, where there is only a colour of right in the one, to put in the cattle, there cannot be a diſtreſs taken by the other; but the remedy is by an action on the caſe. And for this were cited, *Hall* v. *Harding*, *ante*, vol. 2. 572. *Atkinſon* v. *Teaſdale*, *ante*, vol. 1. p. 81. And, SECONDLY, That the right of the plaintiff was not releaſed by the covenant: for no intereſt paſſes by a bare covenant, *Poph.* 140.—Lord LOUGHBOROUGH: There is no difficulty in this caſe. The avowant had, originally, a clear right, in reſpect of his property, to diſtrain cattle, damage feaſant. The right of the plaintiff is alſo ſtated, which he might have had, but which he agreed by deed under his hand and ſeal, not to exerciſe: with regard to the avowant, therefore, he was a ſtranger. The conſequence is, that the avowant had a right to diſtrain. And I think there would have been no difficulty in pleading this agreement as a releaſe.—GOULD, J. and HEATH, J. of the ſame opinion.—WILSON, J. I think there was, in this caſe, a releaſe or extinguiſhment *pro tempore* of the plaintiff's right, and that it might have been pleaded as ſuch. I take it to be a clear rule in pleading, that a party may ſtate a deed, and leave it to the Court to determine what is the operation of it. If the legal operation of the deed is miſtated, the plea is bad; but if the deed is only ſtated, without its legal operation, it is good. The argument for the plaintiff would be good, if the right were a mere perſonal intereſt. Here there is an agreement in the deed that the land ſhall be exempted. It is, therefore, not like the caſe in *Popham*, ſuppoſing that caſe to be law; for there the parſon only agreed that he would not demand the tithes.—Judgment for the defendant.

If a leſſee for years aſſigns his term, he cannot diſtrain for rent.—In replevin, the defendant avowed under a diſtreſs for rent, due from the plaintiff to him upon an aſſignment of a leaſe of a term for years to the plaintiff, in which aſſignment there is no clauſe of diſtreſs: the ſingle queſtion was, Whether this is ſuch a rent for which a diſtreſs lies, there being no reverſion in the defendant?—*Curia*: There are two ways of creating a rent; the owner of the lands either grants a rent out of it, or grants the lands and reſerves a rent; there is no ſuch thing as a rent-ſeck, rent-ſervice, or rent-charge, iſſuing out of a term for years. *Bro. Dette, pl.* 39, cites 43 *Ed.* 3. 4. *per Fynchden*, Ch. J. C.B. If a man hath a term for years, and grants all his eſtate of the term, rendering certain

—— *v.* Cooper, Ea Ter. 8 Geo. 3. C.B. 2 *Wills.* 375.

tain rent, he cannot diſtrain if the rent be in arrear; this caſe is law, and in point; therefore, if the avowant will recover what is owing to him from the plaintiff, he muſt bring his action upon the contract.—*Per totam Curiam.*

Blackey *v.* Diniſdale, Mic. Ter. 18 Geo. 3. B.R. *Cowp.* 661.

A diſtreſs cannot be made for the toll of goods *fraudulently ſold* out of the market to avoid the toll: but the party injured muſt bring a ſpecial action on the caſe.—In an action of treſpaſs, for ſeizing and taking the plaintiff's wheat, the defendant juſtified the ſeizure of the wheat, on the ground of toll, due for corn *brought into the borough of Rippon for ſale*. The facts were theſe: "One *Thomas Cowper* took a chamber for a year, to keep corn in, *within the borough of Rippon*; and, *on a market-day*, called on the plaintiff, *at his own houſe, within* the borough, which was two hundred yards from the market-place. They went together to the *ſaid chamber*, and *Cowper* ſhewed him a ſample of wheat, *which he took from ſixty buſhels* of wheat, which he had in his chamber, and ſold thirty-buſhels of wheat, *which he had at his houſe, ten miles out of the borough*, to be delivered at any time, within a month afterwards. It ſuiting *Cowper*'s convenience on a Thurſday, he ſent it by a ſervant, to be delivered at the plaintiff's mill. As *Cowper*'s ſervant was paſſing through the borough, one of the defendants aſked him, *where he was carrying the corn*, who ſaid, *to the plaintiff's mill*, and thereupon he followed it to the plaintiff's fold-yard, adjoining the mill, and *demanded toll*; which being refuſed, he went away, and ſoon after returned with the toll-gatherer, the other defendant, when *part* of the corn had been unloaded, and then ſeized thirty-two half-pints of it for toll.—THE QUESTION on this ſpecial verdict was, Whether the plaintiff was entitled to recover?—PER CURIAM: The queſtion is, Whether this corn was brought within the borough of Rippon, to be ſold in the market? Now the caſe ſtates the contrary, for it had been previouſly ſold; and the day it was ſeiſed for not paying toll, it was only *paſſing through the borough*, in the road to the plaintiff's mill, which was ten miles off. As to the ſuggeſtion, that this is a fraud upon the corporation, there are caſes in which a man cannot defend himſelf, even by facts ever ſo ſtrong, in ſupport of a fraud, if the fraud can be got at: but then it muſt be made appear. *If this mode of ſale is a fraud upon toll, the remedy of the corporation is by ſpecial action on the caſe.* But this caſe as ſtated is a very different thing: here the vendor lives in the town, ſhews a ſample of corn to a cuſtomer, who agrees for a certain quantity, to be delivered at his mill ten miles off; and the goods happen, on a market day, merely to paſs through the market in the way to the place of delivery.—If it is really a trick, the defendants muſt bring an action on the caſe.

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An averment in a declaration on the 11 *Geo.* 2. *c.* 19. *ſ.* 3. to recover double the value of goods removed, in order to prevent a diſtreſs, that a certain ſum was due for rent before the goods were removed, need not be preciſely proved as laid. And the notice of diſtreſs, which alleged a different ſum to be due, was held immaterial. This was an action of debt, on the 11 *Geo.* 2. *c.* 19. *ſ.* 3. to recover double the value of the goods, which were liable to a diſtreſs, and removed by the defendants to avoid it. The declaration ſtated that 57l. were in arrear for rent, &c. At the trial the notice of diſtreſs was produced, which alleged that 55l. were due; but the plaintiff was ready to ſhew, by the tenant's own admiſſion, that 57l. were due: it was objected by the defendants, that the plaintiff was bound by the notice of diſtreſs, and the plaintiff was non-ſuited. It was afterwards moved to ſet the non-ſuit aſide, on the ground that the ſum, mentioned in the notice, was immaterial.—PER CURIAM: There is no doubt but that if the plaintiff profeſs to ſet out his title, he muſt ſet it out correctly. So where a contract is to be ſtated in a declaration, unleſs it be truly ſtated, the plaintiff cannot recover. If the plaintiff allege any thing which forms a conſtituent part of his title, he muſt ſet it out correctly. But here it was impertinent to ſtate what the rent was; the defendants incurred a penalty under this act of parliament, in fraudulently removing the goods which were ſubject to the diſtreſs. Whether 5l. or any other ſum were in arrear, was perfectly immaterial: the damages were not to be meaſured by the quantity of rent, but by the value of the goods removed. And the notice of diſtreſs might have been abandoned; for a party may diſtrain for rent, and avow for fealty. The giſt of this action is the fraudulent removal of the goods from the premiſes, in order to defeat the diſtreſs; it was, therefore, immaterial to the defendants, whether one ſum or another were due for rent; for in either caſe they are guilty of a tort.—Rule abſolute.

Gwinnet *v.* Phillips, Ea. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 643.

One warrant of diſtreſs, for the amount of ſeveral duties, impoſed by different acts of parliament, each giving a power of diſtreſs, is legal. And the judgment of the commiſſioners of land-tax on appeal, is concluſive in an action of treſpaſs brought againſt the officer, for levying under a warrant of diſtreſs.—This was treſpaſs for taking the plaintiff's cattle: it appeared that the cattle were taken under a warrant of diſtreſs, for the aggregate amount of ſeveral taxes (1), one of

Patchet *v.* Bancroft, *et al.* Tr. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 367.

(1) Viz. land-tax, wood-tax, commutation-tax, window-duty, houſe-duty, horſe-duty, ſervants'-tax, &c.

which

which was the land-tax on ſome woods, which the plaintiff, at the time of the diſtreſs made, refuſed to pay, though he was ready and offered to pay the reſt, if the defendants would have taken them only. The ground of the plaintiff's objection to pay that particular aſſeſſment was, becauſe it was to raiſe a ſum for the uſe of the pariſh, over and above the proportion of the land-tax for that pariſh, payable to government; and he appealed to the commiſſioners appointed under the act of parliament, who, upon hearing the parties, confirmed the aſſeſſment for the whole. The judge thought that, as the objectionable tax had been confirmed on the appeal, it could not now be queſtioned in this action; and that it was ſufficient for the defendants to ſhew a general right to diſtrain; and, therefore, he nonſuited the plaintiff, with liberty to move to ſet aſide the nonſuit, and enter a verdict for him for 24l. if this Court ſhould be of opinion, that the action was well founded. Accordingly, a rule *niſi* was obtained for that purpoſe in Eaſter term laſt, on the ground that there ſhould have been a ſeparate warrant for each tax; and that a diſtreſs, under one warrant, for the amount of all the taxes, was illegal.—The caſe was fully argued, and the Court took time to conſider of their opinion, which was now delivered by Lord KENYON, Ch. J. as follows: As all the taxes were confirmed on appeal, however improper perhaps the one objected to was, it muſt be binding on the parties; and then the warrant of diſtreſs, though it included them all, was properly iſſued. The conſequence of which is, that the rule for a new trial muſt be diſcharged, and the nonſuit ſtand.—Rule diſcharged.

## Dower.

Ilderton *v.* Ilderton, Tr. Ter. 33 Geo. 3. C.B. 2 *Hen. Black.* 145.

A marriage celebrated in Scotland (but not between perſons who go thither for the purpoſe of evading the laws of England), will entitle the woman to dower in England. The lawfulneſs of ſuch a marriage may be tried by a jury; a replication, therefore, to a plea of "*ne unques accouple*" in a writ of dower, alleging a marriage in Scotland, may conclude to the country: and in ſuch replication, it is not neceſſary to ſtate that the marriage was had in any place in England, by way of *venue*.—This was a proceeding in dower, and to the declaration there was a PLEA, that the demandant was never accoupled to *Thomas Ilderton* deceaſed, in lawful matrimony. To this plea there was a REPLICATION, which ſtated that the demandant, on the 6th of September, in the year of our Lord, 1774, was accoupled to

to *Thomas Ilderton* deceaſed, in lawful matrimony, at Edinburgh, in that part of Great-Britain called Scotland, and the replication concludes to the country. To this replication there was a ſpecial demurrer. And the demurrer ſtated for cauſe, that the ſuppoſed marriage in the replication mentioned, declaring it to have been celebrated in that part of Great-Britain called Scotland, was not a marriage, whereby, or by reaſon whereof, the demandant could by law, claim or entitle herſelf to have any dower of the tenements above mentioned. There was alſo another cauſe of demurrer alleged, that the plaintiff has not laid any place by way of *venue*, where the ſuppoſed marriage was had. There was a third cauſe, that the replication is ill concluded, by being concluded to the country, and by having by that concluſion attempted to put in iſſue, and draw to a trial by a jury of the country, a matter that is not by law triable by a jury of the country, but which is of eccleſiaſtical cognizance, and which ought to be tried by the certificate of the biſhop, to whom the right of certifying, whether the plaintiff and *Thomas Ilderton* were or were not accoupled in lawful matrimony, belongs: and alſo for that it did not appear to the Court, by the ſaid replication, to what biſhop, or other ſpiritual judge or perſon, any writ can or ought to be directed or ſent, to inquire and certify, whether the plaintiff was accoupled to *Thomas Ilderton* deceaſed, in lawful matrimony or not: *and there was a joinder in demurrer.* EYRE, Ld. Ch. J.—Upon the argument, the firſt cauſe of demurrer having been abandoned, the reſidue of theſe cauſes reſolves itſelf into two queſtions. The firſt of theſe queſtions is, Whether the plaintiff ought in this caſe to have concluded to the country? The ſecond queſtion is, Whether the replication is either informal, or ſubſtantially defective, for want of a *venue?* In ſupport of the demurrer, and upon the firſt queſtion, it has been argued, that the matter of this replication is excluſively of eccleſiaſtical cognizance; and a paſſage from *Glanville*, book 7. chap. 13 and 14, has been cited, in ſupport of theſe propoſitions, that in intendment of law, a jury is not competent to decide upon this matter; that there was in this caſe no neceſſity for excluding the eccleſiaſtical juriſdiction; that in caſes of baſtardy, which it was ſaid, are not diſtinguiſhable from this caſe, a writ always goes to the biſhop of the dioceſe where the lands lie, without regard to the place where the eſpouſals were had, or where the birth was; and that the analogy directs how the writ ſhould be directed where there happens to be no biſhop having juriſdiction in the place, where the demandant ſtates herſelf to have been accoupled in lawful matrimony; and, conſequently, that in this

this caſe, the demandant ſhould have prayed a writ to the biſhop where the lands lay, and ought not to have concluded to the country. The paſſage in *Glanville* is as follows: " Hæres autem legitimus, nullus baſtardus, nec aliquis qui " ex legitimo matrimonio non eſt procreatus, eſſe poteſt. " Verum ſi quis verſus aliquem, hæreditatem aliquam tan- " quam hæres petat, et alius ei objiciat, quòd hæres inde " eſſe non poteſt, eo quod ex legitimo matrimonio non ſit " natus, tunc quidem placitum illud in curiâ domini regis " remanebit, et mandabitur archiepiſcopo vel epiſcopo loci, " quod de matrimonio ipſo cognoſcat; et quod inde judica- " verit, id domino regi vel ejus juſticiis ſcire faciat, et per " hoc breve." Then follows the form of the writ " Rex " archiepiſcopo ſalutem, veniens coram me *W.* in curiâ " meâ, petiit verſus *R.* fratrem ſuum, quartam partem feodi " unius militis, in illâ villâ ſicut jus ſuum, et in quo idem " *R.* jus non habet, ut *W.* dicit, eo quod ipſe baſtardus ſit, " natus antè matrimonium matris ipſorum. Et quoniam ad " curiam meam non ſpectat agnoſcere de baſtardiâ, eos ad " vos mitto, mandans ut in curiâ Chriſtianitatis inde facia- " tis, quod ad vos ſpectat, et cum loquela illa debitum " coràm vobis finem ſortita fuerit, mihi literis veſtris ſigni- " ficetis quid inde coràm vobis actum fuerit, &c." Now it muſt be acknowledged, that the language of theſe paſſages very diſtinctly marks the ground and principle upon which the temporal courts have ſent their writs to the biſhop, namely, that the cognizance of lawful matrimony belongs to the court Chriſtian, and not to the temporal courts. " Placitum illud in curiâ domini regis remanebit, et manda- " bitur archiepiſcopo vel epiſcopo loci, quod de matrimonio " ipſo cognoſcat, et quod indè judicaverit, id ſciré faciat," are ſtrong words, and the language of the writ " quoniam " ad curiam meam non ſpectat agnoſcere de baſtardiâ, eos " ad vos mitto, mandans ut in curiâ Chriſtianitatis inde fa- " ciatis quod ad vos ſpectat; et cum loquela illa debitum " coràm vobis finem ſortita fuerit, mihi literis veſtris ſigni- " ficetis, quid indè coram vobis actum fuerit," is ſtill ſtronger to mark the ſenſe of the time, in which *Glanville* wrote, that queſtions of matrimony and baſtardy were excluſively of eccleſiaſtical cognizance, and that a jury was at that time thought to be not competent to decide upon theſe queſtions; or at leaſt if they do not go ſo far, as a jury not being thought competent to the deciſion of theſe queſtions, they ſhew that the Court itſelf was not competent to ſuch examination and deciſion. It was agreed by the counſel for the tenant, that the matrimony of which the court Chriſtian has at this day excluſive cognizance, is lawful matrimony, as oppoſed to marriage in fact, and that

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it was eſſential that the marriage ſhould be lawful in two caſes only, in the caſe of dower, and in the caſe of appeal: but it is very obvious that *Glanville*, in the paſſage which I have read, draws no ſuch line, he ſuppoſes that in the caſe of baſtardy "mandabitur epiſcopo, &c. quod de matrimonio "ipſe cognoſcat." *Glanville* wrote in the time of *Henry* the Second, at which time the diſtinction between general and ſpecial baſtardy had not been introduced. The ſtruggle for legitimating the iſſue born before matrimony, which is recorded in the ſtatute of *Merton* (1), 20 *Henry* 3. *c.* 9. ſeems firſt to have ſuggeſted the plea of ſpecial baſtardy; and it is obſervable, and is material, that the temporal courts, from that time, withdrew the cognizance of ſpecial baſtardy from the court Chriſtian. In ſucceeding times, other conſiderations induced the temporal courts to withdraw from the cognizance of the court Chriſtian, the queſtions of matrimony and of baſtardy, in a variety of caſes. In baſtardy, the trial by the certificate of the biſhop takes place at this day, only in the caſe of a general allegation of baſtardy, and that only ſo long as the party is living, and not only living, but a party to the ſuit, and not only a party to the ſuit, but adult: in matrimony, as is agreed, in the two caſes only of dower and appeal. It is not, therefore, to *Glanville*, that we muſt reſort for the preſent ſtate of the law reſpecting the trial by certificate of the biſhop; and when we advert to the ordinary courſe of proceeding, in every one of thoſe caſes which have been withdrawn from the cognizance of the court Chriſtian, it will be impoſſible to maintain, that in intendment of law, a jury is not competent to try queſtions of matrimony or baſtardy. The true propoſition is, that the common law is general and fundamental, that the particular trials by the court Chriſtian are to be conſidered as privileges, and as ſuch in their nature particular, that every thing which is not within the privilege, belongs to the common law. Reſpecting things, which have been conſidered in early times, as proper to be tried by the certificate of the biſhop, if for good reaſon they ought not to be ſo tried, or if from particular circumſtances they cannot be ſo tried, the common law, out of its own inexhauſtible fountain of juſtice, muſt derive another mode of trial, and that mode is the trial by the country. It was upon theſe principles, that the caſe of ſpecial baſtardy, and every one of the other caſes which I have alluded to, have been ſent by the temporal courts to be tried by the country, inſtead of being tried by the certificate of the biſhop; and

(1) 2 *Inſt.* 96.

true

they will be found applicable to every caſe, in which the law of England hath admitted of any ſpecial mode of trial; for inſtance, the trial by inſpection, by the eſcheator, by the certificate of the marſhal of the king's hoſt, by the certificate of the recorder of London, nay, even the trial by the record, and, in ſhort, every other kind of trial that can be ſtated. But it has been argued, in ſupport of the demurrer, that in this caſe there is no neceſſity for departing from the ancient and uſual courſe of trial, of an iſſue joined on the marriage in dower; that this marriage, alleged to have taken place in Edinburgh, in that part of the united kingdoms called Scotland, may be tried by the certificate of the biſhop of that dioceſe, in which the county where the writ is brought happens to lie. This is not ſupported by the authority of any caſe adjudged in point, but it is argued upon the analogy which the preſent caſe bears to adjudged caſes, and particularly to the caſe of general baſtardy, where the writ to the biſhop is ſaid, and I believe truly ſaid, to be always ſent to that biſhop in whoſe dioceſe the lands lie, or, more properly, where the demandant's writ is brought. But there will be found no analogy between thoſe caſes and the preſent. I have obſerved, that the writ to the biſhop goes only where there is a plea of general baſtardy; the replication to that plea, though it may ſpecially allege the eſpouſals of the parents, or the birth in another dioceſe, amounts to nothing more than an averment, that the demandant was *mulier*, and not baſtard; and in ſome of the year books abridged by *Brooke*, in his title "baſtardy," the ſpecial allegation of eſpouſals and birth is diſallowed by the Court, and the demandant is driven to add, "*et ſic mulier et non baſtardus*;" and in one of the caſes in particular, the whole ſpecial allegation is left out of the record, and nothing entered, but that the demandant was *mulier et non baſtardus* (1), and ſo the writ went of courſe to the biſhop of the dioceſe, where the lands lay, and in that caſe could by no poſſibility go to any other biſhop. Upon whatever ground it proceeded in baſtardy, the writ always went to the biſhop of the dioceſe where the lands lay. Now in the caſe of dower, if a general replication to a plea of *ne unques accouple in loyal matrimonie* is admiſſible, there, by analogy to the caſe of baſtardy, it might be argued that the writ ſhould go to the biſhop of that dioceſe where the lands lay, upon a foundation common to both caſes, that the birth in wedlock in baſtardy, or the lawful marriage in dower, ſhould be intended to have taken place in the county, where the lands lay. But as in moſt of the caſes

(1) Pl. 20.

went

of dower, and probably in all, the replication is ſpecial, of eſpouſals in a particular church, in a particular county, and dioceſe, and as the writ to the biſhop has uſually gone to the biſhop of the dioceſe, where the eſpouſals have been alleged to have been celebrated; and as I have been able to find no caſe, in which the eſpouſals having been alleged to have been celebrated in another county, and in another dioceſe, the writ has yet gone to the biſhop of the dioceſe where the lands lay; there ſeems to be no manner of analogy between the caſe of baſtardy and dower. To whatever biſhop the writ, in either caſe, is directed, it is ſent to him as ordinary, as having either in fact or in the intendment of law, cognizance of the queſtion. The ordinary acts as a judge, in a cauſe regularly inſtituted before him: one of the reaſons for not ſending a writ to the biſhop, where a party, who is attempted to be baſtardized, is dead, or a ſtranger to the ſuit, is, that the ſuit in the Court Chriſtian cannot be decided between the parties; it is a falſe reaſon to ſay that it does not go in that caſe, becauſe it is peremptory; it is peremptory, becauſe it is the judgment of a court of competent juriſdiction, in a ſuit between the parties. If, under any circumſtances, the writ goes to a biſhop, within whoſe dioceſe the eſpouſals were in fact not celebrated, it is pretty clear that he might decline certifying. In one of the caſes that were cited, it was ſaid expreſsly, that he might return, by way of anſwer to the writ, that the place of the eſpouſals, alleged to be within his dioceſe, was not within his dioceſe, which return could not be admitted, if the writ might go to any biſhop, in reſpect of the matter being in its nature of eccleſiaſtical cognizance. All the analogies of law contradict that notion. In the theory of our law, a jury of one county could not try a matter of fact ariſing in another county. If we are to reſort to analogy, let us conſider how the law ſtands reſpecting the certificate of the biſhop. In the caſe of profeſſion, the writ went to the biſhop of that dioceſe, in which the religious houſe was ſituate; upon the preſumption that he was the ordinary, and could examine; but if the religious houſe happened to be exempted, as was frequently the caſe, this was a ſufficient return to the writ, and the trial by certificate could not be had. If a queſtion ariſes in *quare impedit*, the writ goes to the biſhop of the dioceſe to certify; but if the biſhop claims any thing more than as ordinary, ſo that he may be a diſturber, the writ cannot go to him, for he is intereſted: in that caſe it does not go to any other biſhop, but it goes to his metropolitan. Why? Becauſe he is ſuperior ordinary. Suppoſe the caſe then to ariſe in the dioceſe of the archbiſhop of Canterbury, who has no ſuperior ordinary, and he was a diſturber; and, conſequently, the writ could

not go to him, all the analogies of law exclude the idea of the writ being ſent to any inferior ordinary; in that caſe, therefore, it is evident, that in a matter confeſſedly ariſing, not only within the kingdom, but even within the dioceſe where the writ is brought, and where the lands lay, there could be no writ to the biſhop. If in all caſes in which a writ goes to the biſhop, the writ is ſent to that biſhop, who has, or is at leaſt preſumed to have, juriſdiction of the ſubject-matter; if it is ſent to him as ordinary, and in no other character; and if where it cannot be ſent to the ordinary, even within the kingdom, it cannot be ſent to a biſhop at all; upon what principle, or upon what analogy of law, can a marriage diſtinctly ſtated to have been celebrated out of any dioceſe, out of any actual or preſumed juriſdiction of any ordinary, nay out of the kingdom, be ſent to any biſhop to be by him inquired into and certified? If the trial cannot be by certificate, we lay it down as a propoſition fundamental and incontrovertible, that the trial is to be by the country: and for a reaſon that is unanſwerable, that there may not be a failure of juſtice. This is not a point to be debated, but they who have the curioſity to enquire what has been done in caſes of a ſimilar exigency, may find, in ſir *Thomas Hardres*'s Reports, 65, ſeveral inſtances collected by him in an argument delivered by him, of caſes, in their own nature triable by the biſhop's certificate, ſent to be tried by the country, upon the particular circumſtances of thoſe caſes. One of them is taken from the *Year-book* 2 *Richard* 33 & 4, and it was treſpaſs for taking of goods, the defendant pleaded a will, by which he was conſtituted executor, and ſo entitled himſelf to the goods in queſtion, which had been the teſtator's. The plaintiff ſaid, that after the will was made, whereby the defendant was appointed to be executor, the teſtator made another will, wherein he appointed the plaintiff to be his executor; the defendant pleaded that the pope, by his bull, had delegated ſuch an one to examine this matter, who had, by ſentence, annulled the will, by which the plaintiff claimed. It was reſolved, that becauſe this matter was not triable by the certificate of any biſhop of England, to whom the Court might write, that therefore ſome matter muſt be put in iſſue triable *per patriam, ne deficiat juſtitia.*

The ſecond queſtion which ariſes upon this demurrer is, Whether, in point of form, or in ſubſtance, it was neceſſary that the plaintiff ſhould have alleged that the eſpouſals were celebrated in ſome place, within ſome county in England, in order to a trial by the country, ſuppoſing that ſuch is to be the trial in this caſe? I muſt conclude, that this inſerting of a place has been anxiouſly avoided, conſidering the circumſtances in which this replication has been framed: I ſuppoſe,

poſe, from an apprehenſion in my judgment, unfounded, that the alleging a place within a county, for the purpoſe of trying here a matter ariſing in a foreign country, might have aſſiſted the argument in favour of a trial by certificate. The leaving the replication open to this objection undoubtedly gives great advantage to the defendant, becauſe, if he can maintain that it is the eſtabliſhed form of replication in ſimilar caſes, to allege a place within a county in England; the want of it will ſupport his demurrer, it being eſpecially aſſigned for cauſe, though, in truth, it be but a mere form, and not at all eſſential to the real juſtice of the caſe: and if it ſhould in the reſult be found, that there is no ſuch eſtabliſhed form of replication, the defendant has ſtill this advantage, that he will be at liberty to inſiſt that the replication is, in this reſpect, ſubſtantially defective; and that, in this reſpect, therefore, the demurrer will hold. The queſtion of mere form muſt be decided by the books of entries; but no one entry has been produced, in a caſe exactly ſimilar, and very few, if any, in caſes analogous, that is, where any matter, ariſing in a foreign country, is replied. Forms of declarations, ſtating matters ariſing in a foreign country, or even pleas, are no precedents. Replications ſtand upon their own ground in this reſpect; they have reference to the declaration, they maintain the declaration, and they cannot be entirely ſeparated from the declaration, in the way in which a plea in bar may. They may, therefore, have the aſſiſtance of the declaration, as far as concerns the allegation of a place within a county of England, for the mere purpoſe of trial. The caſes cited on the part of the defendant, for another purpoſe, proving, or tending to prove, that ſpecial eſpouſals, or birth, in another county, ſhould be tried where the writ is brought, and many other caſes which are to be found in the books, ſome of which were alſo cited, of matter reſpecting the perſons, when pleaded in abatement, being tried where the writ is brought, ſufficiently eſtabliſh that the replication may borrow a place, for the mere purpoſe of trial, from the declaration, of which I make no other uſe at preſent, than to ſhew, that forms of declarations, and of pleas in bar, are no precedents for forms of replications, and I conclude, that this objection to the replication, conſidered as an objection of form only, and to be ſupported only, becauſe it is ſpecially aſſigned for cauſe of demurrer, is not ſo maintained as to oblige us, upon fair ground of form, to ſay, that this replication is ill. Conſidered as an objection in ſubſtance, I am ready to agree, that it is by no means a trivial objection: our books are full of caſes upon the ſubject of *venues*, and the doctrine is very nice and curious. It was anciently the opinion of lawyers, that a jury of one county could not try

any matter arising within another county, and a foreign *county* was almost as formidable a thing, in point of jurisdiction, to try, as a foreign *country*. The place, therefore, in which every alleged fact was done, was to be shewn upon the pleadings, that it might be known to what county the jury process should go; and if the facts arose in two counties, or *in confinio comitatuum*, that the process might go to both counties. The old law too being, that the jury were to come *de vicineto*, there was another necessity created, for very great particularity and niceness in laying *venues:* but when, in process of time, masculine sense had so far controlled the former doctrine of *venues*, that, in respect of all matters transitory in their nature, the defendants were obliged to lay the *venues* of transactions they alleged in their pleas, in the place and county in which the plaintiff had laid his declaration, and since the statute 4 *Anne*, c. 16. s. 6. has directed that the jury should come *de corpore comitatûs*, the law of *venues* will be found to be very substantially altered, and to lie in a very narrow compass; and the distinction between laying no venue at all in a plea, and being obliged to lay the same venue as is to be found in the declaration, will not be a very substantial one. The principle now is, that the place laid in the declaration draws to it the trial of every thing that is transitory, and it should seem that neither forms of pleading, nor ancient rules of pleading, established upon a different principle, ought now to prevail. I have said, that there was a time when a foreign *county* was almost as formidable a difficulty, with respect to mere trial, as a foreign *country*; and in respect of matters arising in the one or in the other, as far as respects the trial merely, there is no difference between them. All matters arising in a foreign country must be considered, for the purpose of trial, as transitory; there can be no reason for preferring the trying them in one county rather than in another. When the old doctrine prevailed, if a matter arose in Ireland, the judges thought themselves obliged to take the jury *de vicineto* of the borders of the English county nearest to Ireland; but, since that doctrine has been justly exploded, if a defendant were to plead a matter arising in a foreign country, he would be obliged to lay the same venue as was laid in the declaration, which brings us again to the distinction between being obliged to repeat the *venue*, which is in the declaration, and laying no venue at all, which appears to me, I confess, to be a distinction without a difference. It may be asked, shall we then assume jurisdiction to try matters arising in a foreign country, without even the colour which the fiction of the parish of *St. Mary le Bow*, in the ward of *Cheap*, has so long supplied? Certainly not: of matters arising in a foreign country,

country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction; but of such matters as are merely transitory, and follow the person, we acquire a jurisdiction by the help of that fiction to which I have alluded, and we cannot proceed without it; but if matters, arising in a foreign country, mix themselves with transactions arising here, or if they become incidents in an action, the cause of which arises here, we have jurisdiction, and, according to the case in 12 *Mod.* the fiction need not be resorted to at all, and, if resorted to, the effect will be, not to give jurisdiction; and, if a place had been before named, for that part of the transaction which arose here, it would have no effect, even as to the trial. In the very infancy of commerce, and in the strictest times, as I collect from a passage in *Brooke*, Trial, *pl.* 93. the cognizance of matters arising here, was understood to draw to it the cognizance of all matters arising in a foreign country, which were mixed and connected with it, and, in these days, we should hardly hesitate to affirm that doctrine.—The result is, that there are no precedents to bind the case in point of form, and, if there were, the law has been so altered, that they ought not to bind. In point of substance, the question on this marriage in Scotland, arising incidentally in a suit in dower, of which we have original jurisdiction, is for the purpose of this cause within our jurisdiction, without the assistance of a fiction; and the venue, for the mere purpose of trial, being necessarily the venue laid in the declaration, the inserting it in the replication would have been nugatory, and the want of it can do no harm. We are, therefore, of opinion, that the demandant is entitled to judgment in her favour.—Judgment for the demandant.

A lease for years, by a copyholder, with the license of the lord, where the widow, by custom, would be entitled to her free bench, if the copyholder had died seised, defeats the widow of her free bench.—This case was as follows: "The "custom of the manor was to grant copyholds for three "lives; the first life had a power of surrendering the whole "estate, and the widow of a tenant, *who died seised, was* "*entitled to her free bench.* On the 6th of September, "1763, *T.* then copyholder for three lives, surrendered to "*Hurd*, the deceased husband of the defendant, who, on the "19th of October, 1767, *by license from the lord*, demised to "*Singer* for ninety-nine years, by way of mortgage, then "*Hurd* died, and *Singer* assigned to the plaintiff." It was contended, that the copyholder, having obtained the lord's license, might do what he pleased with the estate, and could have conveyed it from the wife, in any form he thought fit; and, consequently, her right of free bench must be subject to

Salisbury, *ex dim.* Cooke, *v.* Hurd, Mic. Ter. 17 Geo. 3. B.R. *Corop.* 481.

the mortgage in this case, 1 *Rol. Abr.* 508. *Pop.* 105. And per Cur. There is a great difference between the custom of free bench found in this case, and the case of dower; in the latter, the widow is entitled to dower of all her husband was seised of, during the coverture; but here her right was confined to such estate as he should die seised of: consequently, as between lord and tenant, they might defeat the wife's estate when they pleased.—Judgment to be entered for the plaintiff.

Vaughan, *ex dim.* Atkins, esq. *v.* Atkins, Widow, Tr. Ter. 11 Geo. 3. B.R. 5 *Burr.* 2764.

But the widow is entitled to her free bench in copyhold lands, surrendered to the use of the husband, though he may never have been admitted thereto.—This cause was tried at Winchester assizes, March 5, 1771; and a verdict found for the plaintiff, subject to the opinion of this Court, on the following case: "That *Richard Kent*, being seised in fee of "the premises in question, held of the bishop of Winchester, "as of his manor of Bitterne, by copy of court roll, according to the custom of the manor, but not expressed to be at "the will of the lord, on the 21st of November, 1769, contracted, for a valuable consideration of 1690l. to surrender "the same to *John Atkins*, esq. and his heirs (*prout* the "contract)." "That *Atkins* entered into possession on the "21st of December, cut timber, and did other acts of "ownership. That afterwards, on the 9th of February, "1770, *Kent* surrendered the premises, out of court, to the "use of the said *John Atkins*, and his heirs. That *John* "*Atkins* died without issue, on the 15th of April, 1770, "without being admitted to the said premises, or the said "surrender being presented, and before any court was held "for the said manor. That, on the 20th of June, 1770, "*Henrietta Atkins*, the defendant, the widow of the said "*John Atkins*, was admitted tenant for her life, and paid a "fine and a half for such admission; the whole fine, in right "of her late husband, which he would have paid on admittance; the half, for her own life estate. That afterwards, "on the 14th of September, 1770, *George Atkins*, the lessor "of the plaintiff, the brother and heir of the said *John Atkins*, "was admitted tenant, as brother and heir of the said *John* "*Atkins*, saving the right, &c. (*prout* both admissions); and "paid one fine for the same, as for the admission of the heir. "That some lands, held of the said manor, are called purpresture; others, bond lands. That the only difference "between *purpresture* and *bond* lands is this, that the *purpresture* descends to the eldest son; that tenants thereof "are not entitled to a right of common; and that no heriot "is due for the same. That *bond* land descends to the "youngest son; has a right of common; and that a heriot is "paid on death or surrender of a tenant thereof. That

"part

" part of the premiſes in queſtion was bond land, which " was held by twelve copies; and part purpreſture, held by " three copies. That *John Atkins* paid the heriot on the " ſurrender, and the defendant paid the heriot on his death, " who was executrix of the ſaid *John Atkins*. That the " cuſtom of the manor, with reſpect to widows' eſtate, is " this, that, if the huſband dies ſeiſed, the widow has a right " to be admitted to the land, for her widowhood, paying one " penny; or for the term of her life, paying half the cuſtom- " ary fine certain. That no inſtance appeared, that any " purchaſer or heir, before admittance, was received as " tenant, or taken upon the homage; nor any inſtance of " ſuch being refuſed or offered. That theſe lands held of " the ſaid manor, when entailed, are barred by recovery ſuf- " fered in the lord's court, by plaintiff; in which the de- " mandant uſually claims the land as held at the will of the " lord, according to the cuſtom of the manor. That, on " the death of a tenant, proclamations are made for the heir " to come into court, and fine for his lands." THE QUESTION is, " Whether the plaintiff, on this caſe, ought to recover?"—The leſſor of the plaintiff, as brother and heir at law of the ſurrenderee, contended, that his anceſtor was ſo ſeiſed, as that the lands did, by law, deſcend to him; BUT THAT HE WAS NOT SO SEISED AS TO ENTITLE THE WIDOW TO HER FREE BENCH.—The caſe was very fully argued, CURIA ADVISARE VULT.—And now Lord MANSFIELD, CH. J. delivered their opinion: What is ſtated, relative to the premiſes not being *copyhold at the will of the lord*, makes no difference as to the *queſtion*; and, therefore, I ſhall conſider it as a *general* point, common to all eſtates which *paſs by ſurrender and admittance*. THE QUESTION is, " WHETHER the heir of the ſurrenderee, who dies before " admittance, ſhall avoid the free-bench or cuſtomary dower " of the widow, *becauſe* he died before admittance?" In this caſe, the contract is for a purchaſe and ſale. The ſurrender is the *ſubſtantial* part of the conveyance; and a *complete* execution of the contract, as between the *vendor* and the *vendee*. The ſurrender and the admittance are different parts of the *ſame conveyance*; the *formal* effectuates the *ſubſtantial* part, and, therefore, muſt *relate* to it: both together make but *one* conveyance. The admittance muſt be purſuant to the ſurrender, and, conſequently, muſt *operate* as from the *date* of it. Surrender to *A.* before admittance, ſurrenderor dies; *A.* is afterwards admitted. *A.* ſhall avoid the free bench of the widow of the ſurrenderor; for, *A.*'s admiſſion has *relation to the ſurrender*.—If one joint-tenant ſurrenders to the uſe of his will, his deviſe ſhall take, for the admittance *relates* to the ſurrender, and, from that time, ſevers the joint-

tenancy, *Benſon* v. *Scot*, 3 *Lev.* 385. 1 *Salk.* 185. *Co. Lit.* 59. b.—It is laid down, 4 *Co.* 49. *b.* that the lord is only an inſtrume t; that, after admittance, the ſurrenderee is in by him who made the ſurrender. That, although the ſurrenderor, or the tenants, by whoſe hands the ſurrender was made, die, yet preſentment and admittance afterwards is good; and where he, to whoſe uſe the ſurrender is made, before admittance dies, his heir ſhall be admitted. The true reaſon is drawn from the context, and given in *Bacon*'s Abridgment: vol. 1. p. 476. "For, upon admittance, the eſtate is in *ceſtui* "*qui uſe* from the time of the ſurrender, *by relation.*"—*Moore*'s caſe, *Trin* 40 *Eliz.* 2 *Siderfin*, 38. 1 *Rol. Abr.* 627. *pl.* 9. referred to by Juſtice *Newdigate*, in the caſe of *Blunt* v. *Clarke*, is not ſtated, nor does it appear what the queſtion was. The propoſition in *Roll*'s *Abr.* "that the heir, being "admitted, is in by the lord, and *not* by him that made the "ſurrender," is contrary to truth, and to all the authorities. The lord is a mere inſtrument, and cannot vary from the ſurrender; and in the ſame ca e of *Blunt* and *Clarke* (reported afterwards in the ſame book, 2 *Siderfin*, 61), *Glynn*, Chief Juſtice, ſays, "if a man, ſeiſed of copyhold in Borrough-"Engliſh, ſurrenders to the uſe of *I. S.* and his heirs, and "*I. S.* die before admittance, leaving two ſons, the younger "of them ſhall have the land, becauſe he is in by deſcent, "or, at leaſt, by force of the firſt ſurrender, and ſo in nature "of a deſcent." And it is ſaid in the treatiſe of tenures, aſcribed to Ld. Ch. B. *Gilbert*, and, I ſuppoſe, written by him, "that this opinion ſeems to be very reaſonable; for, "'heirs' was certainly there a word of limitation, and not "of purchaſe; and certainly there is as much reaſon to "adjudge the heir in by deſcent here, as there is to adjudge "an heir in by deſcent, where a recovery was had againſt "the anceſtor, but not executed till after his death, becauſe "the uſe might have veſted during the life of the anceſtor, "and becauſe the execution hath a retroſpect. And, in "truth, the caſe of a ſurrender is juſt the ſame, for admit-"tance might have been in the life of the anceſtor; and, "when it was had, it had a *retroſpect.*" And in the margin he refers to *Shelley*'s caſe, in 1 *Co.* 106, where the opinion was, "that the execution had a retroſpect to the recovery." With this reaſoning we agree, and are of opinion, "that, "*upon admittance*, the heir is in *by deſcent*, from the *ſurrender*, "to which the admittance *relates.*"—The leſſor of the plaintiff, in this caſe, is expreſsly admitted *as heir.* The law caſts the free-bench upon the widow, juſt as it caſts the deſcent upon the heir. The admittance, *by relation*, makes her huſband ſeiſed from the date of the ſurrender.—There is no rule better founded in law, reaſon, and convenience, than this,

"that

" that all the ſeveral parts and ceremonies neceſſary to com-
" plete a conveyance ſhall be *taken together*, as *one act*, and
" operate from the *ſubſtantial* part, *by relation.*"—Livery relates to the feoffment; inrollment, to the bargain and ſale; a recovery, to the deed which leads the uſe: ſo, admittance ſhall relate to the ſurrender, eſpecially when it is a ſale for a valuable conſideration, as in this caſe.—The title is not complete till admittance; and to the lord it is material, in reſpect of his fine: but, as between the parties, the vendor and the vendee, the admittance is mere form. This agreement is executed, and the land bound by the ſurrender. The lord is compellable, by *mandamus*, or decree, to admit. The vendor, his widow, his heir, and all claiming under him, are concluded from ſaying, after admittance, " that the
" land did not paſs *from the day* of the ſurrender." Upon this ground the leſſor of the plaintiff claims the inheritance whereof his brother died ſeiſed: it ſhall not be in his mouth to ſay againſt the widow, " that his brother did *not* die
" ſeiſed." Therefore let judgment be for the defendant.—
JUDGMENT for the DEFENDANT.

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## Eaſt-India Company.

Capt. Parker v. Lord Clive, Ea. Ter. 9 Geo. 3. B.R. 4 *Burr.* 2419.

A MILITARY officer, in the ſervice of the Eaſt-India company, has not a right to reſign whenever he pleaſe.—This was an action brought by an officer in the military ſervice of the Eaſt-India company, againſt the defendant, who was commander-in-chief of their forces in India, for an aſſault and falſe impriſonment.—The tranſaction aroſe in the Eaſt Indies, upon a diſpute about a perquiſite called *batta*, which was thought proper, by Lord *Clive*, to be diſcontinued in future, or, at leaſt, conſiderably leſſened. The officers were exceedingly diſſatisfied with this reduction of their pay, or perquiſite, which had been allowed to their predeceſſors, and reſented it ſo highly, that 175 of them threw up their commiſſions, and quitted the ſervice; of which number Captain *Parker* was one. *Whereupon Lord* Clive, *as commander-in-chief, impriſoned him, and he was kept four months in cuſtody; but a court-martial being called upon the occaſion, he was tried by it, and acquitted, as they apprehended him to have a right to reſign his commiſſion, and quit the ſervice.* Lord MANSFIELD, before whom the cauſe was tried, held that theſe military officers, in the ſervice of the Eaſt-India company, were

were *not* at liberty to resign their commissions, and quit the service at *any* time, and under *any* circumstances, merely *ad libitum*, whenever they themselves should think fit, or be so inclined. If that were the case, then indeed it would follow, that after resigning their commission, and thereby ceasing to be objects of military jurisdiction, Lord *Clive* could no longer have any power over them. And his lordship accordingly directed a nonsuit, but with liberty to move the Court to set it afterwards aside, *without* costs.—Such motion having been made, the point was argued, and, PER CURIAM, we are all of opinion, "that a military officer "in the service of the East-India company has *not* a right "to resign his commission at *all* times, and under *any* cir- "cumstances whatsoever, *whenever he pleases*."

*Vertue v.* Lord Clive, Mic. Ter. 10 Geo. 3. B.R. 4 *Burr. Rep.* 2432.

So in this case, the question was, "Whether Mr. *Vertue*, "the present plaintiff, was *in* his *military* capacity at the "*time* when he quitted the camp?" And, therefore, the object of military law at the time of holding the court-martial on him. Lieutenant *Vertue*, who was a lieutenant of Seapoys, on the 7th of May, went to Colonel *Smith* and complained of certain orders, and offered to resign. Colonel *Smith* refused to accept his resignation, and commanded him to stay in the camp. *Vertue* left his commission upon Colonel *Smith*'s table, and, the next morning, went away from the camp, in the sight of the commanding officers, and of the men under arms: whereupon, Colonel *Smith* ordered him to be arrested, and he was arrested accordingly, and afterwards tried by a court-martial, and ignominiously broken.—Lieutenant *Vertue* could not resign *before* the end of the month, because the advanced month's pay had been paid to the agent of these troops, by the paymaster, upon the 28th of April, to be distributed among the officers as usual; and Mr. *Vertue* was *mustered* on the 1st of May, and, on the 6th of May, he wrote a letter to Colonel *Smith*, *signed as lieutenant*; and again another, on the 7th, *owning himself a lieutenant*: consequently, he was so on the 8th, in the morning. PER CURIAM: In Captain *Parker*'s case, we were clear in the abstract opinion, "that these officers cannot "resign at *all* times, and under *any* circumstances, whenever "they please."—As to their being bound *for life*, by their contract—they certainly are *not*. But, though no particular period is fixed, and though they are not bound for life, it does not, however, follow, "that they are at liberty to "quit under *all* circumstances whatsoever." And it is clear, that this gentleman was an officer in the service at the time when he quitted it.

Nicoll v. Verelst, Ta. Ter. 30 Geo. 3. C.B. 2 Black. Rep. [illegible].

The exclusive trade granted to the East-India company, means the inland trade as well as mere exports and imports; and a person going to, or trafficking in India, without licence, though

though it be in an independent province, not subject to the company, may, for such offence, be seized by the company's servants.

Bolts v. Purvis, Tr. Ter. 15 Geo. 3. C.B. 2 *Black. Rep.* 1022.

And the being an alderman of Calcutta does not authorize the trafficking and trading in the East Indies without license.—This was an action of trespass, assault, and imprisonment: the pleas were, 1st, not guilty; 2dly, a justification, as captain of an East-Indiaman, viz. that he took the plaintiff on board his ship, and brought him to England, in pursuance of an order of the council at Calcutta, he, the plaintiff, having been found there, and being then and there *trafficking and trading* without lawful authority. The replication set forth certain letters patent from the crown, establishing the court of the mayor and aldermen of Calcutta, and that the plaintiff was one of the aldermen of Calcutta, and as such lawfully authorized to be there. To this the defendant demurred, and assigned for cause (*inter alia*), that the plaintiff had not confessed, and avoided, traversed, or denied, that he was *trafficking and trading* in the East Indies.—By the Court, the plaintiff in his replication has stated abundance of matter to shew, that he was lawfully authorized *to be in the East Indies*; but says nothing as to his *trading and trafficking there*. The doubt is, whether this be material, for whatever is materially pleaded on one side, ought to be answered on the other. Now, when the king's charter for establishing the court of the mayor and aldermen was obtained, the trading without consent of the company, was an offence by law. The king's charter could not repeal the law, nor annihilate the offence; nor can the making a man an alderman, give him an implied leave to exercise an illicit trade. It would be a harsh construction to suppose, that making one an officer of the company, would give him a right to oppose and rival his masters: there may have been an unlawful trading and trafficking, which might authorize the company to remove him, and he ought in pleading, either to traverse, or to confess, and avoid the charge of it.

Sumner v. Green, Mic. Ter. 30 Geo. 3. C.B. 1 *Hen. Black.* 301.

The defendant, in this case, having been arrested on a *respondentia* bond, for 5900l. a rule was granted, to shew cause, why he should not be discharged out of custody, on entering a common appearance. On an affidavit, which stated, that *the bond was given for goods, shipped by the plaintiff, a British subject at Calcutta, in the East Indies, on board an American ship, homeward bound, from thence to Rhode Island, in America, which had previously landed in Bengal a cargo from Europe*.—AND THE QUESTION was, Whether the bond, under the above circumstances was not void, by the 2d section of the statute 7 *Geo.* 1. *st.* 1. *c.* 21. which enacts, "That all contracts and agreements whatsoever, at any time "from and after June 24, 1721, made, or entered into, by "any

" any of his majeſty's ſubjects, or any perſon or perſons in " truſt for them, for, or upon the loan of any monies by " way of bottomry, on any ſhip, or ſhips, *in the ſervice of* " *foreigners, and bound, or deſigned to trade in the East Indies,* " or parts aforeſaid; and *all contracts* and agreements what- " ſoever, made by any of his majeſty's ſubjects, or any perſon " or perſons in truſt for them, for the *loading or ſupplying any* " *ſuch ſhip, or ſhips, with a cargo, or lading of any ſort of* " *goods, merchandize, treaſure, or effects, or with any proviſions,* " *ſtores, or neceſſaries, &c. &c. ſhall be void?*"—PER CURIAM: We are all of opinion, that the defendant ought to be diſcharged on entering a common appearance. But we do not think it neceſſary to give *a decided opinion on the act*, becauſe, where the plaintiff has the defendant in cuſtody, and the cauſe of the arreſt being communicated in his own affidavit, appears by reference to the ſecurity on which the debt ariſes, it would be improper to hold the party in priſon, if there appears a probable ground, that the contract which is the foundation of the action, is void. If the contract were not only void, but miſchievous, the law might be evaded, if the plaintiff were permitted to retain the advantage which he has gained over the defendant, and make uſe of the opportunity of treating with him while in confinement; for, poſſibly, the merits of the caſe might then never meet the examination of a court of juſtice. I do not chooſe to enter into the conſtruction of the ſtatute, becauſe the conſequences are very extenſive, ſince if it be as the defendant ſuggeſts, the ſecurity is not only void, but the other clauſes go to ſubject the plaintiff to very conſiderable penalties: but I think it ſeems probable, that in its true meaning, it would reach all trading in the East Indies, for the purpoſe of ſending goods to other parts of the world, contrary to the proviſions of the charter of the East-India company.—Rule abſolute for defendant's diſcharge.

D. Blachford, [illegible] executors of G. Blachford, v. Preſton, [illegible] Ter. 29 Geo. 3. B.R. 3 Ter. Rep. 89.

A ſale (by the owner) of the command of a ſhip, employed in the East-India company's ſervice, without the knowledge of the company, is illegal; and the contract of ſale cannot be the foundation of an action.—This caſe was as follows: In the year 1783, the teſtator, *G. Blackford*, was appointed to the command of the Foulis East-Indiaman, on the recommendation of the defendant, the huſband or managing owner, for which he paid the defendant 500*l*. On his appointment, he and the defendant entered into a charter-party with the East-India company, in which it was agreed, that "*neither he or the defendant, ſhould ſell, or permit, or ſuffer any other perſon to ſell to the maſter, or any other officer of the ſhip, his, or their place, or office, or to take any promiſe or reward for, or in reſpect of any place or office, in, or belonging to the ſhip, &c.*" In 1791, the Foulis was loſt at ſea, with the captain on board,

board, in her passage from Madras to Bencoolen. In 1794, the defendant obtained leave from the East-India company to build another ship (the Cirencester), in lieu, and on the bottom of the Foulis, and appointed Captain *Lindsay* to the command, in consideration of 2500l. paid in money, and of a bond for 2500l. more, which he (the defendant) afterwards paid to the widow and children of Captain *Blachford*, not to the plaintiffs, his executors. For a long time prior to the testator's appointment to the Foulis, it had become usual for the captains of East-India ships to purchase their commands, though it was contrary to the bye-laws of the company. In February, 1796, the court of directors came to a resolution, which was afterwards confirmed by the proprietors, to abolish the practice "*long known to have been privately carried on, and at last, publicly avowed, of the sale of commands*," and to make a pecuniary compensation to those who had paid for their commands. And, in consequence of this, the company afterwards allowed Captain *Lindsay* 4833l. as a compensation for what he had paid to the defendant. Under the above resolution, the company also made allowances to the executors of some late commanders. There was no written contract between the testator and the defendant, but it seemed admitted that the former had paid the latter 5000l. under a promise that it should be returned when his successor was appointed.—It was contended, that the contract on which the action was founded, was illegal, because it was *not only contrary to the bye-laws of the East-India company, and to the charter-party* which had been executed both by the testator and the defendant, *but was also inconsistent with public policy*.—On the other hand it was urged, 1st, That the defendant ought not to contend that this contract is void, as having been entered into, contrary to the bye-laws of the East-India company, because the agreement was founded on a practice that had universally obtained for a long period, and that even with the knowledge of the East-India company.—2dly, That there was still less ground for saying that this contract was void, because contrary to the stipulations of the charter-party, for the contract was entered into before the charter-party was in existence.—And, 3dly, That it could not be said that the agreement is illegal and void, as being against the principles of sound policy. For though it may be admitted that there are other offices, besides those that are enumerated in the stat. 5 and 6 *Ed. 6. c.* 16. that cannot legally be sold, they must be offices respecting which the public are concerned. But the employment in question does not concern the public, but is a mere private appointment by a great commercial company.—Lord KENYON, Ch. J. [the other judges concurring]: There is no rule better established respecting the disposition of every office in which the public are concerned than

than this, *detur digniori*; on principles of public policy, no money conſideration ought to influence the appointment to ſuch offices. This principle was much conſidered by the late Lord Chancellor *Thurlow*, in a caſe that came before him on an injunction bill, where a noble lord having, in conſequence of his own office in the king's houſehold, recommended another perſon to the appointment of another place in the houſehold, and having made that recommendation, in conſideration of an annuity to be granted to a third perſon, not to himſelf, the contract was conſidered as illegal; and a perpetual injunction was granted to the party ſuing on that contract in a court of law (1). Up to a certain extent, the legiſlature have interfered and prohibited, by the ſtat. 5. and 6 *Ed.* 6. the ſale of ſome offices; but whether or not that act of parliament were neceſſary for the purpoſe, I will not now inquire. If the contract, which is the foundation of this action, were legal, and the queſtion were, whether the executors or the widow, of the late Captain *Blachford*, were entitled to the money in diſpute, the right of the former muſt have prevailed. But a plaintiff, who comes into a court of juſtice to enforce a contract, muſt come on legal grounds; and if he have not a legal title, he cannot ſucceed, whatever the private wiſhes of the Court may be. In this caſe, the plaintiffs have relied on the practice, that (as it is ſaid), had ſo long prevailed, of ſelling the commands of ſhips: but that practice is in violation of the laws and regulations of the Eaſt-India company. And it appeared, in this caſe, that in the year 1783 a charter-party was entered into, to which the plaintiff's teſtator, the defendant, and the Eaſt-India company, were parties, and by the expreſs ſtipulations of that contract it was agreed that no place or office in the ſhip ſhould be ſold. I may again reſort to that with which I ſet out, that public policy requires that there ſhould be no money conſideration for the appointment to an office in which the public are intereſted; the public will be better ſerved, by having perſons beſt qualified to fill offices appointed to them; but if money may be given to thoſe who appoint, it may be a temptation to them to appoint improper perſons. The Eaſt-India company is a limb of the government of the country; and, on the ground that this contract was a fraud on the Eaſt-India company, from which much miſchief to the public may enſue, I am of opinion that it cannot be made the baſis of an action.

Franſciſco *v.* Gilmore, Mic. Ter. 38 Geo. 3. C B. 1 *Pul.* et *Boſ.* 177.

The defendant was captain of the Eliza-Anna, an India country trader, and the plaintiff one of her crew. It is the cuſtom of the India country trade, for the captain of ſhips

(1) See *Hantington* v. *Du Chattel*, 1 *Bro. Ch. Caſ.* 124.

to

to contract with a perſon called a *ſerang* (or captain of an Indian crew) for a number of ſeamen, for whom he pays the *ſerang* at a certain rate per man per month; the captain is not anſwerable to the crew for their wages, but to the *ſerang* alone, to whom the crew look for payment. In this manner the defendant contracted with a *ſerang*, at Bengal, for a crew; his ſhip was then taken up by the government of that country, and ſent to England with rice; having landed her cargo here, ſhe was ſent with troops to the Weſt Indies, and from thence back again to England with invalids. Being again arrived here, the plaintiff, together with eighteen other ſeamen, quitted the ſhip, and commenced actions againſt the defendant for wages; to which he put in bail, and ſoon after ſailed for India, with the *ſerang* and the reſt of the crew on board.—It was moved, that a writ, in the nature of a *mandamus*, might iſſue in this cauſe, directed to the mayor and aldermen for the time being, being the judges of the mayor's court at Bombay, in the Eaſt Indies, commanding them to hold a court for the examination of witneſſes, purſuant to the directions made in the 13th year of the reign of his preſent majeſty (1), and that the depoſitions might be tranſmitted here, and read in evidence; and that the trial might be put off, until after the return of the writ.—EYRE, Ch. J. The affidavits on which the rule was obtained, did not inform us, what the voyage was on which the wages aroſe; we could not ſay with certainty, that it was even a voyage out of the country trade. But it now turns out, that, under colour of a bargain, not unuſual reſpecting country ſhips, theſe poor men have been dragged to the Weſt Indies, and that the wages now ſued for aroſe on a voyage to and from the Weſt Indies only. Is it poſſible to ſuppoſe that an uſage in the India country trade, or a contract made in India, founded upon that uſage, could be intended to extend to ſuch a tranſaction as this, where the men have been taken to a different deſtination from that originally in view, and kidnapped, as it were, to the Weſt Indies, having had no idea that ſuch a voyage was to be included in the contract made in Bengal? As ſoon as the

(1) By 13 *Geo.* 3. *c.* 63. *ſ.* 44 it is enacted, "That when and as often as the India company, or any perſon or perſons whatſoever, ſhall commence and proſecute any action or ſuit in law or equity, for which cauſe hath ariſen, or ſhall hereafter riſe in India, againſt any other perſon or perſons whatſoever, in any of his majeſty's courts at Weſtminſter, it ſhall and may be lawful for ſuch Court reſpectively, upon motion then made, to provide and award ſuch writ or writs in the nature of a *mandamus* or commiſſion, to the chief juſtice and judges of the ſupreme court of judicature for the time being, or the judges of the mayor's court at Madras, Bombay, or Bencoolen, as the caſe may require, for the examination of witneſſes as aforeſaid; and ſuch examination being duly returned, ſhall be allowed and read, and ſhall be deemed good and competent evidence at any trial or hearing, between the parties in ſuch cauſe or action."

Court

Court is informed of these circumstances, it must see that it has not any jurisdiction whatever to grant the writ in question. *The cause of action did not arise in India.* The only ground on which we could put off the trial, is the absence of a material witness; to do this, we must take the circumstances of the case into consideration, and inquire into the probability of the *Serang*'s return to England; but here we learn that he is but just departed from this country, in company with the defendant himself, having been here in his power since the commencement of the action. Besides, I much doubt whether we should ever get the *mandamus* executed, even if we had the power to grant it; the *Serang* is a mariner, and probably is gone elsewhere, beyond the reach of those to whom we might direct our writ.—*Per Curiam:* Rule discharged with costs.

## Ejectment.

### *By whom an Ejectment may be maintained.*

Doe *ex dim.* Hodsden *v.* Staple, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 684.

In ejectment, the plaintiff must recover on a legal title.—This was an ejectment brought to recover certain premises in Tatsfield, Surrey. And in the declaration, three demises were laid; *the first*, on the 10th of October, 1768, for 31 years; *the second*, on the 16th of November, 1771, for 21 years; and the last, on the 12th of November, 1787. At the trial, the jury found a special verdict, stating, in substance, as follows: On the 23d of August, 1758, *Richard Staple*, deceased, was seised of the premises in tail general, subject to a term of ninety-nine years, outstanding in *A. Culver*, in trust, for securing four several life annuities to *Sarah Dixie*, *Joseph Coxe*, *Mary Curwen*, and *Mary Day*; which term was determinable on the death of the survivor of the said annuitants, and, subject to the said annuities, was limited in trust to attend the inheritance; the reversion being vested in *Catherine Culver*, who afterwards married *James Hibbins*; *Catherine Culver*, on the 7th of April, 1759, died without issue, in the life-time of her husband, and of the said *Richard Staple*; leaving *Mary Brazier* (who afterwards died in the life-time of *Richard Staple*), and *Richard Hodsden*, the lessor of the plaintiff, her co-heirs. On the 9th of October, 1768, *Richard Staple* died without issue, leaving only one of the annuitants, *Sarah Dixie*, surviving him. On his death, *James Hibbins* entered, claiming the premises under an agreement and will of his wife, subject to the annuity to *Sarah Dixie*. On the 7th of October, 1777, *James Hibbins* died; having devised the premises to *James Lloyd*, for life, with remainders over. After his death, *James Lloyd* entered, claiming title subject to the annuity. On the 14th of November, 1786, *Sarah Dixie* died, and the

the term of ninety-nine years determined. The ſaid *Richard Staple*, *James Hibbins*, and *James Lloyd*, regularly paid the annuity, and the truſt of the term was ſatisfied, at the time of the death of *Sarah Dixie*. The ſpecial verdict then ſtated, that *Richard Hodſden*, after the death of *Richard Staple*, to wit, on the 9th of October, 1768, as heir of *Catherine Culver*, claiming title to the premiſes, ſubject to the annuity payable to *Sarah Dixie*, entered and ejected the ſaid *James Hibbins*, and was ſeiſed of the premiſes; and being ſo ſeiſed, demiſed to the plaintiff, as mentioned in the firſt count, by virtue whereof the plaintiff entered, and was poſſeſſed till the defendant, as ſervant of the ſaid *James Hibbins*, ejected him. That the ſaid *Richard Hodſden*, after the deaths of the ſaid *Richard Staple* and *James Hibbins*, to wit, on the 5th of November, 1777, mentioned in the ſecond count, entered and ejected *James Lloyd*; was ſeiſed ſubject to the annuity; and demiſed to the plaintiff, who entered and was poſſeſſed till the defendant, as ſervant of *James Lloyd*, ejected him. The ſaid *Richard Hodſden*, after the deaths of the ſaid *Richard Staple* and *James Hibbins*, and after the termination of the truſt term, to wit, on the 12th of November, 1787, entered and ejected *James Lloyd*; was ſeiſed, and demiſed to the plaintiff, who entered and was poſſeſſed, till the defendant, as ſervant to *James Lloyd*, ejected him.—THOUGH THE PLAINTIFF WAS ENTITLED TO RECOVER, YET A MATERIAL QUESTION AROSE, viz. *on which of the counts judgment ſhould be given in his favour*; in the conſideration of which it became material to attend to the different dates of the demiſes, in the different counts in the declaration. THE FIRST DEMISE was laid on the 10th of October, 1768, being the day after the death of *Richard Staple*, the tenant in tail, upon whoſe deceaſe the reverſion, which had been veſted in Mrs. *Culver*, the teſtatrix, fell into poſſeſſion, ſubject to the remaining annuity to Mrs. *Dixie*. THE SECOND was on the 16th of November, 1777, a ſhort time afer the death of Dr. *Hibbins*, ſo as to be adapted to the title of the leſſor of the plaintiff, in caſe the doctor ſhould be thought entitled to an eſtate for life, and the term for ſecuring the annuities ſhould not be deemed a bar.—THE THIRD was on the 12th of November, 1787, which was ſubſequent to the death of the laſt annuitant, and the determination of the term.—LORD KENYON, Ch. J. As to the queſtion, *On what count in the declaration the verdict ſhall be given?* We muſt remember that we are in a court of law. I extremely approve of what was ſaid by Lord *Mansfield*, in the caſe of *Lade* v. *Holford*, and another (1), that he would

(1) 3 *Burr.* 1416. 2 *Bl. Rep.* 428. *Bull. N. P.* 110. Vide p. 228. *ſupra.*

*not ſuffer a plaintiff in ejectment to be nonſuited, by a term ſtanding out in his truſtee, or a ſatisfied term ſet up by a mortgagor againſt a mortgagee,* but would direct a jury to preſume a ſurrender: I much approve of that; and when a ſurrender is preſumed, there is an end of the legal title created by the term. But here the facts of the caſe preclude any ſuch preſumption: there was an exiſting term at the ſeveral times of the two firſt demiſes laid in this declaration, and a conſiderable benefit was to be derived out of it: the laſt annuitant did not die till after the time of the ſecond demiſe; therefore there is no reaſon to preſume that the truſtees had ſurrendered, and they would have been perſonally liable, if they had. Suppoſing two ejectments had been brought at the ſame time, before the death of the laſt annuitant, the one by the truſtees of the term, and the other by the preſent leſſor of the plaintiff, the judge could not have directed the jury to find for both; but the truſtees muſt have recovered, for they would have ſhewn a legal title. The juriſdiction of this Court in ejectments, is confined to legal titles; taking care that they do not intrude on the rules of law, nor diſcuſs equitable titles. In real actions there is no doubt, but that the party muſt ſtate a legal title on the record; then it would be abſurd that, reſpecting the manor of Dale, on a ſpecial verdict in *formedon*, the deciſion muſt neceſſarily be given, according to the ſtrict legal title; and that reſpecting the manor of Sale, on a ſpecial verdict in ejectment, there muſt be a contrary judgment. In this caſe, it is impoſſible to ſuppoſe that there was a ſurrender of the term, or that it was ſatisfied, becauſe the verdict find the contrary fact. Therefore, I am of opinion, that judgment muſt be given only on the laſt count in the declaration, after the death of the laſt annuitant.—ASHHURST, J. I think judgment muſt be given on the third count only, becauſe, during the exiſtence of the term, the heir at law was not entitled to recover.—BULLER, J. (*contra*): I am ſorry to be under the neceſſity of differing from the opinion which has been given. It is a queſtion of the moſt ſerious importance to the public in general, whether that ſhall ſtill be conſidered as law, which has undoubtedly been received as ſuch for thirty years paſt; or whether, in all caſes, as between the truſtee and the *ceſtui que truſt*, or between the perſon entitled to the profits of the eſtate, and him who is entitled to certain incumbrances on it, we muſt abide by the ſtrict letter of the law, and ſay that, if there is any legal outſtanding term, the leſſor of the plaintiff ſhall not recover. In the firſt place, the caſe of *Doe* dim. *Briſtowe* v. *Pegge*, (1), goes directly to this

(1) In this caſe it was held, that a mortgagor cannot ſet up the title of a third perſon, againſt his mortgagee in ejectment. See title MORTGAGE, *infra*.

point.

point. In that case there were outstanding incumbrances; but as neither party affected to disturb, but admitted them, and as the trustees did not assert their title, the Court would not permit the term, which was created for securing those incumbrances, to be set up to nonsuit the plaintiff. Suppose the estate, in this case, had been of the annual value of 1000l. and the charge upon it had only been 20l. *per annum*, which was to be raised by a term, the heir at law would be entitled to have the management of the estate, and to improve it, and to have all the profits except that charge; and if he did not intend to disturb that charge, I think the term ought not to be set up against him; for why should he be deprived of that to which he is entitled? *This case, in its consequences, will go a great way to overturn that which has been considered as settled law in a variety of cases*, where it has been held that, though the immediate possession may belong to some other person, yet provided the lessor of the plaintiff claims under the same title with the defendant, and acknowledges that the person who made the defendant's lease, had a right to make it, and does not mean to disturb it, but is only desirous of being put into the receipt of the rents and profits of the estate, the ejectment may be maintained; otherwise, where the title is disputed between the heir at law and the devisee, and there is a lease for twenty-one years in existence, neither of them could get into possession. But all these cases must fall to the ground, if it were sufficient to find out some term outstanding in a third person, and set it up as a bar to a recovery in ejectment. Again, in the case of a mortgage, shall a mortgagee be compelled to take possession, whether he will or not? It is contrary to the intention of the parties. He only takes the legal estate as a security; if it were otherwise, no person would lend his money upon such terms. A mortgagee would say, that he would have nothing to do with the management of the estate; and if he be unwilling to take the estate, shall it be competent to a third person to compel him? So, where portions for younger children are to be raised, if they, who are probably at a distance from the spot, are content that the eldest son shall have the estate, shall they or their trustees be compelled to take possession, and hold it against the head of the family? Very serious mischiefs will follow from such a determination. THE QUESTION THEN is, *Whether we are going too far in a court of law, in preventing the legal title from being set up as a bar to a recovery in ejectment in such cases?* If we are, we must determine that a court of law is totally incapable of examining a question of trust, and indeed of deciding whether it be a trust or not: but *if we are to do that, we must overturn every case upon the subject, from*

*the time of* Littleton *down to the preſent hour.* *Littleton* (1) ſays, that the *ceſtui que uſe* ſhall ſerve in aſſizes and other inqueſts, and this by the common law; for that the law wills that the feoffors and their heirs ought to occupy and take the profits, as if the lands were their own, without interruption of the feoffees. In that inſtance, courts of law are bound to enter into the queſtion of truſt, and ſay what effect it ſhall have. On looking into the ſtatute of 27 *Hen.* 8. *c.* 10. it ſeems ſtrange that any doubt ſhould ever have been made concerning the true conſtruction of it. Not that I mean to overturn any of the caſes which have been determined on the diſtinction between uſes and truſts, as to the limitations of real eſtates. They have been decided, and for the ſake of certainty muſt be adhered to. *For the ſame reaſon I think what has been conſidered as ſettled law for thirty years paſt, ought not now to be departed from.* But when the ſtatute ſaid that all uſes and truſts ſhould be executed, it ſeems ſtrange that any diſtinction ſhould have been afterwards made, even in a court of law. It was not, perhaps, much to the credit of the times, that ſuch a diſtinction was ever made: and, as Lord *Hardwicke* ſaid, this act of parliament, which was paſſed with the utmoſt ſerioufneſs and deliberation, by this conſtruction, had no other effect than to add three words to a conveyance. That cannot now be unſettled. But the queſtion, in the preſent caſe, is, Whether, againſt plain ſenſe, we ſhall overturn all the caſes that have been determined upon ejectments? And, in my opinion, there is a ſubſtantial difference between ejectments and real actions; the reaſoning on one is not applicable to the other. The actions are *diverſo intuitu*; and are not brought for the ſame purpoſes or for the ſame intereſts. And, therefore, it is true that a party may be entitled to recover in ejectment, who is not entitled to recover in a real action. A real action can only be brought for the freehold; whereas an ejectment may be brought for a term of years, for which a real action will not lie. An ejectment is a fictitious remedy; and it has always been ſo modelled, as may be beſt adapted to the adminiſtration of juſtice, and to eaſe parties in the recovery of their rights. It has been extended to the caſes I have mentioned, and to caſes ſimilar to the preſent, where, though there has been an outſtanding term, yet, the plaintiff undertaking not to diſturb the incumbrances, the defendant has not been permitted to ſet it up againſt him. *Therefore, I am of opinion, that judgment ſhould be entered on the ſecond count in the declaration.*—Grose, J. I agree with my Lord Chief Juſtice, and *Aſhhurſt*, J. I am very well

(1) *Sect.* 464.

aware,

aware, that ſome bad conſequences may follow from recognizing, in a court of law, the doctrine which we are now conſidering: but the legiſlature muſt interfere and remedy that. We are ſitting in a court of law, and are bound to give a legal deciſion. The owner of the eſtate raiſed a term for 99 years, and ſaid that, for particular purpoſes, the truſtees ſhould have the poſſeſſion of the eſtate. Then, if the truſtees are in poſſeſſion, no perſon can turn them out of poſſeſſion till the purpoſes of the truſt are anſwered. The purpoſe of raiſing the term was, that the truſtees ſhould have it in their power to raiſe the annuities. Then ſuppoſe them out of poſſeſſion, the truſtees may ſay it was the will of the donor that they ſhould have the poſſeſſion for thoſe purpoſes. To determine, therefore, that, if in poſſeſſion, they ſhall not retain it, or ſhall not recover it, if out of poſſeſſion, would be counteracting the will of the perſon creating the term, and would be taking the eſtate out of the poſſeſſion of truſtees, and putting it into the hands of perſons different from thoſe he intended. It is true, that the purpoſes for which ſuch a term is created may be trifling, when compared with the reſt of the eſtate; but we cannot take that into conſideration. Therefore, on the broad ground, that we have no right to change the poſſeſſion, and take it from him for whom the owner intended it. I am of opinion, that the judgment is to be entered for the plaintiff on the third count only.—Judgment for the plaintiff on the third count.

Goodtitle *ex dim.* Owen Jones *v.* Evan Jones *et al.* in error, Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 47.

Under certain circumſtances, the jury may preſume a ſatisfied term to have been ſurrendered to the *ceſtui que uſe*: but if no ſuch preſumption be made, and it appear in a ſpecial verdict in ejectment that ſuch a term is ſtill outſtanding in a truſtee who is not joined in bringing the ejectment, the *ceſtui que uſe* cannot recover. Both parties claimed under the reverend *John Jones*, clerk, who, before and in 1749, was ſeiſed in fee of the premiſes in queſtion: but there was an outſtanding ſatisfied mortgage term for 500 years, which had been created in June, 1690, and which in November, 1713, had been aſſigned to *J. Lloyd*, in truſt for *E. Griffiths*, the then owner of the inheritance, and under whom *John Jones* claimed as deviſee. On the 13th of June, 1749, *John Jones*, who on his marriage had ſettled the eſtate in queſtion on his wife for life, with remainder to himſelf in fee, by will deviſed it (after his wife's death), to his eldeſt ſon, *Owen Jones* for life, ſubject to certain charges, with power to raiſe 200l. by mortgage, for younger children; remainder to the iſſue male of *O. Jones*, remainder to his iſſue female; and in default of ſuch iſſue, to his ſecond ſon, *John Jones*, for life, remainder to his iſſue male and female; and in default of ſuch iſſue, to his third and fourth ſon,

*William* and *Thomas Jones* (as before); remainder to his own right heirs. The deviſor afterwards died, leaving iſſue four ſons and a daughter. *In December*, 1780, Owen Jones, *by leaſe and releaſe, mortgaged the premiſes to* J. Derbiſhire, *in fee, for ſecuring* 400*l. In the releaſe, it was declared that the reſidue of a term of* 500 *years created in June*, 1690, *and all other terms (if any ſuch there were), ſhould remain veſted in the ſeveral perſons who were then poſſeſſed of the ſame, in truſt for* Derbiſhire, *his heirs, executors, &c. for ſecuring the* 400*l*; *and after payment thereof, in truſt for* Owen Jones, *and his heirs, and to be diſpoſed of as he ſhould direct, and in default thereof to wait upon the inheritance, &c.* In January, 1787, *Owen Jones*, and the repreſentatives of *Derbiſhire*, the mortgagee (who was then dead), by leaſe and releaſe, conveyed the premiſes in queſtion, to *W. Jones* [not one of the ſons of *John Jones*, clerk] in fee, for a valuable conſideration, out of which the mortgage money due to *Derbiſhire*'s repreſentatives was paid. On the abſtract of the title delivered to *W. Jones*, when he purchaſed, was this memorandum; "The ſaid *John Jones* (the above deviſor), died inteſtate thirty years ago, and his widow, upon whom the above ſettlement was made, died in May, 1780, leaving the ſaid *Owen Jones*, their only child." In June, 1790, *W. Jones* died inteſtate, leaving *Evan Jones*, one of the defendants, his nephew and heir at law, who thereupon entered on the premiſes in queſtion, and has continued in poſſeſſion ever ſince. In October, 1785, *Owen Jones* died without iſſue; *John Jones*, the ſecond ſon of the deviſor *John Jones*, died on the 2d of October, 1790, never having entered into, or been in poſſeſſion of the eſtate, leaving *Owen Jones*, the leſſor of the plaintiff, his only ſon and heir at law. It did not appear that the outſtanding term, created in 1690, had ever been aſſigned by *J. Lloyd*, or his repreſentatives, before the ejectment was brought: but it was ſtated in the verdict, that on the 25th of July, 1793, after the ejectment was brought, adminiſtration of the effects of *J. Lloyd*, unadminiſtered by *G. Lloyd*, was granted to *Griffith Thomas*, who, on the 27th of July, 1793, aſſigned the ſaid term to one *J. Griffith*, in truſt for *Evan Jones*, the defendant.—Lord KENYON, Ch. J. obſerved, that on this ſpecial verdict, the queſtion between the two litigating parties was not open to diſcuſſion; for that it was ſtated in the verdict, that *an old term, which was created in the laſt century, had been from time to time aſſigned, and was noticed as a ſubſiſting term ſo lately as in the year* 1780, *in the mortgage by* Owen Jones *to* Derbiſhire. *That as long as that was in exiſtence, it was an anſwer to an ejectment brought by any other perſon.* That though, under certain circumſtances, a judge might direct a jury to preſume an outſtanding ſatisfied term, to have been ſurrendered

dered by the truſtee, yet, if no ſuch preſumption were made, but it was ſtated as a fact that the term ſtill continued, ſuch a legal eſtate in the truſtee, muſt prevail in a court of law. That what was ſaid by Lord *Mansfield*, in *Lade* v. *Holford* (1), "That he would not ſuffer a plaintiff in ejectment to be nonſuited, by a term ſtanding out in his own truſtee, or a ſatisfied term ſet up by a mortgagor againſt a mortgagee, but direct a jury to preſume it ſurrendered;" muſt be underſtood with this reſtriction, that in either caſe the jury might preſume the term ſurrendered, but that without ſuch ſurrender, the eſtate in the truſtee muſt prevail at law, and that to the propoſition ſo qualified, he fully aſſented.—THE COUNSEL FOR THE DEFENDANT, in error, then ſaid, that *the truſtee of this old term, was a truſtee for the perſon under whom the defendant in error claimed*, and then, according to the directions of the ſtatute 1 *Ric.* 3. *c.* 1. the term could not now avail; that ſtatute enacting that "*every eſtate, feoffment, gift, releaſe, grant, &c. of lands, &c. made by any perſon, &c, to any perſon, &c. ſhall be good and effectual to him to whom it is ſo made, and to all others, to his uſe, againſt the ſeller, feoffor, donor, or grantor, of the ſame, and his and their heirs claiming the ſame only as heirs to the ſame ſeller, feoffor, donor, or grantor, and againſt all others having or claiming any title, or intereſt, in the ſame only to the uſe of the ſame ſeller, feoffor, donor, or grantor, or his or their heirs, at the time of the bargain, ſale,*" &c.—Lord KENYON, Ch. J. It ſeems to me that the ſtatute of *Ric.* 3. is not applicable to ſuch a caſe as the preſent: that only applies to caſes where the truſt, in its origin, was created for the benefit of the owner of the eſtate; but that is not the caſe now before us; this was a mortgage term created in favour of the mortgagee. But in a court of law, we cannot take cognizance of truſts; and we ſhould be confounding the boundaries between the different courts, if we were to allow the plaintiff below to recover in this ejectment, when there is a legal eſtate in another perſon.—ASHHURST, J. When there are two kinds of eſtates in different perſons, the one equitable, and the other legal, the perſon having the equitable eſtate, muſt call in aid the legal eſtate, before he can recover in a court of law. If there had been a demiſe by the truſtee, in this caſe the plaintiff below might have recovered, but he cannot recover on his own title.—GROSE, J. The ſtatute of *Ric.* 3. only relates to conveyances, originally made for the benefit and uſe of the then grantor; whereas here the mortgage term was not created for the benefit of the grantor

(1) *Bull. N. P.* 110 and p. 228. *ſupra.*

but of the mortgagee. Therefore, this mortgage term is neither within the words or the meaning of this act of parliament. Then here is a legal term of 500 years, vested in the person claiming under *J. Lloyd*; and he not having joined in the ejectment, the plaintiff cannot recover. In some cases the jury may presume the surrender of a satisfied term, and that gets rid of the difficulty that exists in this case: but here it appears on the verdict, that the term is an outstanding term.—LAWRENCE, J. I observe that the administration, *de bonis non*, of *J. Lloyd*, was not obtained, until after this ejectment was brought; and, therefore, the plaintiff could not have laid a demise by the trustee: if the jury, however, at the trial, had presumed that this term had been surrendered to *J. Jones*, the devisee of *E. Griffiths*, the administration, *de bonis non*, of *J. Lloyd*, would have been out of the way. *But as this ejectment is brought by a person, who, it appears by the special verdict, has not the legal title, he cannot recover in a court of law.* This question has been much discussed of late years; it was once doubted whether or not a person could recover in ejectment on a clear equitable title: but in *Doe* v. *Staple* (*ante*, p. 288) a majority of the judges of this Court were of opinion, that a plaintiff in ejectment could only recover on a legal title. Therefore I take it to be a settled rule, that the legal title must prevail in a court of law.—With regard to the statute 1 *Ric.* 3. it does not seem to me to be applicable to this case. The legislature, in passing that act, only intended, that where a person having an estate in possession, conveyed it to a trustee to his own use, and afterwards conveyed it away to a purchaser, he should not set up the estate in the trustee against the purchaser; that is, that he should not take advantage of his own fraud, and say that the conveyance to the purchaser was defective, on account of the legal title not being in him, but being in his trustee. It was then desired that a *venire de novo* might issue. BUT THE COURT said, that a *venire de novo* could only be awarded in cases where there was a defective finding in the verdict; and that, though a great deal of evidence was unnecessarily stated in this verdict, sufficient facts were found, to shew that the plaintiff below could not recover, on account of the legal title being in another person.

*Armstrong ex dim.* Tinker *et al.* *v.* Peirse *et al.* Ea. Ter. 6 Geo 3. B.R. 3 *Burr.* 1898.

On an ejectment to recover premises in mortgage, on the several demises of the trustees, for the mortgagor, under a marriage settlement, and the personal representatives of the mortgagee.—THE QUESTION intended to be made, was, "Whether a mere trustee could dispute the possession of his "own *cestui qui trust?*"—But the Court, though they looked upon it as a settled point, "That the formal title of a trus-"tee should not, in an ejectment, be set up against the *cestui* "*qui trust*; because, from the nature of the two rights, the

"*cestui*

"*ceſt i qui truſt* is to have the poſſeſſion;" yet, in this caſe, that was not the queſtion: for here, the leſſors of the plaintiff were not truſtees for the defendant, but for the mortgagees. And, therefore, they immediately gave judgment for the plaintiff.

Right *ex dim.* Green *v.* Proctor, Ea. Ter. 8 Geo. 3. B.R. 4 *Burr.* 2209.

An ejectment cannot be maintained, contrary to the leſſor's own covenant.—*Edward Green* was ſeiſed of a houſe in St. Margaret's, Weſtminſter, a brew-houſe, and the ſtock belonging to it. *Proctor* agreed to purchaſe one-fifth of it. *Green* covenanted to aſſign it accordingly. Articles of partnerſhip were entered into, in which were ſeveral covenants. Amongſt others, *Green* covenanted that the ſaid trade ſhould be carried on between *Green*, *Ekins*, and *Proctor*, &c. and that 300l. allotted for the yearly rent of the houſe, ſhould be paid by *Green*. *He covenanted alſo, that* Proctor *ſhould reſide and dwell in the houſe, free of all rent, except taxes*; and ſhould be allowed certain perquiſites, and houſhold expences, and receive 6l. 6s. weekly for his trouble, &c. And he covenanted, that if he ſhould die, his executor ſhould renew the leaſe to *Proctor*. It was likewiſe covenanted, that neither party ſhould diſpoſe of his ſhare, without acquainting the other. Then there is a proviſo, that *Proctor* and his family may uſe the water of *Green*'s canal. *Proctor* alone reſided in the houſe.—THE QUESTION was, "Whether, upon this "ſtate of the caſe, the plaintiff had a right to recover?"—PER CURIAM: The plaintiff cannot recover againſt his own covenant. Even as a licence to inhabit, it amounts to a leaſe: and it appears moſt plainly to be intended, that he was to reſide in it.—Nonſuit entered.

Goodtitle *ex dim.* Robert Edwards *v.* Peter Bailey, Ea. Ter. 17 Geo. 3. B.R. *Coup.* 597.

In ejectment, which is a fictitious action to recover the poſſeſſion, the leſſor of the plaintiff ſhall not be permitted to defeat a ſolemn deed under his own hand, covenanting that the defendant ſhall enjoy the premiſes, and alſo for further aſſurance.—The leſſor of the plaintiff claimed under a deviſe in the will of one *Nicholas Edwards*; but the defendant was in poſſeſſion of the premiſes under a ſubſequent will, made by *J. E.* the brother of *Nicholas*: and being ſo in poſſeſſion, the leſſor of the plaintiff, by deed of releaſe, dated the 5th of January, 1764, reciting the will of *Nicholas Edwards*, and alſo the will of *J. E.* the brother of *Nicholas*. And further, that it had been agreed, that he, the ſaid *Robert* (the leſſor of the plaintiff), ſhould renounce all his right, title, and intereſt, in the ſaid premiſes, to the defendant, *the ſaid* Nicholas Edwards, *having no power to deviſe the ſame*. He did thereby *renounce, remiſe, releaſe, and for ever quit claim*, to the ſaid defendant, and the heirs male of his body, all the ſaid premiſes, and all his right, title, and intereſt therein, with a covenant, for further aſſurance.—Subſequent to this, he brought his ejectment; this releaſe being read, and proved on the trial, the leſſor of the plaintiff was nonſuited.

ſuited.—AFTERWARDS a new trial was moved for, and on ſhewing cauſe, IT WAS OBJECTED, on the behalf of the leſſor of the plaintiff, 1ſt. That this releaſe was fraudulent upon the face of it, being without conſideration; and 2dly, that the recital, relative to *Nicholas*, having no power to deviſe the premiſes, was falſe.—Lord MANSFIELD, Ch. J. As to the objection of fraud obſerved, there was no evidence of any fraud; that the recital did not appear to be the inductive cauſe of the releaſe; and unleſs ſome inducement was ſhewn, fraud could not be preſumed; if any colourable evidence of fraud had been given, the nonſuit would have been wrong, becauſe fraud in this caſe would be matter of fact, of which the jury are to judge. So if the plaintiff could have made out a caſe of miſtake, it would have been equivalent to fraud; but nothing of the kind appears; and as to the conſideration, it might be fair enough: it depends upon the treaty.—IT WAS THEN OBJECTED, that nothing paſſed by the releaſe in this caſe, for want of proper operative words, for that the word *grant* is not made uſe of—the words being *renounce, remiſe, releaſe, and quit claim*, which are the ſpecial form of words adapted to a releaſe only; and, therefore, cannot operate as a grant.—PER CURIAM: The rules laid down in reſpect of the conſtruction of deeds, are founded in law, reaſon, and common ſenſe: that they ſhall operate according to the intention of the parties, if they may: and if they cannot operate in one form, they ſhall operate in that, which, by law, will effectuate the intention: the objection here is, that in the releaſe in queſtion, the word *grant* is not made uſe of: but that the intention of the parties was to paſs all the right and title of the plaintiff, in theſe premiſes, is manifeſt beyond a doubt; and though, in the ſhape of a releaſe, if there were ſufficient words, it may operate as a grant. *One thing, however, is deciſive*; this is a fictitious action to recover the poſſeſſion. In ſuch an action, if a man has made a ſolemn deed, covenanting that another ſhall enjoy the premiſes, and likewiſe, for further aſſurance, it ſhall never be in his mouth to diſpute the title of the party, to whom he has ſo undertaken, no more than it ſhall be permitted to a mortgagor, to diſpute the title of his mortgagee: no man ſhall be allowed to diſpute his own ſolemn deed: therefore, *quâcunque viâ datâ*, the nonſuit was right.

Heatherly *ex dim.* Worthington and Tunnadine *v.* Weſton, *et al.* Ea. Ter. 4 Geo. 3. C.B. 2 *Wils.* 232.

In ejectment, and a verdict for the leſſors of the plaintiffs, ſubject to the opinion of the Court, THE QUESTION was, Whether tenants, in common, can make a joint deviſe? The leaſe, in the declaration, being laid to be of the joint demiſe of the plaintiffs leſſors, who appeared to be tenants in common, upon the ſtate of the caſe. And after time taken to conſider, THE WHOLE COURT were of opinion, that tenants in common cannot join in making a leaſe, for their eſtates

eſtates are ſeveral and diſtinct, and there is no privity between them; and, for that reaſon, one tenant in common may enfeoff another.

A clear poſſeſſion under a will for twenty years, will be evidence of a fee, if no other title appears.—*William Tarſwell*, the father, made his will, dated the 25th of Auguſt, 1755, by which he gave the premiſes in queſtion to his wife *Elizabeth*; and after her deceaſe, to his ſon *William*, *during the term he had therein unexpired*. *William Tarſwell*, the ſon, by deed of aſſignment dated the 26th of February, 1771, in conſideration of love and affection, and for divers ſervices, done and performed by *Mary Tarſwell*, for the ſaid *William*, and alſo of the ſum of ten pounds, aſſigned the premiſes to the ſaid *Mary Tarſwell*, her executors, adminiſtrators, and aſſigns, for and during all her reſt, reſidue, and remainder, of *a certain time of* 2000 *years*, formerly raiſed and granted therein, then ſubſiſting and undetermined, for the yearly rent of one ſhilling. There was a covenant, "that he had "full power to aſſign," and for "quiet enjoyment, during all "the reſt and reſidue of the ſaid term therein, yet to come "and unexpired." The ſubſcribing witneſs to this deed ſaid, that at the time of the execution of this deed, that *Mary Tarſwell* was not preſent: but he was perfectly ſober at the time. He brought the deed with him to her, and ſome ſhillings paſſed from her to him: it was not called a deed of gift, but a deed of aſſignment: he offered to give up the writings to her; but ſhe ſaid he might keep the premiſes for his life, though ſhe had a right to them immediately. *It was by her conſent he continued in poſſeſſion*. It was alſo proved, that *William Tarſwell*, the ſon, was in poſſeſſion, and gave directions about the eſtate ever ſince his mother's death, which was in 1765, or 1766; and, a year ago, he offered the leſſor of the plaintiff 10l. for her eſtate, which ſhe refuſed; ſaying, at the ſame time, that "it was not her intention to turn him out." The leſſor of the plaintiff claimed under the aſſignment from *William Tarſwell*, and the above facts being proved, the defendant refuſed to enter into any title, whereupon a verdict was taken for the plaintiff; and afterwards a motion was made for a new trial, upon the ground that the deed of aſſignment, without the production of the original term of 1000 years, ought not to have been left to the jury.—PER CURIAM: the ſingle queſtion in this caſe is, Whether, upon all the evidence given, the plaintiff ought to be nonſuited, not having ſufficiently made out his title? The defendant has not attempted to ſhew any title: the title is a poſſeſſion of twenty years. It is proved, that in 1755, the teſtator made his will, and gave the premiſes in the manner ſtated in the report. How long he was in poſſeſſion before does not appear; but the defendant does not

Denn *ex dim.* Tarſwell v. Barnard, Ea. Ter. 17 Geo. 3. B.R. Coup. 595.

not attempt to ſhew any one elſe was in poſſeſſion before. It reſts, therefore, in preſumption, and, conſequently, was matter proper for the conſideration of the jury. The poſſeſſion afterwards was clearly under the will, till within two years before the title tried; and nothing elſe appears to ſhew, that the title was not a fee. It is ſaid, that the teſtator held under an old term of 2000 years; but that will not avoid the title, if the jury are ſatisfied that he has been in poſſeſſion twenty years. *If no other title appears, a clear poſſeſſion of twenty years is evidence of a fee*, not that he held under the leaſe. The leaſe is one of his muniments: no man has a leaſe of 2000 years, as a leaſe, but as a term to attend the inheritance.—Rule diſcharged.

Anon, Tr. Ter. 14 Geo. 3. B.R. *Cowp.* 128.

If the leſſor of the plaintiff be an infant, and the guardian undertake to pay the coſts, if the ſuit ſhall be determined againſt him, it is ſufficient, and the Court will not ſtay the proceedings till a ſufficient plaintiff be found.

Goodtitle, *ex dim.* Faulkner, James Shade and Mary his Wife, Samuel Ward and Hannah his Wife, and Ann Robinſon, *v.* Ann and William Morſe, Tr. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 365.

If the heir apparent of a *copyholder* in fee ſurrender in the life-time of his anceſtor, and ſurvive him, the heir of ſuch ſurrenderor is not eſtopped, by that ſurrender of his anceſtor, from claiming againſt the ſurrenderee.—On the trial of an ejectment for copyhold premiſes in Berks, a verdict was taken for the plaintiff, ſubject to the opinion of the Court on the following caſe: The premiſes are copyhold of inheritance, and held of the manors of Great and Little Coxwell, in Berkſhire. On the 4th of October, 1770, *T. Giles* died a bachelor, and ſeiſed of the premiſes in queſtion, leaving a nephew, *Thomas Robinſon, eldeſt ſon and heir of his ſiſter*, Betty Giles, *by* Richard Robinſon, *her huſband, his heir at law.* The ſaid *Thomas Robinſon, the eldeſt ſon of* Betty Giles, *and her ſaid huſband, died* in the year 1778, *without iſſue, and without ever having been admitted to the premiſes in queſtion*, leaving *William Robinſon*, his nephew and heir at law. On the 25th of April, 1772, *William Robinſon, who was the ſecond ſon of the ſaid* Betty Giles, *by her ſaid huſband*, was admitted to the premiſes in queſtion; and at the ſame court ſurrendered into the lord's hands one part of them to the uſe of *Richard Morſe*, ſince deceaſed (whoſe widow the defendant *Ann* is), and the other part to the uſe of *William Morſe*, the other defendant in fee, at the will of the lord, &c.; and ſeiſin of the tenements ſo reſpectively ſurrendered, was accordingly given to *Richard* and *William Morſe*, by the hands of the ſteward, by the rod; and they were accordingly admitted to their reſpective tenements, according to the cuſtom of the manor. In 1781, *William Robinſon* died, leaving his ſiſters, *Mary Shade*, *Hannah Ward*, and *Ann Robinſon*, and his nephew, *John Faulkner*, eldeſt ſon of his ſiſter *Elizabeth*, the leſſors of the plaintiff, his heirs at law. It was argued for the plaintiff, 1ſt, That if this were the caſe of

of a *freehold* eſtate, there could not be any implied warranty to bind the heirs of *William*, the brother of the leſſors of the plaintiff, who made the conveyance in queſtion, and under whom the leſſors of the plaintiff claim; 2dly, That the leſſors of the plaintiff are not barred by any eſtoppel from claiming the eſtate; 3dly, That whatever might be the caſe of a freehold eſtate, they are not barred, or bound, in the caſe of a *copyhold*. Lord KENYON, Ch. J.—This caſe depends on the ſhort queſtion, WHETHER A SURRENDER OF A COPYHOLD ESTATE, MADE BY THE HEIR APPARENT IN THE LIFE-TIME OF HIS ANCESTOR, SHALL OPERATE, SO AS TO PREVENT THE HEIR AT LAW OF THE SURRENDEROR RECOVERING THE POSSESSION? But in ſtating this queſtion, we muſt not omit one material circumſtance, that the heir at law, though he ſurrendered in the life-time of his anceſtor, ſurvived that anceſtor. Generally ſpeaking, in point of reaſon it ſhould ſeem that, where a perſon makes a conveyance, all thoſe who derive title through him ſhould be bound by it. If this had been a *freehold* eſtate of inheritance inſtead of a *copyhold*, and the heir at law, before the eſtate came to him, had confeſſed a judgment which had been properly docketed, and the eſtate had afterwards deſcended on him, the eſtate would have been bound by it in equity. Then it ſeems harſh, in point of reaſon, that the heir at law ſhould derive title, through his anceſtor, to an eſtate which the anceſtor himſelf could not have claimed: but this difference depends upon the doctrine of eſtoppels; and the caſes which are to be found on this ſubject are not eaſily to be reconciled. The principal paſſage, relative to this point, is in ſect. 446. of *Littleton*, cited in the argument: "If there be "father and ſon, and the father be diſſeiſed, and the ſon "(living his father) releaſeth, by his deed to the diſſeiſor, all "the right which he hath, or may have, in the ſame tene-"ments, without clauſe of warranty, &c.; and after the "father dieth, &c. the ſon may lawfully enter upon the poſ-"ſeſſion of the diſſeiſor, for that he had no right in the land "in his father's life, but the right deſcended to him after the "releaſe made by the death of his father," &c. And in commenting on that ſection, Lord *Coke*, *Co. Lit.* 265. ſays: "If there be a warranty annexed to the releaſe, then the "ſon ſhall be barred; for albeit the releaſe cannot bar the "right for the cauſe aforeſaid, yet the warranty may rebut, "and bar him and his heirs of a future right, which was not "in him at that time: and the reaſon which, in all caſes, "is to be ſought out, wherefore a warranty, being a cove-"nant real, ſhould bar a future right, is for avoiding circuity "of action (which is not favoured in law), as he that made "the warranty ſhould recover the land againſt the ter-tenant, "and he, by force of the warranty, to have as much in value

"againſt

" againſt the ſame perſon. Yet there is a diverſity between " a warranty and a feoffment; for, if there be grandfather, " father, and ſon, and the father diſſeiſeth the grandfather, " and make feoffment in fee, the grandfather dieth, the " father, againſt his own feoffment, ſhall not enter; but, " if he die, his ſon ſhall enter. And ſo note a diverſity " between a releaſe, a feoffment, and a warranty: a releaſe, " in that caſe, is void; a feoffment is good againſt the " feoffor, but not againſt his heirs; a warranty is good, " both againſt himſelf and his heirs." Lord *Coke* there refers to ſome caſes in the year books, one of which is in point, but the others are irrelevant. Now that is the principal ground on which the argument for the leſſors of the plaintiff ſtands on that part of the caſe. But, in anſwer to this, there are many caſes to be found in the books, from whence we may collect, that the courts of law have thought, that a conveyance without warranty will equally operate as an eſtoppel; and that, where the anceſtor is eſtopped, the heir ſhall alſo be eſtopped. Such are the caſes in Sir *W. Jones*, 459, and 6 *Mod.* 258. In the former it was ſaid, that eſtoppels in *fait*, and by record, by fine, or recovery, ſhall bind not only the party to the eſtoppel, but alſo all privies who claim under him: but if the heir do not claim as privy, but by his own purchaſe, or from another anceſtor, he ſhall not be bound: and to be ſure this diſtinction is obvious enough. And in the latter of them it was held, that " if a man make a leaſe by indenture of land, which is not " his, and after purchaſes it, that leaſe ſhall bind him, his " heirs, and aſſigns; and an eſtoppel, that affects the intereſt " of land, ſhall run with it to whoever takes it." The ſame caſe is alſo reported in 2 Ld. *Raym.* 1048. If, then, it had not been for the authority of *Co. Littleton*, we ſhould have thought ourſelves preſſed by the later caſes. But in this caſe we think we are delivered from deciding how the law ſtands on that controverted point; for, whatever may be the caſe with reſpect to *freehold* eſtates, *this queſtion ariſes on a copyhold* eſtate. And we have met with a caſe, determined by a great authority (1), which was not referred to in the argument, and which is deciſive of this caſe. In *Taylor* v. *Phillips*, 1 *Vez.* 230. Lord *Hardwicke* ſaid, " In " order to paſs an eſtate by ſurrender, the eſtate muſt paſs " into the hands of the lord, through which it muſt be taken. " A fine differs from the caſe of a ſurrender; for that will " be good againſt the heir by eſtoppel, although it paſſes no " eſtate at all: *but if a ſurrender be not good, there will be no* " *eſtoppel*, and no eſtate can paſs into the hands of the lord."

(1) Lord *Hardwicke*.

Now

Now that is a direct authority in point; and we have not been able to find any other case respecting copyholds, which comes so near the present case. Therefore, on the authority of that case, we are of opinion, that the lessors of the plaintiff are entitled to recover.—Postea to the plaintiff.

### *For what an Ejectment may be brought.*

Goodright, *ex dim.* Welch, *v.* Flood, Mic. Ter. 10 Geo. 3. C.B. 3 *Wilf.* 23.

It was decided in the court of Common Pleas, that an ejectment doth not lie of a messuage or tenement: but if it be of a messuage *and* tenement the Court will give leave to strike out the words, *and tenement*.—In ejectment, the plaintiff declared of one *messuage* OR *tenement*, and had a verdict; and it being moved that judgment might be arrested, because an ejectment will not lie of a *tenement*; and *messuage or tenement* is so uncertain, that the sheriff cannot tell of *what* he shall give possession, for a *tenement* may be of an *advowson*, *house* or *land*, of any kind; see 2 *Stra.* 834. 1 *Barnes*, 114. 3 *Mod.* 238. PER CURIAM: There are many old cases, where judgments in ejectment have been arrested for this uncertainty. There was a late case in B.R. where the declaration was of a messuage *and* tenement, and *that Court* gave leave to strike out the words, "*and tenements*," and to proceed for the *messuage*. A *messuage or tenement*, in common parlance, means *a messuage*; and, at this time of day, no mortal imagines that a *tenement* means any thing but a *dwelling-house*, for, by long use, it has acquired that definite signification. THE COURT, however, though inclined to get over this objection, if possible, at last thought themselves bound by the cases cited, and (against their inclination) arrested the judgment.

Doe, *ex dim.* Stewart, *v.* Denton, Mic. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 11.

But in the court of King's Bench, an objection being taken in arrest of judgment, that the description in this ejectment was too general and uncertain, being for a messuage *and* tenement; for which were cited 1 *Sid.* 295. 1 Ld. *Raym.* 191.—*Buller*, J. said, he remembered a case where a messuage *or* tenement had been held sufficiently certain, and the rule was refused (1).

Connor *v.* West, Mic. Ter. 11 Geo. 3. B.R. 5 *Burr.* 2672.

The same precision and exactness is not necessary in an ejectment, as in a *præcipe*.—On a writ of error, the description of the premises demanded being "fifty acres of furze and heath," and "fifty acres of moor and marsh."—The objection was, the not specifying or ascertaining the *quantity* of *each* species. PER CURIAM: It has been determined over and over, that such exact and precise certainty is not requisite in *ejectments* as in a *præcipe*. A *præcipe*, in a real action, requires exactness and precision; but an ejectment is a fictitious action, contrived for ease, dispatch, and saving expence; and has, of later times, been taken with more

(1) See also the case of *Massey* v. *Rice*, under Title FINES AND RECOVERIES.

latitude

latitude than formerly. And though it has been often ſaid, "that the deſcriptions ought to be ſo certain, that the ſheriff "may be able to know, without any information from the "plaintiff, what he is to give poſſeſſion of;" yet, in truth and fact, the ſheriff delivers poſſeſſion at the ſhewing of the plaintiff, and at the peril of the plaintiff, who is, at his peril, to take poſſeſſion of no more than he is entitled to.

## *By whom an Ejectment may be defended.*

Driver *ex dim.* Oxenden *et al.* *v.* Laurence, Hil. Ter. 19 Geo. 3. C B 2 *Black.* 1259.

The Court will not endure a leſſee to defend (alone), an ejectment againſt his landlord, or thoſe claiming under him, on a ſuppoſed defect of title.—Verdict was for the plaintiff, ſubject to the opinion of the Court on a ſpecial caſe, which ſtated, that *John Harriſon*, on the 28th of June, 1732, deviſed the premiſes to his wife, *Ann*, for her life, and after her deceaſe, to his daughter, *Mary Pembrook*, for her life, with remainder to his grand-daughter, *Ann Pembrook*, and the heirs of her body, with remainder to his own right heirs for ever. *Ann Pembrook* married *David Lance*, and being in poſſeſſion of the premiſes, by the determination of the precedent eſtates for life, they on the 20th of April, 1752, covenanted to levy a fine to the uſe of ſuch perſon, &c. as they two ſhould jointly appoint; and in default thereof to them two, and the ſurvivor, for life, with remainder to ſuch perſon, &c. as the ſurvivor ſhould by deed or will appoint, and in default of ſuch appointment, to the right heirs of the ſurvivor for ever.—In Trinity term, 25 *Geo.* 2. (1752) a fine was levied accordingly, with proclamations according to the ſtatute.—*Ann Lance*, died on the 29th of March, 1753, not leaving any iſſue; and on the 27th of July, 1753, *David Lance* demiſed the premiſes to *Giles Lawrence*, father of the defendant, for eleven years from Michaelmas, 1753, at the rent of 15l.—*Giles Lawrence*, the father, paid rent to *David Lance*, who died on the 17th of November, 1772: ſince which, the defendant, *Giles Lawrence*, the ſon, paid to the leſſors of the plaintiff (who are entitled under the will of *David Lance*), the rent due on the 10th of October, 1772, but has refuſed to pay any more, being forbid by *John* and *William Harriſon*, the heirs of the firſt teſtator, *John Harriſon*, who claim the eſtate; but have made *no entry to avoid the fine*.—By the cuſtom of Gavelkind, the huſband of any woman dying, ſeiſed of any lands of inheritance, is entitled for his life to a moiety of ſuch lands, whether ſhe had or had not children.—THE QUESTION was, If the leſſors of the plaintiff had a right to recover?—ON THE OPENING OF THIS CASE, THE COURT (*abſente Gould*, J.) expreſſed their ſurprize, how the queſtion intended to be tried, which was the right of *Harriſon*, the heir at law, againſt the deviſees of Lance, came to be brought on thus aukwardly, without making *Harriſon* a defendant. *Since the Court*

*Court would not endure that* Lawrence, *the leſſee of, or claiming under, ſuch deviſees, ſhould defend an ejectment againſt his own landlords, on their ſuppoſed defect of title.* But, as the caſe ſeemed to be clearly with the leſſors of the plaintiff on the merits, the Court would not, merely upon that irregularity, give judgment for the plaintiff, which would only produce a new ejectment. They therefore called on the defendant's counſel to ſhew, why the fine in 1752, which began to operate on one moiety in 1753, and on the other in 1772, with five years non-claim and no entry to avoid it, was not a flat bar to any right that might be claimed by the *Harriſons?* And they not being prepared to anſwer this objection, judgment was given, without argument, for the plaintiff.

Fairclaim *ex dim.* Fowler *et al. v.* Shamtitle, Hil. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1290. 1 *Black Rep.* 357.

One claiming as lord by *eſcheat*, may be admitted defendant in an ejectment, brought againſt the tenant in poſſeſſion, by the leſſor of one claiming as heir at law.—It was moved (on behalf of the plaintiff), to *diſcharge a rule*, whereby it had been ordered that earl *Gower* and *Thomas Gifford*, eſq. *landlords* of the tenant in poſſeſſion of the premiſes in queſtion, ſhould be *joined and made defendants with the tenant*, if he ſhall appear: and if he ſhould *not* appear, that they might *appear for themſelves.*—Their objection to the rule was, "That Earl *Gower* and Mr. *Gifford*, had *never been in poſſeſſion*": and that the act of parliament of 11 *G.* 2. c. 19. § 13. was made for the ſecurity of landlords *who had been in poſſeſſion*, and whoſe tenants neglected to give them notice of ejectments. And a caſe was cited (1), where ſuch a rule as this was made, "To ſhew cauſe," only; and on this *ſame cauſe being ſhewn* (viz. "That neither party had been *in poſſeſſion*"), the rule was *diſcharged.* So HERE, the earl and Mr. *Gifford*, claims by ESCHEAT, on the death of *Elizabeth Leviſon*; and the plaintiffs claimed as *heirs at law* to her: but *neither* had been in *poſſeſſion.*—On ſhewing cauſe againſt the rule, it was admitted that the leſſors of the plaintiff claimed as *heirs:* and Earl *Gower*, and Mr. *Gifford*, by *eſcheat* of a copyhold, *pro defectu hæredis; not* for a *forfeiture* for want of an heir's coming-in; and that, therefore, they only deſired to have the cauſe tried.—And it was argued that a lord of a manor has ſuch a *ſeiſin* at law, of an *eſcheated copyhold*, that the occupier is *his tenant at will*, and the lord may *diſtrain* for the rent; and though, perhaps, the occupier may not be liable to the penalty of the triple rent, yet the lord may AVOW upon him for the *ſingle rent.*—That the lords, by eſcheat, claim upon the ſame foot as if they were *heirs* to the deceaſed tenant: and the heir might be admitted to be made defendant; though he had *never received rent.* The eſtate *originally belonged to the lords, and*

(1) *Doe* on the demiſe of *James Goore* v. *Roe.*

*moved from them*, and *reverts* to them for want of heirs of the tenant: and we are *neither ſtrangers*, nor *collude* with the tenant.—That the ſtatute of 11 *G.* 2. c. 19. § 11, 12, 13. is to be extended further than to thoſe caſes only where the rent has been *actually received:* it extends to landlords *de jure*, as well as to landlords *de facto*.—That A PROBABLE CAUSE *of claim* is ſufficient to entitle the landlord to be made defendant: his *real* title is to be tried afterwards in the cauſe.—That BEFORE the ſtatute, the landlord had a right, *by law*, to be joined with the tenant: and the ſtatute enforces this right. And it muſt be conſtrued liberally, to prevent the miſchief which occaſioned the making of it.—That the caſe of *Gore* v. *Roe*, or *Scariſbrick*, was a caſe where no rent had been paid by any body: and *Scariſbrick* had purchaſed a pretended title. But the lord of this manor is *dominus terræ*, and within the words of the act.—Lord MANSFIELD, CH. J. In *ejectments*, the Court can never want juriſdiction to prevent the plaintiff from recovering without a proper trial. An *ejectment* is the creature of *Weſtminſter Hall*, introduced within time of memory; and moulded gradually into a courſe of practice, by rules of the courts. The ſame authority which brought it *thus far*, may certainly carry it to a *higher* degree of perfection, as experience happens to ſhew inconveniences or defects. The act of 11 *G.* 2. was drawn and brought in by Sir *John Strange:* the proviſions therein, relative to proceedings in ejectment, were either to enforce a right practice, or occaſioned by ſome caſe contrary to the general ſenſe of the bar, which the legiſlature virtually condemns as erroneous.—THE COUNSEL FOR THE PLAINTIFF (who had moved to diſcharge the preſent rule) then argued, that theſe *potential landlords* cannot be within the ſtat. 11 *G.* 2. *c.* 19. For, "*ſuch*" landlord muſt be a landlord to whom the tenant is *obliged to deliver the declaration*.—Lord MANSFIELD, Ch. J. AN EJECTMENT is an ingenious *fiction*, for the trial of titles to the poſſeſſion of land.—In *form*, it is a trick between two, to diſpoſſeſs a third by a ſham ſuit and judgment.—The artifice would be criminal, unleſs the *Court* converted it into a *fair* trial with the *proper* party.—The control the Court have over the judgment againſt the caſual ejector, enables them to put any *terms* upon the plaintiff, which are *juſt*. He was ſoon ordered to give *notice* to the *tenant in poſſeſſion*. When the tenant in poſſeſſion *aſked* to be admitted defendant, the Court was enabled to add CONDITIONS; and, therefore, obliged him to *allow* the fiction, and go to trial upon the *real merits*.—It might happen, that the tenant in poſſeſſion was a mere farmer at will. He was bound to give notice to his *landlord*.—The *ſame reaſon*, of a fair trial with the proper party, required the landlord to be admitted defendant; *with* the tenant, if he was amicable; or

*without*

*without* him, if he, contrary to the duty of his relation, ſhould betray the cauſe.—There can be no ground for admitting the landlord to be a *co*-defendant, which does not hold to his defending *alone*, in caſe the other abandons.—The plaintiff ought not to recover by colluſion with one, to the *prejudice* of a *third*: he ought not to recover, without a *trial* with the *perſon* intereſted in the queſtion, and affected by the judgment.—There are two matters to be conſidered: Firſt, Whether the term "*landlord*" ought not, as to *this* purpoſe, to *extend* to *every* perſon whoſe title is connected to, and conſiſtent with, the poſſeſſion of the occupier, and diveſted or diſturbed by any claim adverſe to ſuch poſſeſſion; as in the caſe of remainders or reverſions, expectant upon particular eſtates: ſecondly, Whether it does not extend, as between two perſons claiming to be landlords *de jure*, in right of repreſentation to a landlord *de facto*; ſo as to prevent *either* from recovering by colluſion with the occupier, without a *fair trial* with the *other*.—Where a perſon claims in *oppoſition* to the title of the tenant in poſſeſſion, he can in *no* light be conſidered as landlord; and it would be unjuſt to the tenant, to make *him* a co-defendant: their defences might *claſh*. Whereas, when there is *privity* between them, the defence muſt be upon the *ſame bottom*; and letting in the perſon behind, can only operate to prevent treachery and colluſion.—It is no anſwer "That any perſon affected by the judgment "may bring a *new* ejectment:" becauſe there is a great difference between being *plaintiff*, or *defendant*, in ejectment.—The great ADVANTAGE of this fictitious mode is, that being under the *control of the Court*, it may be ſo modelled as to anſwer in the beſt manner every end of juſtice and convenience.—PUBLIC UTILITY has adopted it in lieu of almoſt all *real* actions, which were embarraſſed and entangled with a thouſand niceties. But as there was good and bad in the method of real actions, the *good* ought to be *grafted* into ejectments, in ſuch a manner as to *avoid* the *bad*.—WILMOT, J. Thought the firſt part of the act, § 12. was not introductory of a new law; (for, before the act, a landlord might be made co-defendant): but that the ſecond part of it, § 13. *was* introductory of a new law.—AFTERWARDS, IT WAS FURTHER ARGUED ON BEHALF OF THE LORD BY ESCHEAT.—That from the time of ſetting up caſual ejectors, the *admitting* landlords to defend, TOGETHER WITH the tenant in poſſeſſion, has prevailed.—And though it was admitted, that many years before this act (even in 5 *W.* & *M. Comberb.* 209.) a rule was laid down by Lord Chief Juſtice *Holt*, "That no man is to be admitted tenant or "defendant in ejectment by the common rule, *unleſs he hath* "*been in poſſeſſion or received rents; and not a mere ſtranger.*" It was contended, that the *reaſon* of that rule does not hold in the preſent caſe; for a lord, by eſcheat's defending his title,

can never be conſidered as *champerty*. and that the *adding unneceſſary defendants* is now prevented by 8. 9. *W.* 3. c. 11. (§ 1). But before that act, leſſors made ſeveral defendants in ejectment, in order to take off their evidence: and they could *then* have no coſts, if acquitted. And the rule was made againſt leſſors of plaintiffs, as well as againſt defendants: and it means to exclude only mere ſtrangers to the poſſeſſion. —That a LORD BY ESCHEAT is *not a mere ſtranger*; but has the immediate *right* and *title*, in caſe no heirſhip is made out: and therefore he is the moſt proper perſon to conteſt that point of heirſhip, by whomſoever claimed. And he may very well, and reaſonably, be conſidered within the word "LANDLORD:" the tenant in poſſeſſion being *his tenant at will*, if there be no heir.—And that admitting the lord to defend, will *prevent a circuity* of litigation.—Lord MANSFIELD, CH. J We are all of opinion that it muſt be tried between the two claimants, the *heir* and the *lord*. The *occupier has no intereſt or concern in the queſtion*. He ought not to take a ſide, or prejudice either. He does *not* appear. The queſtion ſhould therefore be tried in a way to give *neither* any advantage from his poſſeſſion. It may be done, in a *feigned iſſue*: or, an ejectment brought by the lord, with an *admiſſion* of his title, will come to the ſame thing.—WHEREUPON THE COURT recommended, and the counſel on both ſides conſented to, a fair trial of the lord's title to claim by eſcheat: and the method was, at length, agreed upon, viz. *that the lord* (who could never come into poſſeſſion *without* an ejectment to be brought by him,) *ſhould immediately bring his ejectment againſt the preſent leſſors of the plaintiff*; *and*, *that the ſaid leſſors of the preſent plaintiff* (who claimed as heirs of the deceaſed) *ſhould be admitted to defend*, *either alone*, *or together with the tenant in poſſeſſion*; and ſuch ejectment to be tried at the next aſſizes. And the counſel for the preſent plaintiffs were to admit, "that all the lands lie in one and the ſame manor, and that "ſuch manor belongs to Earl *Gower*, as lord of it." AND THE COURT reſerved the conſideration of the preſent motion, and of the rule now depending, till *after* ſuch trial ſhould be had; which they did, in order to retain the power over the matter, in caſe any thing ſhould be attempted at the trial, contrary to the real preſent intention of having the queſtion fairly tried; and alſo in order to give ſuch future directions concerning the award of execution, as ſhould then appear to be fit and proper.—WILMOT, J. obſerved, that it was very remarkable, that two different acts of parliament had been made, at near 500 years diſtance, upon the very ſame ſubject, where there was no occaſion for either, viz. the ſtatute of Weſtminſter 2. c. 3. (13 *Ed.* 1 A. 1285.) and this act of 11 *G.* 2. c. 19.—The ſtatute of Weſtminſter 2. c. 3. he ſaid, was not a *new* proviſion, for, *before* that ſtatute, all thoſe that *ſtood behind* the tenant in poſſeſſion had a right,

a right, *at common law*, to come in and be received, *pro intereſſe ſuo*, to defend the poſſeſſion; which was very material to them, and by the change whereof they would have been greatly incommoded. And he ſaid he was perſuaded, that the more this doctrine of *receit* was looked into, the ſtronger this would appear; and, therefore, he wondered that there ſhould have been any doubt, before the act of 11 *G.* 2, of admitting landlords to defend in the *ſtead* of the tenant in poſſeſſion, eſpecially as they were ſuffered to make themſelves *co*-defendants *with* the tenants. (He referred to 2 *Inſt.* 344, 345. and *Bracton*, lib. 5. fo. 393. b. No. 14.) So, *before* the act of 11 *G.* 2. c. 19, it was certainly the practice to admit the landlord and the tenant in poſſeſſion *co*-defendants.—He took notice likewiſe, that notwithſtanding all the pains that the legiſlature had taken to cut off dilatories, yet it was the *courts of Weſtminſter-hall* to whom the public were *obliged*, for finding out this *eaſy* and *expeditious* method of trying titles by EJECTMENTS. A RULE, by conſent, having been ordered to be drawn up, Lord MANSFIELD now declared, that he was clear that this method of "putting the perſon, claiming to be lord by "eſcheat, to bring his ejectment," was the *proper* way of trying the right upon the merits.—If there was really no heir, then the lord ſtood in the place of the eceaſed: but if there was any heir whoſoever, the lord's claim was at an end.—The Court would have obliged him to come into *ſome* method of trying the right, in a proper iſſue; and *this* method, into which it is now put (viz. his bringing an ejectment), is the moſt *proper* iſſue for that purpoſe.—If the heir had refuſed, the Court would have admitted the lords to defend, which would have given them the benefit of poſſeſſion. If the lords by eſcheat had refuſed to conſent, we would have diſcharged the rule; for, certainly, where the *ſole* queſtion turns upon, "who ought to be landlord to the "tenant in poſſeſſion," he ſhould ſtand *neuter*, and his poſſeſſion avails NEITHER; the queſtion ought to be tried *between* the CLAIMANTS. The plaintiff muſt conſent, elſe the other is admitted to defend: the other muſt conſent, becauſe, to inſiſt "that he is landlord," *begs* the queſtion to be tried.

But the Court will refuſe to permit the *ceſtui que truſt*, not having been in poſſeſſion, to be made defendant in ejectment inſtead of the tenant, as landlord.—On ſhewing cauſe againſt a rule to permit the *ceſtui que truſt* to defend in ejectment, inſtead of the tenant in ejectment. The objection to the rule was, that they had never been in poſſeſſion, and could not be conſidered as *landlords* under the 11 *Geo.* 2. c. 19. ſ. 13. On the other hand, the above caſe of *Fairclaim* v. *Shamtitle*, was relied on, where the Court ſaid, *that they would permit the lord claiming by eſcheat, for want of an heir,*

Lovelock, *ex dim* Norris, *v.* Lancaſter, Tr Ter. 30 Geo 3 B R. 3 *Ter. Reſ.* 783.

*to defend, as againſt a perſon claiming to be heir.* *Sed* PER CURIAM: If the perſon requiring to be made a defendant under the act, had ſtood in the ſituation of immediate heir to the perſon laſt ſeiſed, or had been in the relation of remainder-man under the ſame title as the original landlord, he might have been permitted to defend as a landlord, by virtue of the directions of the ſtatute; but here the very queſtion in diſpute, between the adverſe party and himſelf, is, Whether he is entitled to be landlord or not? And, therefore, we are not authorized to extend the proviſion of the ſtatute to ſuch a caſe as this. As to the caſe mentioned, it appears to have been by conſent.—Rule diſcharged.

Doe *d.* Hebblethwaite, *et al. v.* Roe, Tr. Ter. 30 Geo. 3. B R. 3 *Term Rep.* 785.

But the Court in this caſe, on the motion of Mr. *Holroyd*, permitted an heir, who had never been in poſſeſſion, to come in, and defend under an ejectment. The father, under whom he claimed, died juſt before, having firſt obtained a ſimilar rule.

Lovelock *d.* Norris *v.* Lancaſter, Mic. Ter. 31 Geo. 3. B R. 4 *Ter. Rep.* 122.

So in this caſe the Court permitted a deviſee, who had never been in poſſeſſion, to defend as landlord, under this ſtatute.

## *Proceedings in Ejectment.*

Roe, *ex dim.* Wrangham, *v.* Herſey, Mic. Ter. 12 Geo. 3. C.B. 3 *Wils.* 274.

*Declaration.*]—In ejectment, on the demiſe of an heir by deſcent, the demiſe was laid on the day his anceſtor died, and held well enough after a verdict.—The leſſor of the plaintiff claimed by deſcent from his anceſtor, who died on the 1ſt day of January, 1771, at five o'clock in the morning; and the demiſe was laid in the declaration on the ſame 1ſt of January, to hold from the 31ſt day of December then laſt paſt. PER TOTAM CURIAM: If my anceſtor die at five o'clock in the morning, I enter at ſix, and make a leaſe at ſeven o'clock, it is a good leaſe. It is ſaid, there is no *fraction* in a day, but this is a *fiction in law*, *fictio juris neminem lædere debet*; but aid much it may, and this is ſeen in all matters where the law operates by *relation*, and *diviſion* of an *inſtant*, which are *fictions in law*. A conſtable takes one who had ſtruck another, and then ſets him at liberty, the party ſtricken dies of the ſtroke; this is *felony ab initio*, but not to the prejudice of the conſtable who ſuffered his eſcape, 11 *Hen.* 4. 12 b. *pl.* 26. See *Butler* and *Baker*'s caſe, 3 *Rep.* 25. A *fine* is levied *ſur render*, the conuſee, by *fiction in law*, hath *ſeiſin* in an *inſtant* to make this *render* back, but to no other purpoſe to the prejudice of the conuſor, for the conuſee's wife ſhall not have *dower*, nor ſhall the land be ſubject to any *ſtatute*, &c. in which the conuſee was bound.

bound. See 2 *Rep.* Ld. *Cromwell's* caſe.—If a man were born on the 1ſt of February, and lived to the 31ſt of January, twenty-one years after, and at five o'clock in the morning of *that* day makes his *will*, and dies by ſix at night, *that will* is good, and the deviſor is of age, 2 Ld. *Raym.* 1096. In an action on the caſe for diſturbance of his common, an exception was taken to the declaration, that the demiſe to the plaintiff is alleged to be on the 26th of March, and the tort done to the plaintiff is ſuppoſed to be on the 1ſt of May following, and it is not alleged that the plaintiff entered before the 1ſt of May: but to this it was anſwered by the Court, that it ſhall be intended that he entered immediately after the making of the leaſe, 1 *Lutw.* 108. and ſee *Small*, ex dim. *Baker*, v. *Cole* and *Skinner*, 2 *Burr.* 1162 (1), where amendments in ejectment are carried much further than formerly; 1ſt, A verdict *cures a defect in ſetting out the title*, though it cannot cure *a defective* title; 2dly, After a verdict, if the objection be grounded upon the mere miſtake of the clerk, or a trifling nicety, there is no need of any actual amendment at all, the Court will overlook the exception. By fiction in law, the whole term, the whole time of the aſſizes, and the whole ſeſſion of parliament, may be, and ſometimes are, conſidered as one day, yet the matter of fact ſhall overturn the fiction, in order to do juſtice between the parties.

In ejectment, the demiſe ſtated, that one *M. S.* on ſuch a day, at Haſwell, in the county of B. demiſed to the plaintiff two meſſuages, two cloſes, &c. — After a verdict for the plaintiff, it was moved, in arreſt of judgment, that no vill was mentioned, in which the lands demiſed lay: but on ſhewing cauſe, it appearing, that in the ſubſequent part of the declaration it was ſtated, that the defendant, at Haſwell aforeſaid, ejected the plaintiff from the ſaid lands, &c. *The Court* held, that this amounted to a ſufficient certainty, that the lands lay in the vill of Haſwell.

Goodright *ex dim* Smallwood *v.* Strother, Ea. Ter. 18 Geo. 3 B.R. 2 *Black.* 706.

In the caſe of a plain miſtake, the Court will enlarge the term.—The ejectment was of Hilary term, 1772; the plaintiff declared on a demiſe, 1ſt November, 27 *Geo.* 2, 1753, to hold from the 30th of October then laſt paſt, for ſeven years. On this record, notice was given for trial at the Lent aſſizes, 1772, and a ſpecial jury ſtruck; but the miſtake being diſcovered, the record was not entered. It was moved to amend the declaration, by ſtriking out the word [*ſeven*], and inſerting the words [*thirty-one*], on the authority of *Stra.* 1272. *Et per Cur.* This is a plain miſtake in the declaration, and may be amended by the

Roe, *ex dim.* Lee, *v.* Ellis, Ea. Ter. 14 Geo. 3. C.B. 2 *Black.* 940.

(1) See vol. 1. *ante* p. 582.

writ, which ſpeaks of a term not yet expired, whereas the declaration counts of a term expired twelve years before the action brought. An ejectment is the creature of the court, and open to every equitable regulation, for expediting the true juſtice of the caſe.—Rule abſolute, to amend on payment of coſts.

Hazlewood, *ex dim.* Price, *v.* Thatcher, Tr. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 351.

On a motion to ſet aſide the proceedings in this ejectment for irregularity, becauſe the notice at the foot of the declaration was ſubſcribed in the name of the nominal plaintiff inſtead of the caſual ejector, THE COURT, after conſulting with the maſter, ſaid, that it had been repeatedly obſerved, that this was not a ſufficient ground of irregularity to ſet aſide the proceedings.

Roe, *ex dim.* Burlton, *et al. v.* Roe, Hil. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 477.

It was moved to enter up judgment againſt the caſual ejector.—This was an ejectment againſt ſeveral tenants; but in the ſeveral copies ſerved, the name of the individual tenant, on whom the declaration was ſerved, was prefixed to the notice inſtead of the names of all, and, conſequently, the perſon making the affidavit of ſervice, could not ſwear that the copy of any one declaration and notice was ſerved on all the tenants. THE QUESTION, therefore, was, Whether there ſhould be ſeveral rules, or whether one would be ſufficient? And *The Court* were of opinion, that one was ſufficient.

Fenn, *ex dim.* Tyrrell, *et al. v.* Denn, Tr. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1181.

A rule was made upon Mrs. *Magdalen Campbell*, the tenant in poſſeſſion, to ſhew cauſe why the *ſervice* of the ejectment in this cauſe, which (1) *had been theretofore made* upon a woman, who had *ſaid her name was Magdalen Campbell*, at the time when it was ſerved upon her at the ſaid *Magdalen Campbell*'s houſe, *ſhould not be deemed good ſervice*; and that the leaving a copy of this rule at the houſe, or, if no one could be met with, *affixing* a true copy of it on the door, ſhall be *deemed good ſervice.* And the ſaid rule was afterwards made abſolute, upon producing an affidavit, "that *Magdalen Campbell* was either not at home, or "(if at home) was denied; and that her ſervant-maid was "at home, but could not be ſerved; and that, therefore, "one copy of the rule was fixed on the door of the "houſe, and the maid told the effect of it, and another "thrown in at the window."

Leſſee of Methold *v.* Norright, Tr. Ter. 1 Geo. 3 B.R. 1 *Black.* 290.

It was moved, on the authority of leſſee of *Hollings* v. *Dunch*, Hil. 1 *Geo.* 3. that ſervice of a declaration in ejectment, at the houſe of the tenant in poſſeſſion, on the 13th of May *laſt paſt*, might be good ſervice, it having formerly been uſual to grant ſuch rules, with reſpect only to future ſervice,

(1) If the rule were not thus made with a retroſpect, the plaintiff muſt loſe the aſſizes.

and

and not with any retroſpect. But that, in the caſe relied upon, this rule was firſt altered in the *King's Bench*, it having before been the courſe of the court of *Common Pleas*. A rule was granted to ſhew cauſe, and that ſervice of this rule at the houſe might be good ſervice:—the matter was afterwards compromiſed.

A rule was granted, and afterwards made abſolute, that ſervice of a declaration in ejectment at the houſe of a tenant in poſſeſſion, on a day paſt, might be good ſervice; and that ſervice of the firſt rule, at the houſe of the ſaid tenant, ſhould be good ſervice.

Gulliver *v.* Wagſtaff, Mic. Ter. 2 Geo. 3. B.R. 1 *Black.* 317.

The attorney, who ſerved the declaration, ſhewed the copy to the wife of the tenant in poſſeſſion, in his abſence; acquainted her with the contents, and would have read the notice, but ſhe ſaid ſhe could read it herſelf, took it from him, and run her eye over it, as if ſhe read it: HELD good ſervice.

Goodright, *ex dim.* Waddington, *v.* Thruſtout, Hil. Ter. 12 Geo. 3. C.B. 2 *Black.* 800.

On a motion for judgment againſt the caſual ejector, it appeared that the attorney went with the declaration in ejectment, to the houſe of the tenant in poſſeſſion, before the eſſoign-day; but not finding either him or his wife at home, left it with his daughter, and, at the ſame time, acquainted her with the contents and meaning of it. On a *ſubſequent day*, the attorney called again at the houſe, when he ſaw the tenant's wife (the tenant himſelf being then alſo from home), and enquired of her, whether ſhe had received the declaration which was left with her daughter. She anſwered ſhe had received it, and ſhewed it to the attorney, who read it over to her, and explained it: ſhe then ſaid, that her huſband had not been at home ſince the paper was delivered to her daughter, but that ſhe would ſend it to him. *The Court* were at firſt much inclined to refuſe the rule, becauſe it did not clearly appear, from the affidavit, that *the declaration came to the hands of the wife before the eſſoign-day of the term*; but the caſe of *Goodtitle* v. *Thruſtout*, *Barnes* 183, being cited, they made the—Rule abſolute.

Smith, *ex dim.* Lord Stourton, *et al. v.* Hurſt, Tr. Ter. 31 Geo. 3. C.B. 1 *Hen. Black.* 644.

If the declaration in ejectment be ſerved on the wife of the tenant in poſſeſſion, it is ſufficient, if it be either on the premiſes, or at the huſband's houſe, though that ſervice be not on the premiſes; but it is neceſſary to ſtate in the affidavit, if it be not on the premiſes, that the ſervice was on the wife at the huſband's houſe, to ſhew that they were living together as man and wife, and that by ſuch ſervice the huſband may have notice of the proceedings.

Doe, *ex dim.* Morland *v.* Bayliſs. Tr. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 765.

*Evidence.*]—In ejectment, the leſſor of the plaintiff muſt recover by the ſtrength of his own title, and not by the weakneſs of his adverſary's.—In ejectment, the title opened for the plaintiff was under Mrs. *Haldane*, formerly *Elizabeth Holmes*, as deviſee of *Robert Holmes*. The title was proved to

Richard Roe, *ex dim.* Elizabeth Haldane and Thomas Urry, *v.* Wm. Harvey, Mic. Ter. 10 Geo. 3. B.R. 4 *Burr.* 2484.

to be in *Robert Holmes*, and that he had, by his will, devised all the reſt and reſidue of his eſtate, whatſoever and wherefoever, to his wife, *Elizabeth*, her heirs, executors, and adminiſtrators. It was alſo proved, that Mrs. *Elizabeth Holmes* married Captain *Haldane*, and that he was dead. And *William Clark*, a witneſs produced for the plaintiff, upon his croſs-examination, ſaid, "*that Mrs.* Haldane *had, before* "*the 6th of October*, 1768 [which was the day on which "both the demiſes were laid], *conveyed away her intereſt in* "*the poſſeſſion to Mr.* Thomas Urry; AND THAT THE "DEED WAS IN COURT."—Upon this, it was inſiſted for the defendant, "that the plaintiff's own witneſs proving "the title *out* of Mrs. *Haldane*, and that the *deed* of conveyance to *Urry* was *in court*, it *ought* to be PRODUCED in "evidence, to ſhew a *title* in *Thomas Urry*, the other leſſor "of the plaintiff."—The deed's being *in court*, or, at leaſt, in the *plaintiff's power*, was not controverted. But, for the plaintiff it was inſiſted, "that *no notice* having been "given by the defendant, for the plaintiff to produce this "deed, they were *not obliged* to do it. And it was alſo "inſiſted, that the plaintiff ought to recover under *one* or "the *other* of the leſſors; for, upon *this evidence*, *if* Mrs. "*Haldane* had *parted* with the title, yet *Urry had it*." It was anſwered, "that this was not a caſe which *required* "*notice*; that the *defendant* did not claim under this deed; "it was only then diſcloſed by the plaintiff's *own* evidence; "and to be *produced*, to complete his title derived from *Urry*."—Under the above circumſtances, ASTON, J. thought "the plaintiff ought to give *further* evidence, to *aſcertain the* "*title*, under which he was to recover the term."—But the plaintiff reſted his caſe, and was *nonſuited*; the defendant agreeing, "that the plaintiff ſhould be at liberty to move "for a new trial, without coſts."—A motion was accordingly made, and cauſe ſhewn.—Lord MANSFIELD laid it down as a poſition, "*that in this action the plaintiff cannot* "*recover, but upon the ſtrength of his own title.*" He cannot found his claim upon the weakneſs of the *defendant's* title; for, *poſſeſſion* gives the defendant a right *againſt* every man who *cannot ſhew* a *good title*.—The witneſs produced for the plaintiff proved, upon croſs-examination, "that Mrs. *Hal*- "*dane* had conveyed away her intereſt in the premiſes to "*Urry*, the other leſſor, before the 6th of October, 1768," which was the day on which both demiſes were laid to be made; ſo that it is plain, that the plaintiff had *no title* under the widow, Mrs. *Haldane*.—Then, as to his claim of a title under *Urry*, he has *not proved* any title in *Urry*. The jury could not have found for the plaintiff, *under the deed* of conveyance to *Urry*, *without producing it*: and, probably, there was ſomething in the deed, which would have ſhewn, that

that *Urry* had *no* title.—*He principally* laid ſtreſs upon the plaintiff's *refuſing to produce* the conveyance from Mrs. *Haldane*, which was in court: *the want of notice was no objection in this caſe, becauſe they had the deed in court.* The refuſal to produce it was an unfair attempt to recover, contrary to the real merits; and being a deliberate refuſal, by the advice of counſel, contrary to the recommendation of the judge, warranted the ſtrongeſt preſumption, "that the deed would "ſhew, that neither of the leſſors of the plaintiff had any "title."—YATES, J. *(contra)* thought the plaintiff ought to have had a verdict. He founded himſelf upon the *rules of evidence: its coming out upon croſs-examination of the witneſs makes no difference*; no more does the *value* of the eſtate. *The plaintiff's counſel were not obliged to produce this deed*; *no man can be obliged to produce evidence againſt himſelf.* The *only* conſequence of *notice* to produce it would have been "the admitting inferior evidence." He inſtanced in a caſe which happened before himſelf, when a *poll-book*, which *lay in court*, was refuſed to be produced: he held, "they "could *not* be obliged to produce it." And this, his determination, was *acquieſced in.* He thought the counſel for the plaintiff ſhould not have ſuffered a nonſuit, but ſhould have *appeared*, and ſo had it *left to the jury*, "Whether the plain-"tiff had ſhewn a ſufficient title or not?" Mr. Juſtice ASTON:—In an ejectment, the party who would *change* the poſſeſſion, muſt make out a title. This was a ſcambling title. It was a matter of ſmall value, excepting its being for the purpoſe of voting at the election of members to parliament. I was not called upon to leave it to the jury; I thought the refuſing to produce the deed was a want of fairneſs; and that the plaintiff had *not* made a *complete* title without it: but, if there is any doubt in the Court, I have no objection to a new trial.—WILLES, J. thought the direction was right.—In ejectment, the plaintiff muſt recover upon the ſtrength of his *own* title.—The only proof here is, "that "the witneſs *ſaid*, that Mrs. *Haldane* had conveyed to "*Urry*;" but he *would not produce* the deed of conveyance to *Urry*, though actually in court. I don't ſay that the Court could *oblige* them to produce this deed; but I think the title of the plaintiff was *not complete*, the deed *not* being produced. *Parol evidence could not be given by the party who had the deed in his power, and refuſed to produce it, though it might by the adverſe party.* It is reaſonable, that if one party is in poſſeſſion of a deed, and refuſes (after proper notice) to produce it, the *other* ſide ſhould be admitted to prove the contents by inferior evidence: but there is no reaſon why the poſſeſſor of the deed ſhould be allowed to give ſuch inferior evidence, when he *can* give better, if he pleaſes. Lord MANSFIELD obſerved, that in *civil* cauſes, the

the Court will force parties to produce evidence, which may prove againſt themſelves; or leave the refuſal to do it (after proper notice), as a ſtrong preſumption to the jury. The Court will do it in many caſes, under particular circumſtances, by rule, before the trial, eſpecially if the party, from whom the production is wanted, applies for a favour. But, in a *criminal* or *penal* cauſe, the defendant is never forced to produce any evidence, though he ſhould hold it in his hands, in court.—Rule diſcharged.

Oates *ex dim.* Wigfall *v.* Brydon *et al.* Ea. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1895.

On the trial of an ejectment, THE QUESTION was, "Whether an *actual* entry is neceſſary to be *proved*; or "whether the *confeſſion* of leaſe, entry, and ouſter, be *ſufficient*, without actual proof of it?" PER CURIAM: As there was no proof of actual ouſter, no actual ouſter can be ſuppoſed; but ſlight proof will be ſufficient to be left to the jury. However, though no actual ouſter can be ſuppoſed, yet *we are all of opinion, that the confeſſion of leaſe, entry, and ouſter, is ſufficient to bar a nonſuit, for want of proof of actual ouſter. The meaning of confeſſing, leaſe, entry, and ouſter, is to bring the matter to the mere queſtion of the plaintiff's poſſeſſory title.* To avoid a fine, there muſt be an actual entry; and the demiſe cannot be carried back beyond the actual entry. In all other caſes, the confeſſion of leaſe, entry, and ouſter, is ſufficient. And ſo it is now ſettled, that it is ſufficient for an ejectment brought upon a condition broken. As to this particular caſe of a tenant in common, there are caſes enow to juſtify our opinion. *Vide Johnſon* v. *Allen*, 13 *W.* 3. reported in 12 *Mod.* 657. And indeed it is ſcarce poſſible, that a tenant in common ſhould bring an ejectment, but where there is an actual ouſter. 7 *Mod.* 39. 1 *Queen Anne.*—"*per Holt.* He ſhall "not be compelled when he does not diſpute the title: but "where he does diſpute it, he ſhall be compelled to confeſs "leaſe, entry, and ouſter." Therefore, we are all clear that the confeſſion of leaſe, entry, and ouſter, is ſufficient, in the caſe of a tenant in common, without proof of actual ouſter.—Poſtea to be delivered to the defendant.

Goodright *ex dim.* Balch *v.* Rich, Tr. Ter. 37 Geo 3. B.R. 7 *Ter. Rep.* 327.

On the trial of an ejectment, the plaintiff muſt prove the defendant to be in poſſeſſion of the premiſes, which he claims to recover. In this caſe, THE PRINCIPAL QUESTION, was, WHETHER the defendant, who has entered into the conſent rule, is not thereby eſtopped from diſputing at the trial his poſſeſſion of the premiſes for which the ejectment is brought? *In ſupport of the affirmative*, it was argued, on the behalf of the leſſor of the plaintiff, that the whole proceeding is founded in fiction. The declaration againſt the caſual ejector is in very general terms. The notice from the caſual ejector, ſtates that he is informed that the perſon, on whom the ſervice is made, is either in poſſeſſion, or claims title to, the

the premiſes; the latter of which deſcriptions has been added in modern times, and was intended to apply to the caſe of landlords. This gives the party intereſted notice to come in and defend his title, otherwiſe he will be turned out of poſſeſſion. If no perſon appear to defend, then judgment follows againſt the caſual ejector. If any come in and defend, he muſt enter into a conſent rule, to conleſs leaſe, entry, and ouſter; the effect and ſubſtance of which is, that the leſſor has made a leaſe to the plaintiff of the premiſes which he ſeeks to recover, that he entered into poſſeſſion of the ſame, and that the defendant ejected him; and upon this condition alone, the defendant is admitted to defend; and he thereby alſo ſtipulates to inſiſt upon the title only. *Having therefore by the conſent rule agreed to admit theſe facts as the condition of his being let in to defend, he cannot be permitted at the trial to retract his conſent to any part.* But it was admitted, that, in this reſpect, the conſent rule of the court of *C. B.* materially differs from that in this court, for there the confeſſion of the leaſe entry and ouſter is only "of ſo much "of the tenements ſpecified in the plaintiff's declaration as "are in the poſſeſſion of the defendant or his tenants, or "any perſons claiming by or under his title." Lord KENYON, Ch. J.—The caſe in *Buller's Ni. Pri.* 110, in which it was ſaid, "If there be but one defendant as tenant in poſſeſſion, the plaintiff need not prove him in poſſeſſion," was ſuppoſed to be law; and when a caſe afterwards came on before me on the home circuit, I ruled accordingly, not thinking it neceſſary to prove the defendant in poſſeſſion. But I was never called on to conſider the queſtion accurately till now; and when we conſider the reaſon of the thing, it ſeems wonderful that any queſtion could ſeriouſly have ariſen upon this ſubject. *On the trial of an ejectment, two parties come to litigate the title to an eſtate, the perſon claiming, and the perſon who is ſuppoſed to withhold improperly, the poſſeſſion: but as ſoon as it turns out that the latter is not in poſſeſſion, it ſeems to me that the cauſe is ill conſtituted between thoſe two perſons.* The proceedings in ejectment were inſtituted in order to try who is entitled to the poſſeſſion of an eſtate on title: when the declaration is delivered the leſſor of the plaintiff claims in general terms ſo many acres of land, ſo many meſſuages, &c. which communicates but little intelligence to the perſon ſerved with the declaration. If the latter happen to be in poſſeſſion of any land falling within the deſcription in the declaration, he muſt defend, in order to preſerve his own right; then it would be unjuſt that a verdict ſhould be found againſt him, though he can prove a title to every acre of land in the pariſh of which he was ever in poſſeſſion; and yet this is the conſequence of the plaintiff's argument. In the common pleas the defendant enters

enters into the conſent rule as to all the lands in his poſſeſſion: then on that rule it is neceſſary for the plaintiff to prove the defendant in poſſeſſion of the land that he claims. But it is ſaid that the meaning of the rule of this Court is different: I ſhould be extremely ſorry to find that in a fictitious proceeding, inſtituted for the more eaſy attaining of juſtice, different rules were to obtain in the different courts. If we were bound to decide in this caſe in favour of the plaintiff, it would be neceſſary to alter the rule of our Court immediately. This point, however, came under the conſideration of the Court in the caſe of *Smith* v. *Man*, reported in 1 *Wilſon*, 220, where it was holden that *the plaintiff muſt prove the defendant in poſſeſſion*; and I think that that caſe was properly decided. Then it was urged that two caſes have been ſince determined at *Niſi Prius* the other way: but they were only deciſions at *Niſi Prius*, where perhaps the ſubject was not ſo well conſidered, and they cannot outweigh the authority of the caſe in *Wilſon*. Therefore on the convenience and reaſon of the thing, and conſidering the queſtion in every point of view, I am of opinion that the plaintiff muſt prove the defendant in poſſeſſion of that which he ſeeks to take from him, and that the contrary practice that has obtained is wrong.—ASHHURST, J. If the defendant have any land in the pariſh mentioned in the declaration in ejectment, he may ſuppoſe when he is ſerved with the ejectment that the plaintiff intends to proceed for that; and if it turn out that the plaintiff ſues for other lands it is hard that he ſhould be anſwerable for the coſts of the ejectment when he is not in fault.—GROSE, J. It is admitted that according to the rule of the common pleas the plaintiff is bound to prove the defendant in poſſeſſion: then it would be extraordinary that in a fictitious proceeding, invented for the purpoſe of trying titles, there ſhould be different rules in the different courts. But I think that the rules of both the courts are in ſubſtance the ſame; nor is there any hardſhip in requiring proof of that which the plaintiff is ſuppoſed to have already ſworn; for he ſwears that he has ſerved the declaration on the tenant of the premiſes in poſſeſſion.—LAWRENCE, J. Alſo agreed.—*Per Curiam:* Judgment of nonſuit.

Roe *ex dim.* Thorne *v.* Lord *et al.* Tr. Ter. 26 Geo. 3. C.B. 2 *Black.* 1099.

In this caſe it became a queſtion, whether, in ejectment, one claiming title as heir, is bound to deduce any pedigree in proof of his deſcent.—It was an ejectment, as heir at law to *Thomas James Selby*, eſq. who died A.D. 1768, poſſeſſed of a conſiderable real and perſonal eſtate, the bulk of which, by will, dated the 18th of Auguſt, 1768, he deviſed to his right and lawful heir at law; for the better finding of whom, he directed advertiſements to be publiſhed in ſome of the public papers, immediately after his deceaſe. And charged the ſaid eſtates with his

his debts, legacies, &c. to be paid by such heir at law, within twelve months after his decease. "But should it so happen that no heir at law is found," he constitutes and appoints *William Lowndes*, esq. to be his lawful heir, on condition he changes his name to *Selby*, and gives him the said estate, subject to the charge aforesaid. And devises another estate, in Middlesex, to *Lord* and *Filkes*, his executors, in trust to sell; for which estate this ejectment was brought.—On the trial, the lessor of the plaintiff gave some slight evidence of a reputed relationship between himself and the testator, and of acknowlegements, that the *Thornes* were his heirs at law, but made no deduction of pedigree, nor was able to state how that relation arose, or who was the common ancestor, or whether any ancestor of *Thorne* was brother or sister to any ancestor of *Selby*. The jury found for the plaintiff.—A motion was afterwards made for a new trial, as well upon the imperfection of the evidence, as also upon the principle, that in order to recover an estate by descent, *it is necessary to state some pedigree to the jury, and shew how the lessor of the plaintiff claims to be heir*. Else, if a mere apprehension of the deceased, that *A.* was his relation, or was his heir, be sufficient, it might carry the estate contrary to the rules of descent, to the half blood, to the maternal, instead of the paternal line, &c.—and would introduce much confusion and perjury. On shewing cause for the plaintiff, THE COURT took time to consider, when not being able to agree in opinion concerning the necessity, that a person claiming to be heir shall state in evidence a pedigree, either proving the deceased and the claimant to be descended from some common ancestor, or at least from two brothers or sisters (which was allowed to be an immediate descent)—or, whether vague evidence of heirship, without such deduction, is proper to be left to a jury;—AND THE WHOLE COURT being clear, that the evidence now given was too loose and insufficient to prove even general kindred to the testator, they made the rule absolute for a new trial.—The judges, who thought the deduction of descent was necessary, held (in their private conferences), that the same which ought to be pleaded in real actions, must now be given in evidence in ejectment, in order to make out a title by descent. And they relied on *Bro. Mort d' Aunces.* 13. 2 *West Symboleogr.* 65. *Co. Entr.* 596, 597. *Theloal.* 207. *no.* 11. *Dyer* 79. *Fitzh. Waste* 51. *Dyer.* 89. *b. Dyer.* 37. *b. Plowden* 425. *Dyer.* 319. *Co. Entr.* 196. *a.* for the several cases in which deduction of pedigree was required. See also *Heard* and *Baskerville*, *Hob.* 232. *Jenk's* case, *Cro. Car.* 151. *Edwards* and *Rogers*, 1 *Jon.* 456. Duke of Newcastle and *Wright.* 1 *Lev.* 190. *Kellow* and *Rowden.* 1 *Show.* 244. *Carth.* 126. *Denham* and *Stevenson. Salk.* 355. 6 *Mod.* 241.

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Doe *ex dim.* Maſon *v.* Maſon, Eaſt. Ter. 10 Geo. 3. C.B. *Wilſ.* 63.

A ſingle admittance to a copyhold, is evidence to prove the cuſtom of a manor, for lands to deſcend to the youngeſt nephew.—On the trial of an ejectment, it was contended, on the part of the defendant, that the cuſtom of the manor was, that the copyhold lands deſcended to the youngeſt ſon; or, if no ſon, to the youngeſt brother of the tenant, laſt lawfully ſeiſed; and that the cuſtom extended no farther.—On the part of the leſſor of the plaintiff it was contended, that the cuſtom was, that the lands deſcended to the youngeſt ſon; if no ſon, to the youngeſt brother; if no brother, to the youngeſt nephew; if no nephew, to the youngeſt couſin of the tenant, laſt lawfully ſeiſed.—It was proved for the leſſor of the plaintiff, that he was the youngeſt nephew of the perſon laſt ſeiſed of the premiſes; and it appeared, by the court rolls of the manor, that a youngeſt nephew, at a court leet and court baron, held in and for the ſaid manor, in 1657, was admitted tenant, as heir, by the cuſtom, to the perſon laſt ſeiſed of lands in this manor: *this was the only evidence for the plaintiff.*—For the defendant it appeared, that in 1692, the homage had by a preſentment and which was entered upon the rolls of the manor, found that the cuſtom of deſcent extended only to the youngeſt ſon; and if no ſon, to the youngeſt brother, and no farther. Alſo two old witneſſes ſwore, that they had heard and believed, that this was the cuſtom, and that it went no further than the youngeſt ſon and youngeſt brother.—It was moved for a new trial, as a verdict contrary to evidence; inſiſting that the ſingle inſtance of admittance of the nephew, in the year 1657, was not ſufficient evidence to ſupport the cuſtom.—SED PER CURIAM: The admittance of the nephew in 1657, was very material evidence, being done at a court leet and court baron, when it would certainly have been controverted, if the jury had not thought that to be the cuſtom. And as this is an ejectment, there is no occaſion to grant a new trial, for the defendant may try the cuſtom again, if he thinks fit.

Earl *ex dim.* Goodwin *v.* Baxter, Mic. Ter. 19 Geo. 3. C.B. 2 *Black.* 1228.

On the trial of an ejectment for the reſidue of a term of 1000 years, the leſſor of the plaintiff produced the original leaſe, and proved the poſſeſſion in himſelf; and thoſe under whom he claimed, ever ſince 6 *Ann.* and alſo ſhewed one meſne aſſignment in 16 *Jac.* 1. But as he did not prove all the meſne aſſignments, he was nonſuited.—PER CURIAM: It ſhould have been left to the jury, with a recommendation to preſume all the meſne aſſignments.

Goodtitle *ex dim.* Revett *v.* Braham, Hil. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 497.

The defendant, in ejectment, is entitled to the general reply, where the plaintiff, claiming by deſcent, proves his pedigree, and ſtops; and the defendant ſets up a new caſe in his defence, which is anſwered by evidence on the part of the plaintiff.

*Judg-*

*Judgment.*]—A judgment in ejectment had been regularly obtained by the plaintiff, againſt the caſual ejector, by default: and the landlord of the premiſes had moved to ſet aſide this judgment; becauſe his tenant had not given him notice of his having been ſerved with an ejectment. AND THE COURT were clearly of opinion, that the poſſeſſion ought not to be changed by a judgment in ejectment, where there had been no trial or opportunity of trying; though the obtaining the judgment might be owing to the default, or even treachery, of the defendant's own tenant. But, if the plaintiff had not been guilty of any colluſion with the tenant, they thought it reaſonable that the tenant, who was the perſon guilty of the default, ſhould pay the coſts. For, the rule of the Court, which requires ſervice upon the tenant in poſſeſſion, is calculated with a view that the tenant ſhould give notice to his landlord, in order that the ejectment-cauſe may be tried between the proper parties intereſted in the queſtion. The rule was, therefore, enlarged; and an order made upon the tenant, to ſhew cauſe why he ſhould not pay the coſts. —Upon its coming on again, the tenant admitted himſelf to be in fault; and ſubmitted to the Court. The landlord was an infant; and, therefore, could not conſent to the trial of the queſtion (which was heirſhip) in an iſſue. But as relief was, on his behalf, prayed againſt a judgment which was ſtrictly regular, there could be no doubt but that the Court might add ſuch terms and conditions to ſuch relief, as were juſt and equitable, by bringing the real queſtion between the plaintiff and him to be tried upon the real merits. —THE COURT accordingly ordered the judgment, and alſo the writ of poſſeſſion, to be ſet aſide. And referred it to the maſter to tax the leſſor of the plaintiff his coſts, together with the coſts of this application: to be paid by the tenant in poſſeſſion. And it was further ordered, that the landlord be made defendant (as in the conditional rule); *and that he ſhall, upon the trial of the iſſue, to be joined between the parties, not ſet up any ſatisfied term, or any truſt-eſtate, to defeat the leſſor of the plaintiff*; and alſo admit that *Zouch Troughton* was ſeiſed of the premiſes in queſtion.

Doe *ex dim.* Troughton *v.* Roe, Mic. Ter. 7 Geo. 3. B.R. 4 *Burr.* 1996.

*Coſts.*]—On a motion to ſet aſide a rule to reply, it appeared that the landlord had applied to be made a defendant, and had entered into the common rule; but the leſſor of the plaintiff had never joined in the conſent rule: and it was objected that he could not be forced to proceed againſt a perſon, whom he never had accepted as defendant.—BUT THE COURT held the rule to be regular; and that the nominal plaintiff might be nonproſſed thereby; but being nominal, the defendant could have no coſts.

Goodright *ex dim.* Ward *v.* Badtitle, Ea. Ter. 11 Geo. 3. C.B. 2 *Black.* 763.

Smith, *ex dim.* Ginger, *v.* Barnardiſton, Ea. Ter. 13 Geo. 3. C.B. 2 *Black.* 904.

But the Court will ſtay the proceedings in a ſecond ejectment, till the coſts of the former are paid; in a caſe like the laſt, where the leſſor of the plaintiff has neglected to enter into the conſent rule. For when the Court ſees manifeſt vexation and oppreſſion, it will exerciſe its juriſdiction over this fictitious proceeding to prevent it.

Doe, *ex dim.* Chambers, *v.* Law, Hil. Ter. 18 Geo. 3. C.B. 2 *Black.* 1180.

An ejectment brought by the fraudulent aſſignee of an inſolvent debtor, was ſtayed, till the coſts of former ejectments, which had been brought by the debtor himſelf, were paid.—This was a mere contrivance to defraud the defendant. The firſt ejectment was brought in the King's Bench, in 1773, which failed. In July, 1774, *Chadwick* took the benefit of the inſolvent act, and delivered in his ſchedule. In Eaſter, 1777, a new ejectment was brought in this Court, which was ſtaid till the payment of the former coſts (1). To evade this rule, and for no other purpoſe, a ſubſequent aſſignment is made to *Chambers*.—PER CURIAM: This is too groſs to be endured.—Rule abſolute to ſtay proceedings until, &c. and that *Chambers* ſhould pay the coſts of the application.

Keene, *ex dim.* Angel, *et al. v.* Angel, Tr. Ter. 36 Geo. 3. B R. 6 *Ter. Rep.* 740.

On ſhewing cauſe againſt a rule for ſtaying the proceedings till the coſts of a former ejectment, brought by the ſame leſſor of the plaintiff, were paid. The objections were, *Firſt*, That the defendant had been guilty of laches in not having before applied for the coſts of the former nonſuit, which was in 1793, the coſts of which had not been taxed till Hilary Term laſt.—*Secondly*, That there is another defendant now, who was not a party to the laſt ejectment.—*Thirdly*, That the preſent ejectment is for different lands in a different county.—PER CURIAM: The only queſtion in theſe caſes is, Whether the ſecond ejectment is in ſubſtance brought to try the ſame title; if ſo, the rule is of courſe to ſtay the proceedings until the coſts of the former ejectment have been paid. And as to the laches of the defendant, in this caſe, as it is called, in not calling for the coſts of the former nonſuit, for near three years; viz. between 1793 and 1796, that is rather in favour of the leſſor of the plaintiff than a ground of objection on his part; and there may be many good reaſons for ſuch a proceeding on the part of the defendant, ſuch as the poverty of the other party, or a view to quiet any further controverſy. In *Doe* d. the Ducheſs of *Hamilton* v. *Hatherley*, and others; 2 *Stra.* 1152. and 1 *Stra.* 318. there was a much longer period intervening between the two ejectments, namely, from the 6 *Geo.* 1. to the 14 *Geo.* 2. but that was held no objection to ſuch a rule as the preſent. That caſe alſo furniſhes an anſwer to another objection, that this ſuit is not between the ſame parties as the

(1) See vol. II. p. 752.

former;

former; for there the first ejectment was brought on the joint demise of the Duke and Duchess, and the second on the demise of the Duchess alone. But the Court considered that it was on the same title, and therefore in effect between the same parties: and the same rule has been adopted in a variety of cases since. The same answer applies to the defendants being different: that must be the case upon every change of tenants, and is of no manner of importance, any more than the ejectment being brought for a different part of the same estate. If it were otherwise, the rule itself would be rendered nugatory, as nothing would be more easy than to evade it.—Rule absolute (1).

*Writ of possession.*]—The legal relation to the teste of the writ is to be supported in maintenance of the *hab. fac. poss.* on judgment in ejectment.—The lessor of the plaintiff died on the 1st of March: after which event, *the writ of possession* was taken out. But it was *tested* on the last day of the preceding Hilary Term; returnable on the first day of the following Easter Term; held that this proceeding was *regular:* and that it would have been so in any other case as well as in an ejectment, by reason of the writ's legal relation to its teste.

Doe, *ex dim.* Mary Beyer, *v.* Roe, Mic. Ter. 7 Geo. 3. B.R. 4 *Burr.* 1970.

The plaintiff in ejectment, as tenant in common, recovered possession of five eighths of a cottage, with the appurtenances, and a writ of possession was executed by the sheriff, who turned the tenant out of possession of the whole, and locked up the door; AND THE COURT, upon motion, made a rule upon the sheriff and the lessor of the plaintiff, to restore to the tenant, possession of three eighth parts of the premises.

Roe, *ex dim.* Saul, *v.* Dawson, Hil. Ter. 10 Geo. 3. C.B. 3 *Wils.* 49.

*Action for mesne profits.*]—If one tenant in common recovers against another in ejectment by default, he may maintain trespass for the mesne profits.—The plaintiff, *Goodtitle*, on the demise of his lessor, who was tenant in common of the lands in question, with the now defendant, *Tombs*, recovered judgment and possession in ejectment, against a casual ejector by default, and afterwards brought this action of trespass, for the recovery of damages sustained, by being kept out of possession by his companion, *Tombs*, from the time of the demise laid in the declaration in ejectment, until the time of the execution of the writ of possession. Upon the general issue pleaded, there was a verdict for the plaintiff, damages 15l. and 40s. costs, subject to the opinion of the Court, upon this question, viz. WHETHER *one tenant in common can maintain this action against the other, to recover damages for the expulsion and mesne profits?*—For the plaintiff, it was objected at the trial of this cause, that although a tenant in common may maintain an ejectment against his com-

Goodtitle *v.* Tombs, Tr. Ter. 10 Geo. 3. C B. 3 *Wils.* 118.

(1) See vol. II. p. 752.

panion, upon an actual ouſter, yet he cannot have this action of treſpaſs againſt him to recover damages, and the meſne profits; and it was inſiſted on the behalf of the defendant, that one tenant in common cannot have treſpaſs *quare clauſum fregit* againſt the other, for their poſſeſſion is *one* and *entire*, the poſſeſſion of one is the poſſeſſion of both, ſo they cannot be treſpaſſers upon one another, for each of them may enter and occupy in common, *per my*, & *per tout*, the lands and tenements which they hold in common.—That without an actual *ouſter*, treſpaſs will not lie, a bare taking the whole profits is not an *ouſter;* but to drive his cattle off, and not to ſuffer him to enter, is an actual *ouſter*.—WILMOT, Ch. J. Before the time of *Hen.* 7. plaintiffs in ejectment did not recover the term; but until about that time, the meſne profits were the meaſure of damages. I bruſh out of my mind all fiction in an ejectment, the nominal plaintiff, and nominal defendant, the caſual ejector, the *dramatis perſonæ*, or *actores fabulæ*, and conſider the recovery by default, or after a verdict, as the ſame thing, viz. a recovery by the leſſor of the plaintiff, of his term againſt the tenant, in the actual wrongful poſſeſſion of the land. By the old law and practice in an action of ejectment (as I before ſaid), you recovered nothing but damages, the meaſure whereof was the meſne profits; no term was recovered; but when it became eſtabliſhed that the term ſhould be recovered, the ejectment was licked into the form of a real action; the proceeding was in *rem*, and the thing itſelf; the term only was recovered, and nominal damages, but not the meſne profits; whereupon this other mode of recovering the meſne profits in an action of treſpaſs was introduced, and grafted upon the preſent fiction of ejectment; and I take it, that the preſent action is put in the place of the ejectment at common law, which was indeed a true, and not a fictitious action, and in which the meſne profits only, and not the term, were recovered, for it was no other than a mere action of treſpaſs. PER CURIAM: It muſt be taken for granted in this caſe, that *there was an actual ouſter, and that the defendant kept him out from the time of the demiſe till the judgment in the ejectment;* the plaintiff in this caſe is not confined to the very meſne profits only, but he may recover for his trouble, &c.—Juries are not confined to the mere rent of the premiſes, but may give more than the value of the meſne profits in this ſort of action of treſpaſs; if it were not to be ſo, ſometimes complete juſtice could not be done to the party injured. This action may be brought either in the name of the nominal plaintiff in the ejectment, or by his leſſor; it follows the ejectment as a neceſſary conſequence: the judgment in ejectment by default is of the very ſame effect in this caſe as if it had been after a verdict; and the Court will intend every thing poſſible againſt the defendant, that

that there was an actual *ouſter*, if *that* were neceſſary in this caſe; but proof of the judgment in ejectment, and the writ of poſſeſſion executed, was ſufficient in this caſe to warrant a verdict for the meſne profits.

*Writ of error.*]—The defendant having brought a writ of error in parliament, upon an ejectment on the demiſe of *Boughey*, THE COURT obliged him to enter into a *rule*, "Not to commit *waſte* or deſtruction, during the pendency of "this writ of error." Wharod *v.* Smart, Mic. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1823.

Bail in error, on a judgment in ejectment, juſtify in double the ſum.—In ejectment, on a writ of error from *C. B. Evan Thomas*, the defendant below, and now the plaintiff in error, offered to become bail to proſecute the writ of error, and to juſtify in *double the rent*. And although the judgment had been given for the plaintiff in ejectment; and alſo for 20l. coſts.—The COURT, on conſideration of the ſtat. 17 *Car.* 2. c. 8. ſ. 3. (1) and alſo of the *practice* (which is to require him to *juſtify in double the rent*), did accordingly admit him to be bail: and the rent being 16l. per annum, he juſtified in double that ſum, (32l). Evan Thomas *v.* Goodtitle, Mic. Ter. 10 Geo. 3. B.R. 4 *Burr.* 2501.

## Engravings.

If the proprietor of a mezzotinto, or other print, will entitle himſelf to the benefit of the ſtat. 8 Geo. 2. cap. 13. and ſecure his property, he muſt engrave both *his name, and the day of the firſt publiſhing thereof*, on the plate, and print the ſame on the print.—On the trial of an action upon the ſta. 8 *Geo.* 2. c. 13. ſect. 1. againſt the defendants (brought to recover the penalty given by the above ſtatute, for copying and ſelling a print), it was proved that the plaintiff purchaſed the plate of the proprietor, and that the defendants had copied and ſold the ſame. The name of the proprietor of the plaintiff's plate, and the year of our Lord wherein the ſame was publiſhed, was engraved thereon, and printed on his prints; *but the day of the month of the firſt publiſhing thereof was not engraved on his plate, or printed on his prints*, and thereupon it was objected for the defendants, that the plaintiff could not recover, becauſe he had not complied with the act of parliament. Sayer, *qui tam*, &c. *v.* Dicey, *et al.* Ea. Ter. 10 Geo. 3 C B. 3 *Wils.* 60.

(1) Which directs, that the plaintiff in error ſhould be bound to the plaintiff in the action of *ejectione firmæ*, &c. in ſuch *reaſonable* ſum as the Court to which ſuch writ of error ſhall be directed ſhall think fit; with condition, that if the judgment ſhall be affirmed in the writ of error, or the writ be diſcontinued, in default of the plaintiff therein, or the plaintiff be nonſuit in ſuch writ of error, that then the plaintiff ſhall pay ſuch coſts, damages, and ſums of money, as ſhall be awarded, upon, or after ſuch judgment affirmed, diſcontinuance, or nonſuit had.

The point was reſerved; AND now, PER CURIAM: The words of the ſtatute are as plain and certain as poſſible: there are two conditions therein, viz. the *day* of the firſt publiſhing the print, and the *name* of the proprietor thereof, both muſt be engraved and printed; that any perſon may know when the proprietor's excluſive right ceaſes; and when, and againſt whom, he may be guilty of offending contrary to the ſtatute. —Poſtea to the defendants.

See alſo Title **Copyright**, in vol. II.

## Error.

Batchelor *v.* Ellis, Tr. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 337.

*Who may bring error.*]—The defendant, in the original action need not obtain a judge's order to change his attorney upon bringing a writ of error: becauſe a writ of error is the commencement of a new action, the writ being returnable in a different court: in the ſame manner as a *ſcire facias*, to revive a former judgment, has been holden to be a new action in a variety of caſes.

Camden, Calvert and King, *v.* Edie, Tr. Ter. 28 Geo. 3. C.B. 3 *Hen. Black.* 21.

Defendants having agreed, under a conſolidation rule, not to bring any writ of error, cannot do ſo, though there be manifeſt error on the record.—The plaintiffs having brought twenty-five actions on a policy of inſurance againſt the defendant and others, a rule was obtained to conſolidate; by which it was ordered (among other things), that the defendants ſhould be at liberty to proſecute a bill filed by them in the Exchequer, upon their undertaking not to file any other bill againſt the plaintiffs for an injunction, NOR TO BRING "ANY WRIT OF ERROR."—The cauſe went to trial, and a verdict was found for the plaintiffs for a total loſs. The plaintiff's attorney was afterwards ſerved with an allowance of a writ of error; upon which a rule was obtained to ſhew cauſe why an attachment ſhould not iſſue againſt the defendant's attorney for contempt, and breach of the conſolidation rule, and why all further proceedings on the allowance of the writ of error ſhould not be ſtayed. On ſhewing cauſe, it appeared by the affidavit of the defendant's attorney, that he had conſulted ſome very eminent counſel, who gave it as their opinion, that there was manifeſt error in the record; upon which, and alſo conceiving that the defendant was only bound by the rule not to bring a writ of error *for delay*, he brought the writ of error in queſtion, the damages and coſts being previouſly ſatisfied.—PER CURIAM: It is contrary to juſtice, to permit the defendant to proceed in the writ of error, ſince he has by his own act and conſent, prevented the plaintiff from purſuing the common courſe of law

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in the other actions; the rule must therefore be made absolute with costs for staying the allowance of the writ of error; but though it is not regular to take notice of the extra opinions of counsel, yet as the attorney appears to have been led into a mistake, that part of the rule which relates to the attachment against him must be discharged.

Wade *v.* Rogers, Tr. Ter. 11 Geo. 3. C.B. 2 *Black.* 780.

But a consent to confess a judgment does not imply a consent not to bring a writ of error.—The plaintiff recovered judgment by default; and signed final judgment. The defendant brought a writ of error in the King's Bench, but (there being no bail in the action below) the plaintiff brought his action of debt on the judgment, and held the defendant to bail. In Easter Term, 1771, there was a rule by consent, to stay the proceedings on the second action, on the defendant's giving judgment with a stay of execution, till the writ of error should be determined. In the same term, the original judgment was affirmed. And now the defendant brings a new writ of error, on the second judgment. It was moved, to quash the writ of error; being vexatious, and contrary to the defendant's implied consent, on giving judgment in Easter Term.—PER TOT. CUR. No such consent (not to bring a writ of error) is implied, in the present rule; but may be proper to be expressed, for the future in similar cases.—Rule discharged.

Knox, Esq. *v.* Costello. Mic. Ter. 6 Geo. 3. B R. 3 *Burr.* 1789.

One defendant alone cannot bring error on a judgment against several.---But a *scire facias quare executionem non* may be prayed and sued out by one executor upon a writ of error brought upon a judgment for him and another, without shewing that the other executor is dead.---This was a writ of error from *B. R.* in Ireland, to reverse a judgment of theirs, affirming a judgment in *C. B.* there, in an action of debt for 1800l. brought against *William Knox*, by *Christopher Fallon*, deceased: and also affirming the adjudication of *C. B.* in Ireland, of execution of the same judgment upon writs of *scire facias*, issued out of the said court of *C. B.* in Ireland, against the said *Knox*, at the suit of *Edmond Costello*, and *Edmond Fallon*, surviving executors of the said *Christopher Fallon*.—The original action was brought in C. B. in Ireland, by *Christopher Fallon*. A *scire facias quare executionem non* issued, at the suit of the said *Edmond Fallon*, and *Edmond Costello*, suggesting "That *Christopher Fallon* was dead, and "that they were his surviving executors." Upon this *scire facias* the defendant pleaded payment: which was found against him, with sixpence damages. Whereupon it was adjudged, "That they (as his executors) should have execution "against *Knox*, for the debt *and damages* aforesaid:" and it was *also* adjudged, "That they do recover against the "said *William Knox*, their *costs and expences aforesaid*, to "sixpence by the jury aforesaid, in form aforesaid assessed; "and *also*, 17l. 14s. 8d. for their *costs and expences* aforesaid,

" adjudged to them at their own requeſt, by the Court here, " by way of increaſe, according to the form of the ſtatute in " ſuch caſe made and provided; which ſaid coſts *and damages*, " in the whole, amount to 17l. 15s. 2d. and that the ſaid " *Edmond Fallon* and *Edmond Coſtello*, have execution, &c.— *Only one* of the executors appeared to the writ of error in B. R. in Ireland, viz. *Edmond Coſtello;* who, *alone*, ſued out the *ſcire facias quare executionem non*, in B. R. there; and yet that Court affirmed the judgment of C. B. for *both*; and the adjudication was, " That BOTH ſhould recover."—TWO OBJECTIONS were made for the plaintiff in error; 1ſt, That the Court below have given *damages* for non-payment of the money: whereas, *damages* cannot be given in a *ſcire facias;* 2dly, That the *ſcire facias quare executionem non*, in the King's Bench in Ireland, is prayed by *Edmond Coſtello*, only; though the writ of error is brought againſt the *two* executors: and yet there is no ſuggeſtion " That either of them is dead;" though *only one* of them appears to it, and prays the *ſcire facias*.—PER CURIAM: " The Court ought to *ſupport* a judgment upon the *merits*."—The firſt objection turns upon a fact, which does not ſupport the objection. To be ſure, *damages for delay of execution* cannot be given in a *ſcire facias*; nor could *coſts*, till the ſtatute of 8, 9 *W.* 3. c. 11. ſ. 3. and if this caſe were ſo, the judgment might be reverſed as to the 6d. and affirmed as to the *reſt*.—But here, the being " damni- " fied, and put to coſts to the amount of 6d." is only meant as a *foundation* for the *coſts de incremento:* and the judgment is " That the plaintiffs ſhall recover 17l. 14s. 8d. for their " *coſts and expences*, &c."—The 2d objection is, " That the " *ſcire facias quare executionem non*, is brought by *only one* of " theſe *two* executors."—But a *ſcire facias quare executionem non*, is only to bring the plaintiff in error in, to *aſſign his errors*. He comes in, upon it, and aſſigns his errors. Therefore he waived any objection, and admitted the one executor to be ſufficient to call upon him, merely to aſſign errors. He might, perhaps, have moved to quaſh it: but as he did not challenge it, he has waived the objection to it; and we are not to *preſume* the other executor to be alive.---*Hacket* v. *Herne*, in *Carthew* 7. indeed is a determination " That a writ of " error by one alone, upon a judgment againſt two, is *not* " good." But that is upon account of the inconvenience that would ariſe from a perpetual delay of the execution, if *every* defendant might bring a writ of error by himſelf. Now *that reaſon* does not *hold*, in the preſent caſe, where theſe executors are *defendants* in error, and not plaintiffs.---Judgment was affirmed.

Rafael, v. Verelſt, Ea. Ter. 16 Geo 3. C.B. 2 *Black.* 1067.

*Bail in error.*]---Where a writ of error is amended in B. R. new bail ſhall be given to the amended writ in C. B. and the plaintiff below ſhall not take out execution for want of bail.--- It was moved to ſet aſide the execution in this cauſe with coſts,

costs, and to amend the recognizance of the bail in error. A writ of error had been brought on a judgment, in the name of *Smith* (who had a verdict in his favour on the first trial) as well as of *Verelst*, against whom the judgment was entered. This, the cursitor made affidavit, happened by his mistake, and was contrary to his instructions, which were to sue out a writ of error for *Verelst* only. The court of King's Bench was moved, on the part of the defendant in error, to quash this writ; on the part of the plaintiff in error, to amend it by striking out the name of *Smith*.---THE COURT discharged the former rule, and made the latter absolute.---The recognizance of bail having necessarily followed the writ, the same mistake had happened there, so that there was, in fact, no bail to the amended writ. Whereupon, the plaintiff below (the defendant in error) served an execution the same evening, for 4315l. 5s. debt and costs: and though the plaintiff in error offered to alter the recognizance, agreeable to the amended writ, it would not be accepted.---For the defendant in error (the plaintiff below), it was urged, that he had got a legal advantage, and was entitled to keep it; especially as the writ of error was only brought for delay. But PER CUR. The question of law is a question of weight and consequence, and proper to be discussed on a writ of error, if the parties are dissatisfied with our judgment. The present proceeding is too ingenious, and too nimble, in such a cause as this; therefore, the bail in error having entered into a new recognizance in court, the rule was made absolute, for setting aside the execution, and restoring the goods (1).

This was a writ of error returnable in *parliament*, brought upon a judgment in this Court, in an action in debt upon a *recognizance in error*. And the plaintiff in error in parliament, *not* having entered into a recognizance, pursuant to 3 *J.* 1. c. 8. the defendant in the said writ of error moved for and obtained a rule for the said plaintiff in error, to shew cause, why the defendant in error should not be at liberty to *sue out execution*, for *want* of such recognizance.---On shewing cause, for the plaintiff in error, it was insisted, that 3 *J.* 1. c. 8. does not require bail on bringing such a writ of error as this is. For, it only requires bail "upon writs of error for reversing "judgments in any action or bill of debt upon any *single bond* "for debt, or upon any *obligation*, with condition for the "*payment of money only*, or upon any action or bill of debt for "*rent*, or upon any *contract*:" whereas *this* writ is for reversing a judgment in an action of debt *upon a recognizance*; which judgment is of a superior nature to any of the judgments specified in the statute. And Lord MANSFIELD recognized the decision in case of *Bidleson* v. *Whytel* (*ante* vol. I. p. 769.),

Trinder, *v.* Watson, *et al.* Mic. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1566.

(1) See the case of *Verelst* v. *Rafael*, in vol. I. p. 586.

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and said we must not depart from settled determinations. In that case the weight of authorities prevailed.—THE COURT, however, ordered it to stand over, to inquire into the practice. And on the last day of the term, it was moved to enlarge the rule: but that rule was never drawn up; nor was any thing further done in consequence of it. So that the defendant in error probably gave up his motion, "To be at "liberty to sue out execution."

Pulteney *v.* Townson. Mic. Ter. 19 Geo. 3. C.B. 2 *Black.* 1227.

In error on a judgment, after a verdict upon a *scire facias* against bail, there must be bail to the writ of error; the *scire facias* being a personal action.—*Scire facias* against bail. They plead that the principal is dead; and, on issue joined, a verdict for the plaintiff and judgment accordingly. The bail bring a writ of error, upon which no bail is put in; whereupon the plaintiff sues out execution.—On a motion to set aside the execution, because the *scire facias* not being a personal action, but a mere award of execution, it was not within the statute of the 17 *Car.* 2. which requires bail on writs of error. It was answered, that a *scire facias* is considered as an action, and *Litt. sect.* 505. *Co. Litt.* 290. *b.* *Skinn.* 682. were cited.—THE COURT held, that a *scire facias* was upon principles a personal action; and we have the authority of *Littleton*, *Coke*, and *Holt*, to call it so. The reason they give for it is unanswerable; the defendant has a power to plead to it.—Rule discharged.

Sambidge *v.* Housley, in error, Tr. Ter. 27 Geo 3. B.R. 2 *Ter. Rep.* 17.

*Assigning errors.*]—If the defendant, in error from C. B. into B. R. give an eight-day rule to certify the record, the record may be certified in less time, though the rule expire in vacation; and a *scire facias quare executionem non*, having been issued immediately upon the record being certified, returnable the first day of the following term, the defendant may serve the plaintiff in error on that day, with a rule to appear to the *scire facias*, and a rule to assign errors.—After verdict in an action of debt in the court of Common Pleas, a writ of error was brought, returnable the last return of Easter term; and bail being perfected, a rule was given by the defendant, in error, signed by the clerk of the errors, to certify the record in eight days, otherwise a nonpros would be entered. This rule was served on the 18th of May, and the record was certified, before the first day of this term. The defendant, after the record was certified, and three days before this term, sued out a *scire facias quare executionem non*, tested the last day of Easter term, and returnable the first day of this term, and a warrant thereon was served on the plaintiff, the first day of this term. On the same day the plaintiff was also served with a rule to appear to the *scire facias*, and another rule to assign errors on record.—It was moved to quash the *scire facias* for irregularity, on two grounds; *first*, that the record should not have been certified before the first day of the present term, till which time the

*scire*

*ſcire facias* ſhould not have been ſued out; and, *ſecondly*, that the rule to aſſign errors ſhould not have been given, before the rule to appear to the *ſcire facias* was out.—PER CURIAM: The proceedings are regular on both grounds. As to the firſt; the record was brought into this Court in the vacation; then it remains as a tranſcript of the laſt term. It is not neceſſary that the officer ſhould have eight days allowed him to tranſcribe it; it is his duty, as an officer of the Court, to tranſcribe it as ſoon as he can. And though eight days are mentioned, which he is not to exceed, yet if he can certify the record in leſs time, he ſhould do it. Then, as to the other point, there is no ground, for it is an irregularity; the two rules are conſiſtent, being both for the ſame purpoſe.—Rule diſcharged.

It was agreed by court and counſel, that a writ of error could not be *non-proſs'd*, without a rule "to aſſign errors." *Leith* v. *Mac Ferlan*, Mic. Ter. 6 *Geo.* 3. B.R. 3 *Burr.* 1772.

Where a plaintiff brings a writ of error to reverſe his own judgment (which is nothing ſtrange or unreaſonable, where it is given for a leſs ſum than he has a right to demand), the common method of bringing a *ſcire facias quare executionem non*, or a *ſcire facias ad audiendum errores*, would be improper. Therefore, if the plaintiff in error will not proceed, this court may, and ought to, make a rule, to oblige him to aſſign errors within a limited time. Johnſon *v.* Jebb, Mic. Ter. 6 Geo. 3 B.R. 3 *Burr.* 1772.

In error from the Common Pleas of a judgment by default. The error aſſigned was, that no warrant of attorney for the defendant (the now plaintiff in error) was entered on the record below.—It was inſiſted for the defendant in error (the plaintiff below), that a man ſhall not take advantage of his own neglect, in not making proper entries on record.—On the other hand it was urged, that, in judgments by default, the plaintiff is to make up the whole record, and, therefore, it is his own laches.—THE COURT ordered the cauſe to ſtand over, till the court of Common Pleas could be moved, for leave to amend the record. And, afterwards, on an application to the Chief Juſtice of the Common Pleas, at his chambers, he directed a proper warrant of attorney to be filed and entered; and thereupon a new *certiorari* iſſued, and the judgment was affirmed in the King's Bench. French *v.* Cornelys, Hil. Ter. 4 Geo. 3. B.R. 1 *Black.* 453.

It is not aſſignable for error, that the plaintiff is adjudged to be in *miſericordiâ*, inſtead of the defendant. Nor after a judgment by default, on a promiſe to pay the debt and coſts, if the ſheriff will deſiſt from executing a writ of *fi. fa.* That it was not averred that the ſheriff did in fact deſiſt from the execution, nor what the amount of the poundage, &c. was, nor that the defendant had notice of ſuch amount.—This was an action of aſſumpſit, upon a promiſe to pay the debt and coſts, and ſheriff's charges, if a writ of *fi. fa.* againſt one *Mathias Taylor*, was withdrawn. The plaintiff Pullin one, &c. v. Stokes one, &c. in the Exch. Cham. in error. Tr. Ter. 34 Geo. 3. 2 *Hen. Black.* 312.

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in error let judgment go by default, in the court below, and afterwards brought a writ of error, wherein he aſſigned the common errors, and "*that the ſaid* James Pullin (the plain-"tiff in error), *is not in, or by the judgment aforeſaid, amerc-*"*ed, or declared, or adjudged, to be in* miſericordiâ, *or mercy,*"*but, on the contrary, the ſaid* Thomas Stokes (*the defend-*"*ant in error*), *is adjudged to be in mercy.*"—On the argument for the plaintiff in error, it was contended that the judgment was erroneous on two grounds; 1ſt. Becauſe the defendant, in the action, was in *miſericordiâ*, inſtead of the plaintiff. 2dly. Becauſe the ſecond count was bad, for want of a conſideration, it being only *that the ſaid* James *had then and there requeſted the ſaid ſheriff to forbear and deſiſt from executing the ſaid writ*, and alſo for want of averments; becauſe it was not averred that the ſheriff did actually forbear. And, likewiſe, that though it is ſtated that the defendant undertook to pay the poundage, bailiff's fees, and charges, there was no averment what the amount of the poundage, &c. was, or that he had notice of it.—THE COURT held that all the objections failed: that clearly there could be no error aſſigned, with reſpect to the *miſericordiâ*; that as to the conſideration of the promiſe in the ſecond count, it was ſufficient to ſtate the requeſt to forbear, if the contrary did not appear, that is, that the ſheriff did not deſiſt from proceeding in the execution; and that, though the want of ſtatement of notice might have been a ground of ſpecial demurrer, yet, as the amount of the poundage was capable of being aſcertained on a writ of inquiry, it was not a ſubſtantial objection in error. —Judgment affirmed.

Parrott one, &c. v. Spraggon *et al* in the Exch. Cham. in error, Hil. Ter. 36 Geo. 3. 2 *Hen. Black.* 608.

In an action by bill, as of Trinity Term 34 *Geo.* 3. againſt an attorney in the King's Bench, as acceptor of a bill of exchange, judgment went by default; and a writ of error being brought, the error aſſigned was, that *there was no bill filed between the parties*, in Trinity Term 34 *Geo.* 3. *to warrant the declaration and judgment*, upon which a *certiorari* iſſued, reciting the error aſſigned, and requiring the Chief Juſtice of the King's Bench to certify, whether there was any ſuch bill between the parties, filed of record in that court, in Trinity Term 34 *Geo.* 3. The return to the *certiorari* ſtated, "That it did not appear that any bill was filed "of record, between the parties in the ſaid Trinity Term "34 *Geo.* 3. But by the ſaid file of bills of Trinity Term "aforeſaid, it appeared that a bill was filed of the aforeſaid "Trinity Term, between the parties, in the vacation of the "aforeſaid Trinity Term, to wit, on the 11th day of Octo-"ber, in the ſaid 34th year of his ſaid Majeſty's reign, as by "the ſaid bill, &c. would appear."—For the plaintiff in error, it was contended, that by law, no bill can be filed in a court of common law, in vacation; but it muſt be in term. Another objection to the record was, that the return does not

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ſtate whether ſuch a bill was filed, as would warrant the declaration and judgment.—Lord Ch. J. EYRE: It is the practice of the court of King's Bench, to file bills in vacation as of the preceding term; and the return to the *certiorari*, ſhews that there is a bill filed of the term preceding, it is not neceſſary to inquire into the preciſe time when it was filed. The real queſtion is, Whether there is a bill on the file of that term? and if there is, this Court will not enquire how it came there. As to the other objection, if the *certiorari* had been to certify, whether there were any defect in the bill itſelf upon the record, ſuch a return would have been imperfect, but as the caſe ſtands, it is wholly immaterial.—Judgment affirmed.

James *v.* Staples, Tr. Ter. 35 Geo. 3. in error, B.R. 6 *Ter. Rep.* 367.

It is irregular to rule the plaintiff in error, to aſſign errors, before the expiration of the rule to appear to the *ſcire facias*.—The defendant, in error, obtained a judgment in C.B. in Hilary Term; the plaintiff, in error, ſued out a writ of error, returnable the laſt return of Eaſter. The record having been certified in Eaſter vacation, the defendant, four days before Trinity Term, ſued out a *ſcire facias quare executionem non*, teſted the laſt day of Eaſter Term, and returnable the firſt return of Trinity Term. On the firſt day of Trinity Term, *the defendant, in error, gave a rule on the* ſcire facias; *and afterwards, on the ſame day, gave another rule for the plaintiff to aſſign errors on the record.* The former of theſe rules expired on a Wedneſday, the latter on Tueſday, the day preceding the expiration of the other rule.—On a rule to ſhew cauſe, why the rule to aſſign errors ſhould not be diſcharged.—THE COURT ſaid, that the rules appeared to be inconſiſtent; that the plaintiff, in error, was called upon to aſſign errors, before he is required to appear in this Court; that the latter rule ſhould precede the former.—Rule abſolute.

Vicars *v.* Haydon, Tr. Ter. 18 Geo. 3. B.R. *Coupt.* 843.

Upon a writ of error to the Houſe of Lords, from B.R. a tranſcript of the record only goes up: and the record is ſuppoſed to be ſent back again hither; and if the judgment is affirmed, B.R. muſt out execution.

On a writ of error from C.B. though a tranſcript only is removed, B.R. may award execution.

Upon a writ of error from Ireland (when allowed), in judgment of law, the record was removed into B.R.; but, in fact, a tranſcript only came over: and when the judgment was affirmed, it was ſent back (1) with a mandatory writ, iſſued from hence to the B.R. in Ireland, reciting the whole record and proceedings, and commanding them to award execution; by which the cauſe became reſtored to that court.

Cowperthwaite *v.* Owen *et al.* in error, Ea. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 657.

So when a record is removed here from a county palatine court, by writ of error, and that writ is non-proſſed, this Court will award execution.—This action was brought by the

(1) See vol. 1. p. 5. 587.

defendants

defendants in error, in the Common Pleas, in the county palatine of Lancaſter; and after they had obtained a verdict, the plaintiff ſued out a writ of error returnable here, which was non-proſſed. And a writ of *fieri facias*, on the judgment having iſſued out of this court to the ſheriff of Surrey, a rule was obtained to ſhew cauſe, why it ſhould not be ſet aſide, on the ground, that *the judgment of non-pros ſhould have been remitted to the county palatine court, out of which execution ſhould have been awarded.*—But THE COURT were clearly of opinion, that there was no foundation for the objection; for that it was not according to the courſe of practice to ſend the record back again to the County Palatine Court, but to award execution here.—Rule diſcharged.

*Lloyd qui tam*, &c. *v.* Skutt, Ea. Ter. 20 Geo. 3. B.R. 1 *Doug.* 350.

A writ of error in the Exchequer Chamber, can only be quaſhed by that court.—It was moved that a writ of error, removing the judgment in this caſe (which was an action of debt upon the ſtatute of uſury), into the Court of Exchequer Chamber, might be quaſhed.—The objections were; 1ſt. To the form of the writ, becauſe it deſcribed the action as between the two private parties, *Lloyd* and *Skutt*, not as a *qui tam* action, in which the king was intereſted [which was but little relied on].—2dly. To the ſubſtance, on the ground that this ſort of penal action is not within the meaning of the ſtatute of 27 *Eliz. c.* 8. which firſt gave the writ of error, from this court to the Exchequer Chamber.—THE COURT, after cauſe ſhewn, took time to conſider; and now Lord *Mansfield* delivered their opinion as follows: We have conſidered this caſe, and have talked with all the other judges upon it; and we are all of opinion, that the writ of error cannot be quaſhed here, but that the application ought to be made, either to the Court of Chancery, from whence it iſſues, or to the Exchequer Chamber, where it is returnable.—Rule diſcharged (1).

Cheveley *v.* Morris, Trin. Ter. 19 Geo. 3. in Ex. Ch. in error, 2 *Black.* 1300.

If the jury aſſeſs more damages than are laid in the declaration, and judgment be entered accordingly, it is error.—In this caſe, the damages were laid in the declaration at 20l. the jury, on the execution of a writ of inquiry, aſſeſſed the damages at 31l. 10s. to which the increaſed coſts being added, final judgment was ſigned for 41l. 10s. A writ of error being brought, the error aſſigned was, that the damages found by the jury, and for which judgment was entered up, exceeded the damages laid in the declaration.—AND all the juſtices and barons (*De Grey*, Ch. J. *abſente*), agreed unanimouſly, That the verdict and judgment therein were erroneous (2); and, conſequently, reverſed the judgment.

(1) A ſimilar application was afterwards made, firſt to the court of Chancery, which refuſed to entertain the queſtion, and then to the court of Exchequer Chamber, where it was determined, that the writ of error lies to that court.

(2) See *Fitz. Abr.* tit. *Dam.* 7, 13, 16. *Yelv.* 45, 70. *Cro. Jac.* 297. 1 *Buſh.* 49.

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But where a verdict is given for a greater sum than the amount of the damages laid in the declaration, and for that cause a writ of error is brought—THE COURT will permit the plaintiff to enter a *remittitur* of the excess above the sum, laid in the declaration, on payment of the costs of the writ of error; for, as long as the record remains in court, it may be amended. Pickwood v. Wright, Tr. Ter. 31 Geo. 3. C.B. 1 *Hen. Black.* 643.

*Operation of a writ of error.*]—An allowance of a writ of error, on a judgment by *nil dicit*, is so entirely a *supersedeas* to a subsequent writ of execution, and all proceedings against the bail, that all may be set aside upon motion.—The plaintiff *Dudley* arrested *Stokes*, and held him to bail. He afterwards proceeded to final judgment, and on the taxation of costs, the plaintiff's attorney was immediately served with an allowance of a writ of error by the defendant's attorney; notwithstanding which, and his giving a rule to transcribe and receiving the transcript money, he the same day sued out a *ca. sa.* against the defendant, which was left in the office, and returned *non est inventus*. Therefore the plaintiff sued out two *scire facias*'s against the defendant's bail, which he procured to be returned *nihil*; and having signed final judgment sued out a *fieri facias* against the bail.—It was moved to set aside the writs of *ca. sa.* and *scire facias*, and the subsequent proceedings thereon, with costs; alleging, that the allowance of the writ of error was a *supersedeas* to the execution; and as no execution could be regularly sued out against the principal, no *scire facias* against the bail could be grounded thereon.—On shewing cause, it was contended, on the behalf of the plaintiff, that though the *ca. sa.* was irregular against the principal, that is no cause to quash or set aside the proceedings against the bail; but they should have pleaded it to the *scire facias*.—SED PER CURIAM: In the clandestine way in which *scire facias*'s are usually sued out and returned, it would be unjust to require the bail to plead this matter to a suit, of which they have, in fact, no notice; and, therefore, the irregularity may be taken advantage of upon motion:—they also held that, upon the merits, the allowance of the writ of error was a *supersedeas* to the writ of execution, and to all the subsequent proceedings founded thereupon.—Rule absolute. Dudley v. Stokes, Hil. Ter. 18 Geo. 3. C.B. 2 *Black.* 1183.

If the defendant brings a writ of error, and the plaintiff bring another action on the judgment, and recover; he cannot sue out execution on the second judgment, till the writ of error be determined; and if he does, the Court will set it aside. For as the plaintiff, in such case, is restrained from suing out execution on the first judgment, if he were permitted to do so on the second, it would be permitting him to do that indirectly, which cannot be done directly. Benwell v. Black, Ea. Ter. 30 Geo. 3. B.R. 3. *Ter. Rep.* 643.

But

Taſwell *v.* Stone, Tr. Ter. 9 Geo. 3. B.R. 3 *Burr.* 2454.

But the Court will not in ſuch a caſe ſet aſide the ſecond judgment.—This was an action of debt upon a former judgment; and judgment had been ſigned for want of a plea: it was now moved to ſet this judgment aſide, and ſtay all further proceedings until the determination of a writ of error which had been brought, and was then depending upon the former judgment. *The Court* were clear that there was no reaſon to ſet aſide this latter judgment; though, on the other hand, they held that it was highly proper to ſtay proceedings upon it, as it would be unreaſonable that the plaintiff ſhould proceed in executing a judgment which would of courſe fall to the ground, in caſe the original judgment upon which it was founded ſhould be reverſed. Rule abſolute, the defendant conſenting not to bring a bill in equity.

Lane *et al. v.* Bacchus, Tr. Ter. 27 Geo. 3. B.R. 2 *Ter. Rep.* 44.

The Court will not ſet aſide an execution ſued out before, but executed after, the allowance of a writ of error ſerved on the ſheriff and the party, if the plaintiff, in error, has not regularly put in bail.—On a rule to ſhew cauſe why the writ of *fieri facias*, iſſued and executed in this cauſe, ſhould not be ſet aſide for irregularity; the only queſtion was, Whether the allowance of a writ of error was, or was not, a ſtay of execution, *no bail having been put in?*—Per Curiam: If the writ of error had been followed up immediately by the plaintiff in error, regularly putting in bail, it would have operated as a *ſuperſedeas*. The party taking out execution, after the allowance of a writ of error, and before bail put in, does it at his peril; for if the writ of error be regularly followed up, the execution will be ſet aſide. But, in the preſent caſe, no bail having been put in, the writ of error became an abſolute nullity.—Rule diſcharged.

Entwiſtle *et al. v.* Sheppard *et al.* Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 78.

The Court will not ſtay proceedings in debt upon a judgment, while a writ of error is depending, if the writ of error appears to be merely for the purpoſe of delay.—This action was brought on a judgment recovered in the Common Pleas. *The defendants firſt brought a writ of error in this Court upon the judgment, and then brought a writ of error returnable in parliament; after which they non-proſs'd the firſt writ of error*, and then obtained a rule to ſhew cauſe, why the proceedings, in the action in this court, ſhould not be ſtayed pending the ſecond writ of error. And on ſhewing cauſe, it was relied on as being a mere matter of courſe to grant the application, without any other foundation, than the circumſtance of there being a writ of error depending.—Per Curiam: This application is not a matter of courſe. For a rule is firſt obtained to ſhew cauſe why the proceedings ſhould not be ſtayed; which would be abſurd, if the rule were granted of courſe. Then, if it be diſcretionary, there cannot be a ſtronger caſe than the preſent, in which the rule ought not to be granted. It appears, by the defendant's own conduct, that the writ of error has been ſued out without

without any foundation for it. They have brought a writ of error in parliament, and then non-proſſed their firſt writ of error, which can only be for vexatious purpoſes. Therefore, we ought not to ſtay the proceedings. It has been ſaid that, if this rule were made abſolute, the plaintiffs would be deprived of intereſt, on the judgment pending the writ of error in parliament: it is a queſtion for a jury to ſay, whether or not they will give intereſt on the judgment, in the name of damages. For intereſt may be recovered in an action on the judgment, if it be not the practice of the Court to allow intereſt in the coſts.—Rule diſcharged (1).

So, if the principal has confeſſed that the writ of error is brought purely for delay. On ſhewing cauſe againſt a rule for ſtaying the proceedings *againſt the bail*, pending a writ of error. And it appearing on the plaintiff's affidavit, that the defendant and his attorney had declared that they would delay the plaintiff as much as poſſible, by bringing a writ of error, if he did not comply with certain terms propoſed.—THE COURT ſaid, they muſt exerciſe a diſcretion upon theſe queſtions: and if the parties confeſs that the writ of error is brought purely for delay, the Court will interfere, and will not permit them to abuſe the forms of juſtice. Pool *v.* Charnock, Hil. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 79.

So alſo in this caſe, on a rule to ſtay the proceedings in an action, on the judgment pending a writ of error; it appearing, on an affidavit, that the defendant, in the original action, had once taken out a ſummons, to pay the debt and coſts, which he afterwards deſerted, and ſuffered judgment to go by default; and that the attorney admitted there was no error, but that the writ was brought merely for delay.—The Court diſcharged the rule with coſts. Goodin *v.* Hammond, Tr. Ter. 31 Geo. 3. C.B. 2 *Hen. Black.* 30. (*n. a*)

Likewiſe, in this caſe, where there had been a ſimilar rule obtained, it appearing, on affidavit, that the defendant's attorney had admitted that the writ of error was merely for delay, and to drive the plaintiff into terms.—The Court diſcharged the rule. Mitchell *v.* Wheeler, Ea. Ter. 32 Geo. 3. C.B. 2 *H. Black.* 30.

So in this caſe, which was a judgment, in debt on a recognizance, againſt bail: it appeared, on an affidavit, that the defendant's attorney had ſaid, that "the reaſon why he had brought the writ of error was, that if *Grant*, the defendant, ſhould pay the money pending the action, he ſhould never get it again from *Phillips* (the defendant in the original action), but that, while the cauſe was depending, he might prevail on him to ſettle it."—PER CURIAM: It is admitted, that when the party has declared that he brought the writ of Maſterman *v.* Grant, Tr. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 715.

(1) Similar applications were afterwards refuſed in this term, in *Carter* v. *Roberts*, and *Butt* v. *Mowe*; it appearing that the writs of error were brought for the purpoſe of delay.

error for delay, the Court has refuſed to ſtay the proceedings. Now the expreſſions uſed by the defendant's attorney, in this caſe, are equivalent to ſuch a declaration.—Rule to ſtay proceedings diſcharged.

Box *v.* Bennett, Ea. Ter. 30 Geo. 3. C.B. 1 *H. Black.* 432

The plaintiff was *nonſuited* at the trial of this cauſe, at the laſt aſſizes for the county of Kent; but immediately after the taxation of coſts ſerved the defendant with the allowance of a writ of error. And the defendant, not regarding this, proceeded to take out a *fi. fa.* for the coſts, under which the ſheriff levied.—On a rule to ſhew cauſe, why the *fi. fa.* ſhould not be ſet aſide, and the goods reſtored.—The Court, after cauſe ſhewn, ſaid, that though error might be brought on a judgment of nonſuit, it did not follow that the execution ought to be ſet aſide. And they laid it down as a general rule, that they would, in no caſe, ſtay proceedings, or ſet aſide an execution, on account of a writ of error being brought on a judgment of nonſuit, which evidently muſt be for the purpoſe of delay and vexation.

Kempland *v.* Macauley *et al.* Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 436. 1 *Black. Rep.* 267

So in this caſe in B. R. A rule having been obtained, calling on the defendants to ſhew cauſe, why their execution for the coſts founded on a judgment of nonſuit, ſhould not be ſet aſide, becauſe it was ſued out after the plaintiff had ſerved them with the allowance of a writ of error, the above caſe of *Box* v. *Bennet*, was cited and relied on.—PER CURIAM (after cauſe ſhewn): In general the rule is, that a writ of error allowed and ſerved, operates as a ſuperſedeas to an execution, and the Court will ſtay the proceedings of courſe; but that is on the ſuppoſition that the party may have ſome error to complain of in the judgment, which it is right ſhould be examined into before execution is awarded. And, therefore, *if it appear plainly and unequivocally to the Court, that the writ of error is brought merely for delay, that reaſon does not hold.* Now nothing can make it appear more plainly, than the mere ſtate of the proceedings in this caſe; for here it is apparent that there can be no error of which the plaintiff can avail himſelf; for if the record were manifeſtly erroneous, the plaintiff, who has made default by ſuffering a nonſuit, can never have a judgment afterwards in his favour; and the caſe cited from the Common Pleas being directly in point, there ſeems no ground here for withholding from the defendants the fruits of their judgment.—Rule diſcharged.

Levett *v.* Perry, Tr. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 669.

But in this caſe, on ſhewing cauſe againſt a rule to ſtay proceedings, pending a writ of error, *on a judgment of nonſuit*.—The above caſe of *Box* v. *Bennett*, and *Kempland* v. *Macauley*, were cited and relied on, to ſhew that, as it was apparent that a writ of error, in ſuch a caſe, could only be brought

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for delay, the Court would not interfere and ſtay the proceedings: but, *Per Curiam*, The practice not to ſtay proceedings, pending a writ of error, muſt be confined to thoſe caſes where the party himſelf, his attorney, or bail, declare that the writ of error is brought only for delay.—Rule abſolute.

But the Court will ſtay the proceedings unleſs it be clear that the writ of error is brought for delay.—On ſhewing cauſe againſt a rule to ſtay proceedings in this action, pending a writ of error, it was ſtated, on an affidavit, that the writ of error was brought merely for the purpoſe of delay; that the defendant firſt pleaded in abatement in the original action; and that, ſince the writ of error, the plaintiff offered to the defendant's attorney to waive the judgment, if he would point out any error, which was refuſed. —PER CURIAM: This rule muſt be made abſolute. If it were fit that parties ſhould be reſtrained from bringing writs of error, the legiſlature muſt interfere. But by the conſtitution of this country, every ſubject has a right to have his cauſe reviewed by a court of error. In this caſe, perhaps, the defendant's attorney might not know, whether there was error or not in the judgment in the former action; that is for the determination of the court of error. However, the defendant is certainly at liberty to ſue out his writ of error: and very little danger is to be apprehended, in general, from permitting parties to purſue that remedy ſince it muſt be recollected, that they act under the terrors of paying the coſts if they do not ſucceed.

Chriſtie *v.* Richardſon, Hil. Ter. 29 Geo. 3. B R. 3 *Ter. Rep.* 78.

And the Court will not permit execution to be taken out, pending a writ of error in parliament, on the ground, that, after judgment recovered, the defendant removed the record into the Exchequer Chamber, where the judgment was affirmed, without any argument or objection taken to it by the defendant. FOR PER CURIAM: *Non conſtat*, but that in this caſe there may be error on the record. *The mere circumſtance of the defendant's not arguing the caſe in the Exchequer Chamber, is by no means concluſive*, ſince, in ſome of the caſes that have been moſt litigated in the Houſe of Lords, the parties have waived all argument in the Exchequer Chamber.

Harriſon *v.* Grote, Tr. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 400.

*Coſts in error, and allowing intereſt on the judgment.*]—On ſhewing cauſe againſt a rule which had been obtained "for "the plaintiff to ſhew cauſe why, upon payment of the "WHOLE PENALTY of the bond, together with all the "*coſts in this Court*, and alſo the *coſts of the writ of error* "brought upon the judgment given by this Court, the exe- "cution ſhould not be *ſtayed*, and *ſatisfaction entered* upon "the record." It appeared, that it was an action brought in B.R. upon a *bond* given at Calcutta (in Bengal), in the Eaſt Indies, at which place the allowed intereſt is 9l. *per cent.*

Bodily *v.* Bellamy, Mic. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1094. 1 *Black. Rep.* 267

which was the rate payable by the condition of the bond. And upon the trial, the verdict was taken for the plaintiff *generally*, and judgment entered up accordingly. At the *time* of the judgment, the *penalty* of the bond was *sufficient* to have answered the *whole* of the debt, intereſt, and coſts, *then* incurred.—But the defendant had affected very great *delay*, in various methods; he had brought a bill in equity for an injunction, and had taken exceptions to the anſwer, and hindered the getting the injunction diſſolved, till Hilary term, 1759, when (after arguing the exceptions,) it was diſſolved on the merits. He then immediately BROUGHT A WRIT OF ERROR *in the Exchequer Chamber, merely for delay*, and aſſigned the common errors. Then he pleaded "*nul tiel record*" to the *ſcire facias* upon the judgment; ſo that he prevented the plaintiff from ſigning his final judgment till this term. By theſe delays the caſe was ſo altered, that, at *this* time, *the penalty of the bond alone was become inſufficient* (by about 150l.) *to anſwer the total of the debt, intereſt, and coſts, now incurred.* Lord MANSFIELD, Ch. J. —The plaintiff is, *in juſtice*, entitled to recover *the ſum really lent to the defendant, together with Indian intereſt, till the ſigning of the judgment*; but with only the legal intereſt of *this* country (which is no more than 5 *per cent.*), *from the time of the liquidation of the debt by the judgment.*—The plaintiff, having been kept out of his money by a writ of error, brought after a verdict, is entitled to a ſatisfaction for this damage, *under the ſtatute* of 13 *Car.* 2. ſtat. 2. c. 2. ſ. 8, 9, 10, which obliges the plaintiff in error to give ſecurity, as well for damages as coſts; or he may bring an action of *debt on the judgment*, and have damages *pro detentione debiti.*—There are four courts (all included under the ſame act of parliament), to which writs of error may be made returnable, namely, the Houſe of Lords; the Court holden before the Lord Chancellor, and Treaſurer, and Judges (under 31 *Ed.* 3.) for examining erroneous judgments in the Exchequer; the court of Exchequer Chamber, holden before the judges of the Common Pleas, and barons of the Exchequer (under 27 *Eliz.* c. 8.), for examining into errors in the judgments of (1) this court; and this court itſelf, for correcting the errors of the King's Bench in Ireland, Common Pleas here, and other Courts.—In the firſt of theſe (the Houſe of Lords), they give ſometimes very large, ſometimes very ſmall, coſts in their *diſcretion*, according to the nature of the caſe, and the reaſonableneſs,

(1) N B. This is confined to cauſes not commencing here by original, for, where the action commences in this Court by original, the writ of error is returnable in parliament.

or

or unreaſonableneſs, of litigating the judgment of the court below.—In the ſecond, it is done by the Lord Chancellor or Lord Keeper perſonally; and the practice is, to give intereſt from the day of ſigning the judgment to the day of affirming it there, computed according to the *current*, *not* according to the ſtrictly *legal*, rate of intereſt.—In the third (the Exchequer Chamber), the courſe is, for the *officer* to ſettle it, unleſs any particular direction be given by the Court: and he, in taxing the coſts, allows double the money out of pocket, or thereabouts, but *adds* (1) *no intereſt*.—In *this* Court, upon writs of error from C.B. &c. the *officer* taxes the coſts of affirmance, and taxes them in the ſame manner as he taxes other coſts, though ſomewhat more liberally; but *our officer* never has any regard to intereſt, nor allows it as of courſe. THE COURT themſelves have ſometimes, indeed, ordered intereſt to be computed on the ſum liquidated by the judgment below; *one* inſtance of this was in the caſe of the *Biſhop of London* and *Lewen* againſt the *Mercers' Company*, and is mentioned in 2 *Strange*, 931. That was a writ of error upon a *quare impedit*; and the judgment below was for 70l. for half a year's value of the church, and for a writ to the biſhop, which judgment having been affirmed here, the defendants in error moved, in Eaſter term, 5 *G.* 2, for coſts and damages, on 3 *H.* 7. c. 10. (2). And they would have had the damages computed according to the value of the church, during the time of their being kept out of their preſentation. The Court, after deliberation, agreed, that it was in their DISCRETION to ſettle the *quantum* of damages; but they did not think it right to give damages to the *patron*, in proportion to the profits of the benefice, becauſe he himſelf would not have been entitled to receive them. They declared, therefore, that the *meaſure* they went by, was the *intereſt* of the money recovered, the legal intereſt, from the time of bringing the writ of error, to the time of affirming the judgment. And they directed the maſter to compute the damages accordingly, viz. legal intereſt upon the 70l. recovered, and to add it to the coſts.—So here, in the preſent caſe, *intereſt ought to be paid after the rate of 9 per cent. according to the Indian allowance, till the aſcertainment of the ſum to be paid, by ſigning the judgment*; AND *from that time, till the actual payment of the money, after the*

(1) Vide poſt *Welford* v. *Davidſon*, and *Shepherd* v. *Macbreth*.

(2) The ſtatute 3 *Hen.* 7. c. 10. reciting that writs of error were often brought for delay, it is enacted, "That when judgment ſhall be affirmed, or the writ diſ-"continued, or the party nonſuited, on a writ of error brought by a defendant or "tenant, the perſon againſt whom it is ſued out ſhall recover his coſts and *damages*, "for his delay and wrongful vexation in the ſame, by diſcretion of the *juſtices* "before whom the ſaid writ of error is ſued."

*rate of 5 per cent only, upon the accumulated ſum aſcertained by the judgment*; for *that* is the *real damage* which the plaintiff has ſuſtained by the delay of his execution, and the detention of his debt.—The *juſtice* of the caſe is plain; and the law is agreeable to it.

Zinck *v.* Langton, Ea. Ter. 22 Geo. 3. B.R. 2 *Doug.* 751. [n. 3.]

The defendant brought a writ of error in this court, upon a judgment in the Common Pleas, of the county palatine of Lancaſter (1), which judgment below being affirmed, a rule was obtained, to ſhew cauſe *why the maſter ſhould not compute intereſt on the ſum given by the jury on the writ of enquiry, from the day of ſigning final judgment below, down to the time of the taxation of coſts*, and why the ſame ſhould not be added to the coſts taxed for the plaintiff. AND, after cauſe ſhewn, Lord MANSFIELD, CH. J. mentioned, that what he had delivered, in *Bodd ly* v. *Bellamy*, was the reſult of a ſtrict enquiry into the practice of all the courts. And in Tr. Ter. 22 *Geo.* 3. his lordſhip delivered the opinion of the Court, that "*damage*," in the ſtatute of *Hen.* 7. muſt mean ſomething different from *coſts*, as both words are uſed: that the queſtion was, What was to be the rule for aſſeſſing the *damage?* And that, in this caſe, the intereſt ought to be the meaſure of the damage, the action being for a debt (2); but that, in a caſe of another ſort, the rule might be different.—Rule abſolute.

Shepherd one, &c. *v.* Mackreth, in the Exch. Cham. in Err. Hil. Ter. 34 Geo. 3. C.B. 2 *Hen. Black.* 284.

The court of Exchequer Chamber is bound to allow *double coſts* to the defendant in error, on the affirmance of a judgment of the King's-bench: but it is entirely a matter in their diſcretion, whether or not *intereſt* ſhall be allowed on ſuch affirmance. PER CURIAM: The ſtatute 3 *Hen.* 7. c. 10. provides, that "if any defendant, or tenant, or any "other that ſhall be bound by the judgment, ſue before "execution had, any writ of error to reverſe any ſuch "judgment, *in delay of execution*, then, if the ſaid judgment "be affirmed good in the ſaid writ of error, and not erro"neous; or if the ſaid writ of error be diſcontinued, or the "perſon that ſues it be nonſuited in the ſame; the perſon "againſt whom the writ of error is ſued, ſhall recover his "*coſts and damage* for his delay and wrongful vexation in "the ſame, by diſcretion of the juſtice before whom the "ſaid writ of error is ſued." This ſtatute not having been put in execution, the 19 *Hen.* 7. c. 20. directs that it ſhall be in future. The 3 *Jac.* 1. c. 8. enacts, that "no "execution ſhall be ſtayed, or delayed, upon any writ of "error, or *ſuperſedeas* thereupon, for the reverſing of any "judgment given, or to be given, in any action, or bill "of debt, *upon any ſingle bond, or upon any obligation, with*

(1) See vol. II. p. 547. (2) This action was *indebitatus aſſumpſit*.

"*condition*

" *condition for the payment of money only, or upon any action,* " *or bill of debt for rent, or upon any contract,* unleſs ſuch " perſon, or perſons, in whoſe name, or names, ſuch writ " of error ſhall be brought, with two ſufficient ſureties, " ſuch as the Court, wherein ſuch judgment ſhall be given, " ſhall allow of, ſhall firſt, before ſuch ſtay made, or " *ſuperſedeas* to be awarded, be bound unto the party for " whom any ſuch judgment is or ſhall be given, by re- " cognizance to be acknowledged in the ſame court, in " double the ſum adjudged to be recovered by the former " judgment, to proſecute the ſaid writ of error with effect, " and alſo to ſatisfy and pay, if the judgment be affirmed, " all and ſingular the *debts*, *damages*, and *coſts*, adjudged " upon the former judgment, and all *coſts* and *damages* to be " *alſo awarded*, for the *delaying of execution*." This ſtatute preſcribes a term, upon which there may be a delay of execution, which is the giving bail to anſwer the original judgment, and coſts and damages to be awarded for delay of execution, evidently referring to the ſtatute 3 *Hen.* 7. c. 10. The 13 *Car.* 2. ſt. 2. c. 2. ſ. 8 & 9, reciting the 3 *Jac.* 1. c. 8, and that other caſes were within the ſame miſchief, provides, " that no execution ſhall be ſtaid by any " writ or writs of error, or *ſuperſedeas* thereon, AFTER ANY " VERDICT AND JUDGMENT THEREUPON obtained in " any action of debt, on the ſtatute of *Ed.* 6, for not ſetting " forth of tithes, *nor in any action upon the caſe upon any* " *promiſe for payment of money*, *actions of trover*, *covenant*, " *detinue*, *and treſpaſs*, unleſs ſuch recognizance, as is direct- " ed by the ſtatute 3 *Jac.* 1, be firſt acknowledged;" and by ſect. 10, it is enacted, " that if the judgment be affirmed, " the perſon bringing the writ of error ſhall pay to the de- " fendant in error *double coſts*, to be aſſeſſed by the Court, " where ſuch writ of error ſhall be depending, for the " delaying of execution." It muſt be acknowledged, that there is a little ambiguity in this ſection; but, without debating whether this ſhould not be read, " where ſuch " writ of error *for the delaying of execution* ſhall be depend- " ing," *this is manifeſtly a ſubſtantial independent proviſion of double coſt, abſolute and not at diſcretion*, not only in the ſpecified caſes in 3 *Jac.* 1, and in the former clauſe, but in all caſes whatſoever after verdict, popular and other penal actions excepted, which are ſo by the next ſection. The general proviſion of theſe ſtatutes of *Jac.* 1. and *Car.* 2. is extended by 16 & 17 *Car.* 2. c. 8. *to all perſonal actions whatſoever after verdict:* and in the caſe of a writ of error, on a judgment after verdict in dower, or *ejectione firmæ*, the plaintiff in error is to be bound with condition, if judgment be affirmed, or the writ diſcontinued, or the party nonſuit, to pay ſuch coſts, damages, and *ſum or ſums of*

*money* as ſhall be awarded. Here a new term is introduced, "*ſum or ſums of money*," which is explained in the next ſection of the ſtatute, which directs, "that the Court, "wherein ſuch execution ought to be granted, upon ſuch "affirmance, diſcontinuance, or nonſuit, ſhall iſſue a writ, "to enquire as well of the meſne profits, as of the damages "by waſte, committed after the firſt judgment in dower, "or *ejectione firmæ*; and, upon the return thereof, judgment "ſhall be given, and execution awarded for ſuch meſne "profits and damages, and alſo for coſts of ſuit." Here the legiſlature, meaning to provide a ſatisfaction for a particular damage by waſte, the words, *ſum or ſums of money*, are introduced; and, as neither this ſpecial damage, nor the general damage, as applied to the two caſes of *dower* and *ejectione firmæ*, were matters of computation, which the Court could make at its diſcretion, a writ of enquiry is given. In this ſtatute, there are the ſame excepted caſes, with the addition of writs of error brought by executors and adminiſtrators. Theſe proviſions are further extended, by ſtatute 8 & 9 *W.* 3. c. 27. ſ. 3. to the caſe of the marſhal of the King's Bench and warden of the Fleet, bringing a writ of error to reverſe judgments in actions for an eſcape, who are to put in ſpecial bail; in default whereof no execution is to be ſtayed, nor any ſequeſtration of the profits of their offices delayed. Theſe ſtatutes are perfectly conſiſtent with each other, being all in *pari materiâ*, and are nothing but a gradual extenſion of the ſtatute 3 *Hen.* 7. c. 10. To prevent writs of error being brought for delay, double coſts are abſolutely given in all caſes, and, under particular circumſtances, damages alſo, at the diſcretion of the Court. That rule lets in applications to the Court, in all caſes; which it is entirely in their diſcretion to refuſe or comply with, and, if complied with, to fix the quantity of the recompence.

Afterwards the rule was drawn up, *that it ſhould be referred to the clerk of the Errors, to calculate and aſcertain the amount of the intereſt upon the final judgment, after the rate of four pounds* per cent. per annum, *from the time of ſuch final judgment being entered up, until the affirmance of the ſaid judgment in this Court, and that ſuch intereſt may be added to the damages.*—A ſimilar rule was alſo made on the affirmance of the judgment, in the caſe of *The Earl of Lonſdale* v. *Littledale*, Mic. Ter. 34 *Geo.* 3. C.B. 2 *Hen. Black.* 267.

Sykes v. Harriſon, in the Exch. Ch in Err. Ea. Ter. 37 Geo. 3. 1 *Pul. & Baſ.* 29.

And the court of Exchequer Chamber will allow intereſt to a defendant in error, under the ſtat. 3 *H.* 7. c. 10. on a judgment of non-pros, as well as on a judgment of affirmance; and, for the future, the intereſt allowed will be 5*l.* *per cent.* inſtead of 4*l.*—This was error on a judgment in the King's Bench, in an action of covenant for liquidated damages.

damages. The plaintiff in error was non-profed: it was therefore moved, "that it ſhould be referred to the clerk of "the Errors, to calculate intereſt upon the final judgment, "from the time of the allowance of the writ of error, *until* "*the ſigning of the non-pros in this Court*, and that ſuch "intereſt might be added to the damages." AND THE COURT, who, at firſt, thought there might be ſome difference between this and *the caſe of an affirmance of judgment*, after cauſe ſhewn, made the rule abſolute. And though, agreeable to the caſes of *Shepherd* v. *Mackreth*, and *Lord Lonſdale* v. *Littledale*, where the Court allowed 4l. *per cent.* only, the Court ſaid, that the better way would be to allow 4l. *per cent.* only, in the preſent inſtance, YET they gave notice that 5l. *per cent.* would be allowed in future.

The bail in error are liable to the intereſt, from the time of the affirmance of the writ of error.—An action had been brought in this Court, and judgment obtained thereon. A writ of error was brought in the Exchequer Chamber, upon this judgment, and bail given on bringing the writ of error: the judgment of this Court was affirmed in the Exchequer Chamber. After which affirmance, a *ſcire facias* was brought here againſt the bail. The bail pleaded payment, and uſed all methods of delay; whereby they put off the payment of the money recovered ſo long, that the *intereſt* of it *exceeded* the coſts they were, by the *ordinary* taxation, to pay; and, conſequently, they would be conſiderable gainers by the delay. It was, therefore, on behalf of the defendant in error, moved, that the maſter might allow the *intereſt* of the money recovered, in *damages* (1). Lord MANSFIELD.—You cannot go back further than the *judgment* in the Exchequer Chamber; for, the giving or not giving intereſt, to *that* time, was the province of the court of Exchequer. *But the maſter ſhould allow intereſt from the time of affirming the judgment by the Exchequer Chamber.*—Rule accordingly. Welford *v.* Davidſon, Tr. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2127.

But the bail are not liable to pay *intereſt* on the judgment, between the ſigning of the judgment in B.R. and the affirmance of it in *Cam. Scacc.*—The plaintiff having recovered a judgment for 800l. *upon promiſes*, againſt *Aylett*, the defendant in the original action, the defendant brought a writ of error in the Exchequer Chamber, and put in bail. The judgment was affirmed, and the ſum recovered not being paid, debt upon the recognizance was brought againſt the bail in the ſame term; and the plaintiff recovered. The bail requeſted indulgence for a time, which was granted. THE ONLY QUESTION was, *Whether the plaintiff was entitled to intereſt from the* Frith *v.* Leroux, *et al.* Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 57.

(1) 13 C. 2. ſtat. 2. c. 2. ſ. 8, 9, 10.

*bail*

*bail upon the ſum recovered, between the times of ſigning judgment in* B.R. *and the affirmance of it in the Exchequer Chamber?* Intereſt for the whole time, ſince the time of ſigning final judgment, had been levied under an execution againſt the bail. PER CURIAM: The recognizance the bail entered into is with a condition, that the defendant, in the original action, ſhall proſecute his writ of error; and that, if judgment ſhould be affirmed, *they will pay the debt and coſts upon the former judgment, together with ſuch coſts as are occaſioned by the delay*; ſo that the bail, in expreſs terms, only promiſe to pay what was due upon the original judgment, and the coſts given in the Exchequer Chamber, therefore we are not warranted in giving any more. Thus it ſtands on the recognizance itſelf. But this point has been already decided in ſeveral caſes which have come before the Court. In *Cumming* v. *Hanforth*, *H.* 14 *Geo.* 3. B.R. it was moved, "that the maſter might be directed to include intereſt in the "coſts, to be taxed on non-proſſing a writ of error, returnable in parliament, for want of tranſcribing. The action "was brought on a note of hand, payable three months "after date, which, in its nature, carried intereſt; and "*Bodily* v. *Bellamy* was cited." Lord *Mansfield* ſaid: "You are breaking into the whole courſe of proceedings. "When final judgment is given by the Court, the demand "is liquidated, and no intereſt can be computed after that "time. On debts carrying intereſt, the jury are now "directed to give intereſt in damages, up to the day on "which judgment may be ſigned." And the motion was denied. So in *Smith*, and another, v. *Copeſlake*, M. 16 *Geo.* 3. B.R. cauſe was ſhewn againſt a rule, obtained for "ſtaying "proceedings in an action againſt the defendant, on a "recognizance of bail in error, on payment of 848l. the "amount of the damages and coſts taxed upon the original "judgment in the cauſe, and of the coſts taxed upon the "affirmance of the ſaid judgment in the Exchequer Chamber. It was inſiſted, that the plaintiff was entitled to "take intereſt upon the ſum liquidated in the judgment, "up to the time of the affirmance; and *Welford* v. *Daviſon*, "*Bodily* v. *Bellamy*, and *White* v. *The Duke of Newcaſtle*, "*M.* 15 *Geo.* 3. B.R. were cited. But, after the Court "had taken time to conſider, Lord *Mansfield*, on the laſt "day of the term, delivered the opinion of the Court, and "ſaid, that they had conſidered all the caſes, and that they "did not warrant the doctrine contended for. That, on "affirmance of a judgment in error, bail are not liable for "more than they have undertaken to pay, namely, the "debt and coſts which have been adjudged due; and that "the caſe of *White* v. *The Duke of Newcaſtle*, certainly "went by ſurprize; and the rule was made abſolute, to

"ſtay

" ſtay proceedings on payment of the debt and coſts in the " cauſe, and the coſts in error of the affirmance of the " judgment." Then, as to the intereſt due ſubſequent to the time of the affirmance, that ſtands on a different ground, becauſe, when the judgment is affirmed, it becomes, from that time, the debt of the bail; and, if an action were brought on that judgment, the jury might give damages for the detention of the debt, ſo as to include intereſt up to the time of final judgment; therefore, the bail are liable only for the intereſt ſubſequent to the time of affirming the judgment.—GROSE, J. declared himſelf of the ſame opinion.—Rule abſolute (1).

After the judgment of the Court was given in the above caſe of *Frith* and *Leroux*, the caſe of *Zink* and *Langton* was mentioned, on a ſuppoſition that they were contradictory deciſions. But BULLER, J. ſaid, in this caſe of *Entwiſtle* v. *Shepherd*, on looking into the caſe of *Zink* and *Langton*, it does not apply to that of *Frith* and *Leroux*, as they are perfectly conſiſtent. In the latter, the proceedings were againſt the bail; and we ſaid that, on the terms of the recognizance, they were not liable for intereſt on the judgment, between the times of ſigning and affirming the judgment. But, under the ſtatute of *Hen.* 7. it is now ſettled, that the party is to pay intereſt on the judgment; and provided, by the courſe of the Court, intereſt is not computed in the allowance of coſts, the jury would give intereſt in the name of damages.

Entwiſtle *v.* Shepherd, Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 79.

Where judgment for the defendant, on a ſpecial verdict, is reverſed in the Exchequer Chamber, that Court, on motion, will give a final judgment for the plaintiff.—Judgment, on a ſpecial verdict in ejectment, having been given for the defendant in the King's-bench, and reverſed in this Court (2), it was moved, that it might be added to the judgment, that the plaintiff do recover his term, damages, and coſts; and for this was cited *Philips* v. *Bury*, *Lord Raym.* 10. *Carth.* 319. and *Skinn.* 514. THE COURT ſeemed, at firſt, to doubt, whether they ſhould grant this in the firſt inſtance, or only give a rule to ſhew cauſe; but on conſideration, thinking the point decided, that the plaintiff muſt enter up his judgment at his own peril, for, if he entered it wrong, he ſubjected himſelf to another writ of error and reverſal in

Denn, *ex dim.* Mellor, *v.* Moore, in Error, in Exch. Cham. Ea. Ter. 37 Geo. 3. C.B. 1 *Pul.* & *Baſ.* 30.

(1) There is a difference between the form of the recognizance on writs of error, in the Exchequer Chamber and in the King's Bench; in the former the bail engage to pay the ſum recovered by the judgment, and ſuch further *coſts of ſuit*, ſum and ſums of money, as ſhall be awarded for delay of execution; in the latter, they engage to pay the ſum recovered by the judgment, as alſo all ſuch *coſts and damages* as ſhall be awarded for delay of execution.

(2) Vide p. 162, *ſupra*.

another

another court.—They accordingly gave leave, in the first instance, to enter up judgment as above.

## Escape.

Ravenscroft v. Eyles, esq. warden of the Fleet, Hil. Ter. 6 Geo. 3. C.B. 2 *Wils.* 294.

AN action upon the case will lie against the keeper of a prison, for an escape upon mesne process, though the prisoner returns the same day, and the plaintiff proceeds to final judgment against him.—This was an action on the case against the warden of the Fleet, for the escape of one *William Warren*; and on the trial, a verdict was found for the plaintiff, subject to the opinion of the Court, upon the following case, viz. The said *Warren* being indebted to the plaintiff, and in custody of the warden of the Fleet, at the suit of another person, was regularly charged in custody, at the suit of the present plaintiff, in Trinity term. Afterwards, *upon the 1st of October*, the defendant *voluntarily permitted the said* Warren *to escape* out of prison. The plaintiff, *knowing of such escape*, on the said 1st of October, did, notwithstanding, *afterwards proceed in his said cause against the said* Warren, *and in the then next term obtained judgment* against him; and, after having so obtained judgment, commenced his present action against the defendant, the warden. *But* Warren, *having so escaped on the said 1st of October, returned to the Fleet prison on the same day*, and ever since continued a prisoner. THE QUESTION was, Whether the plaintiff was entitled to recover, having proceeded to judgment against the said *Warren*, as is above mentioned? PER CURIAM: The *quantum* of the damages is nothing to the purpose, for, if the jury had power in this case to give damages, we must now take it, that they have done right; the jury were not confined to give the exact damages in the final judgment, but had a power and discretion to assess what damages they thought proper, for this being an action upon the case, the damages were totally uncertain. It is objected for the defendant, the warden, that the escape was but for a single day; that the plaintiff knew thereof, and proceeded to final judgment, and might have charged the defendant in execution, as he returned again to the Fleet the same day, and is now there. *But whenever a gaoler permits a voluntary escape, from that moment he commits a tort, and the plaintiff has a right of action to recover such damages as a jury shall please to give for the same.* The prisoner, when voluntarily suffered by the gaoler to escape, is instantly at large; the gaoler cannot afterwards retake and detain him for the same matter. The plaintiff may retake him by an escape warrant, but has his option

option to proceed as he pleaſes, either againſt *Warren*, to judgment and execution in this caſe, or againſt the warden. *Warren* is not now a priſoner at the plaintiff's ſuit, although he be locked up every night, and though the plaintiff might lawfully proceed to judgment againſt him, yet he could not charge him in execution (1); and the caſe of *Key* and *Briggs*, *Skin.* 582. is directly in the point. If an eſcape be voluntary in the gaoler, nothing afterwards will purge it. *Salk.* 271.—Judgment for plaintiff.

Atkinſon *v.* Matteſon *et al.* Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 172.

A bailiff who has arreſted a priſoner on meſne proceſs may retake him before the return of the writ, though he voluntarily permitted the priſoner to eſcape immediately after the arreſt.—This was an action for an aſſault and falſe impriſonment by the plaintiff againſt three defendants. The declaration contained two counts; to which all the defendants pleaded generally not guilty. And then as to the firſt count, they juſtified making the arreſt under meſne proceſs. To this the plaintiff new aſſigns; and that new aſſignment admits the legality of the arreſt under the proceſs, but charges that the defendant *Waite*, after that arreſt, by the conſent of the plaintiff in the original action, diſcharged the plaintiff out of cuſtody, and afterwards impriſoned him again. To this new aſſignment the general iſſue was pleaded, and a verdict was given for the defendants *Matteſon* and *Jackſon*, and for the plaintiff againſt the defendant *Waite*, ſubject to the opinion of this Court on the following caſe:—"The defendant *Waite* arreſted the plaintiff on the 20th of November, 1784, and detained him in cuſtody all that night; but the next day the ſaid *Waite*, at his requeſt, *but without the conſent or knowledge of* the plaintiff in that ſuit, permitted him to go at large, and he remained at large till the 23d of the ſame month, on which day the defendant *Waite*, without any other proceſs, took the plaintiff to the common gaol, and delivered him to the common gaoler there, *with the proceſs under which he was firſt arreſted and which was not then returnable.* And the plaintiff continued in priſon upon that proceſs until he gave bail. THE QUESTION was, Whether the plaintiff is entitled to recover againſt the defendant *Waite?*—PER CURIAM: The allegation that the defendant *Waite*, after the arreſt, by the conſent *of the plaintiff, in the original action*, diſcharged the preſent plaintiff out of cuſtody, is a very material allegation, becauſe it depends on the diſcharge being with the conſent of the original plaintiff. Then how does this bear on the ſecond count? The plaintiff has agreed by his new aſſignment, that he did not intend to go for that arreſt which was under

(1) See the caſe of *Wilkinſon* v. *Jaques*, in vol. I. p. 607.

the

the writ; therefore he has precluded himſelf from giving evidence of that on the trial. It is true that if there were in fact two impriſonments, and the plaintiff had not new aſſigned, as he has done here, he might have given evidence of both at the trial: but there being only two impriſonments in fact, and one of them being abandoned on the record, the plaintiff could not have recourſe to the ſecond count; for he cannot avail himſelf of one and the ſame act of impriſonment both on the new aſſignment and on the ſecond count. The plaintiff then relies on his new aſſignment: now the new aſſignment ſtates that the re-taking by *Waite* was after the plaintiff had been releaſed by the conſent of *Matteſon*, the original plaintiff; to this the defendant pleads that he was not guilty; and as the caſe ſtates that *Matteſon* did not conſent to his releaſe, the new aſſignment is falſified. If the plaintiff could have proved two impriſonments beſides that which he has waived on the record, he might have done it as the pleadings now ſtand: but there was but one impriſonment beſides that which he has waived, and that one is the ſubject of the new aſſignment; therefore there is no evidence of any impriſonment on which he could recover on the ſecond count. Thus it ſtands on the pleadings; and as to the general queſtion of law. The only difference between an arreſt on meſne proceſs and in execution is this, on the former the bailiff may permit the priſoner to go at large, provided he has him at the return of the writ: but in the latter caſe, if the bailiff voluntarily permit the priſoner to go at large, though only for a minute, he cannot afterwards re-take him. And the reaſon of the difference between a re-taking after an eſcape on meſne proceſs and in execution is this; in the latter, if the priſoner eſcape by the voluntary permiſſion of the gaoler, the plaintiff's debt is paid; and if the gaoler re-take him, he is liable to an action of falſe impriſonment. But the bailiff may give the priſoner, who is arreſted on meſne proceſs, indulgence, provided he has him at the return of the proceſs. And this reaſon is ſtrongly enforced by the ſtatute with regard to letting a priſoner out on giving bail: for it does not only give the ſheriff the power of letting him to bail, but it compels him to do ſo on giving ſufficient bail. And if no ſecurity be given, it is done at the riſk of the bailiff; and then if the priſoner do not voluntarily return, the bailiff may retake him before the return of the writ.

Bonafous *v.* Walker, Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 126.

Under a Count for a *voluntary* eſcape, the plaintiff may give evidence of a *negligent* eſcape: and the defendant may plead a retaking on a freſh purſuit to ſuch a count, without traverſing the voluntary eſcape.

But an eſcape from the rules of the King's Bench priſon, without the marſhal's knowledge, is not a voluntary eſcape.

And

And a voluntary return of a priſoner, after an eſcape, before action brought, is equal to a retaking on a freſh purſuit; but it muſt be pleaded.

And an adminiſtratrix may maintain an action, in her own name, againſt the marſhal, for the eſcape of a priſoner who is in execution, on a judgment obtained by her as adminiſtratrix.

In debt, againſt a ſheriff or gaoler for an eſcape, the jury cannot give a leſs ſum than the creditor would have recovered againſt the priſoner, namely, the ſum indorſed on the writ, and the legal fees of execution.

An action of debt was brought by the plaintiff for 2019l. againſt the defendant, as marſhal of the marſhalſea, for an eſcape. *The firſt count* in the declaration ſtated, that the defendant *voluntarily* ſuffered one *Rybot*, who was in his cuſtody at the plaintiff's ſuit, in execution, for 1009l. 10s. to eſcape. *The ſecond count*, was for a *negligent eſcape*. To this action, the defendant pleaded, 1ſt. *Nil debet*. 2dly. That *Rybot*, without the privity and conſent of the defendant, and againſt his will, eſcaped, and that the defendant freſhly and diligently purſued and retook him. And from thenceforth, until now, hath detained, and ſtill detains him, for the cauſe aforeſaid. 3dly. As to the ſecond count, that *Rybot* eſcaped without the privity or conſent, and againſt the will, of the defendant; and, before the defendant had any notice of the eſcape, *ſſ.* on the 4th of November in the 27th year, &c. the ſaid *Rybot*, into the defendant's cuſtody, without the knowledge of the defendant, returned, and continually after ſuch return, hath been detained in execution, &c. Replication, that the defendant did not freſhly and diligently purſue *Rybot*, in order to retake him, &c. And, as to the third plea, that *Rybot* was not continually, after his return, detained in the defendant's cuſtody, in execution; and iſſues thereon. At the trial, it appeared that *Rybot had been taken in execution, on a judgment obtained againſt him by the plaintiff, as adminiſtratrix of her huſband*, and regularly committed to the cuſtody of the marſhal. The *ca. ſa.* was indorſed to levy 344l. beſides ſheriff's fees, &c. *Rybot*, who had the liberty of the rules of the priſon, was proved to be out of them on three ſeveral days, the laſt of which was on the 3d of November laſt; but on the defendant's hearing that the priſoner had eſcaped beyond the rules, he was put in cloſe cuſtody on the 4th of November, before the action was brought. It was objected, firſt, on the behalf of the defendant, that this action ought to have been brought by the plaintiff as adminiſtratrix, becauſe the judgment, on which the party had been committed in execution, was obtained by the plaintiff as adminiſtratrix of her huſband; and,

and, *ſecondly*, that the plaintiff could not give a negligent eſcape, in evidence, under the firſt count, which was for a voluntary eſcape: BUT the judge over-ruled both objections; the latter on the authority of ſir *Ralph Bovy*'s caſe (1). *It was then contended*, on the part of the defendant, that though the plaintiff was entitled to recover, yet that the jury were not bound to give the whole ſum demanded, though it were an action of debt; and that, if it could be left to their diſcretion under the circumſtances of the caſe, they would only give nominal damages: but the judge was alſo of opinion againſt him on this point, and directed the jury to find a verdict for the plaintiff for 344l.—A motion for a new trial was afterwards made.—And on ſhewing cauſe, it was again objected, FIRST, that the action ought to have been brought by the plaintiff, as adminiſtratrix; and for this was cited *Wate* v. *Briggs*, 1 Ld. *Raym.* 35. where this point was ruled.—[SED PER CURIAM: That caſe cannot be law (2): the inſtant the plaintiff recovered a judgment againſt *Rybot*, it became a debt due to her on record, and was aſſets in her hands; for which it was not neceſſary to declare as adminiſtratrix.] SECONDLY, That by the evidence, this appeared to be a negligent, and not a voluntary, eſcape; and, therefore, could not be given in evidence under the firſt count.—THIRDLY, That notwithſtanding this was an action of debt, the jury might have given leſs damages than the whole ſum demanded, in the ſame manner as if it had been an action on the caſe for the ſame cauſe.—BULLER, J. The diſtinction between an action of debt and on the caſe, is this; at common law an action on the caſe only lay againſt the ſheriff or gaoler for an eſcape, in which caſe the creditor might recover damages for the officer's miſconduct; but ſtill he had a right to recover the debt againſt the original debtor. But the ſtatutes gave an action of debt againſt the ſheriff, or gaoler, to recover at once the ſum for which the priſoner was charged in execution. Now thoſe being affirmative ſtatutes, did not take away the common law remedy, ſo that the creditor has his election: but if he adopt the latter, he muſt recover the whole ſum. But the only point on which I had any difficulty is, whether a voluntary return of the priſoner, before action brought, be not equivalent to a retaking on a freſh purſuit. There is a ſtrong caſe to this effect in *Comyns*, 554. *Chambers* v. *Gambier*, where the pri-

(1) 1 *Vent.* 211. 217.

(2) Vide *Gower* v. *Kendal*, 1 *Lutw.* 893. *Brooks* v. *Cooke*, 1 *Show.* 57. *Carew* v. *Broughton*, *Lane*, 79. *Townley* v. *Steele*, *Hutt.* 79. *Martin* v. *Henley*, *Sty.* 232. *Holdin* v. *Sutton*, 1 Ld. *Raym.* 698. *contra*. But *Crawford* v. *Whittal*, *Doug.* 4. n. 1. inſerted in vol. I. p. 342. agrees with this opinion.

ſoner's

ſoner's return, before action brought, was held tantamount to a retaking on a freſh purſuit. It is not, indeed, ſtated in that caſe, whether it was after the return of the writ, though it appears that the priſoner was in execution.—PER CURIAM (after cauſe ſhewn againſt the ſecond and third objection): ASHHURST, J.—This muſt be conſidered as a negligent, and not as a voluntary, eſcape: for by the 8 & 9 *W.* 3. the rules are to all intents and purpoſes the ſame as the walls of the priſon.—BULLER, J. The eſcape is not voluntary, unleſs it be with the conſent or by the default of the marſhal: but his allowing the rules of the priſon, is no default in him, becauſe the law has given a ſanction to it; and it cannot be inferred from thence, that he conſented to the priſoner's eſcape, becauſe he took ſecurity that the priſoner ſhould not go beyond the rules, and immediately on his return, the defendant confined him in cloſe cuſtody; therefore, this muſt be taken to be a negligent eſcape. As this record ſtands, the plaintiff is entitled to a verdict, and ſo far it is right; becauſe the marſhal, on the general iſſue, could not give evidence of freſh purſuit. But at the trial the law was miſtaken by both ſides. Now, in a caſe of this ſort, where both parties were in an error at the trial, there is no objection to the Court's interpoſing to let them into the juſtice of the caſe, which can only be effected by granting a new trial, with liberty to amend the pleadings. With reſpect to the other objection; a queſtion has been raiſed, whether the plaintiff was entitled to recover the whole penalty, and to levy under that the poundage and fees of execution. I am clearly of opinion, that the plaintiff was not entitled to recover the whole of the penalty. This action of debt depends on two very old ſtatutes, which never have nor can be conſtrued literally; the firſt of which is *Weſtm.* 2. 13 *Ed.* 1. c. 11. which is entitled, "The maſter's remedy againſt their ſervants, and other accomptants." If we were to ſtop here, this caſe would not come within it: but then it enacts, "Let the ſheriff take heed that he do not ſuffer him (the "priſoner), to go out of priſon, and if he do, and be there-"of convict, he ſhall be anſwerable to his maſter of the "damages done to him by ſuch his ſervant, according as it "may be found by the country, and ſhall have his recovery "by writ of debt." This ſtatute, therefore, enacts, that the creditor ſhall recover againſt the gaoler, thoſe damages which he has ſuffered by his ſervant. And this ſtatute, by a liberal conſtruction, has been held to extend to all caſes. The next is the ſtatute of 1 *Ric.* 2. c. 12. which in expreſs terms only mentions the warden of the Fleet; but that alſo by conſtruction has been extended to all gaolers. The ſenſe of theſe ſtatutes is, that the party, who ſuffers by the eſcape, ſhall have the ſame remedy againſt the gaoler which he had

againſt the debtor. But he cannot recover more than he could have recovered againſt ſuch original debtor; and the debtor, in this caſe, would have been entitled to be diſcharged on paying what was really due. Then as to the poundage; I think the poundage is part of the debt, and the priſoner could not have been diſcharged out of execution without paying the poundage: and, therefore, if the plaintiff was entitled to recover at all, he was entitled to recover the poundage as well as the debt.—GROSE, J. Agreed, and ſaid, there is an allowed diſtinction between an action of debt and an action on the caſe; in the latter caſe, where an action is brought for an eſcape, the jury are at liberty to give ſuch damages as they ſhall think right, under all the circumſtances of the caſe, and a ſhilling is frequently ſufficient: for many caſes ariſe of great hardſhip againſt the gaoler.—PER TOT CUR: The plaintiff is entitled to take the poundage as well as the debt. And to come at the juſtice of the caſe—Let there be a new trial, on payment of coſts by the defendant, with liberty to both parties to amend the pleadings.

*Boothman v. the Earl of Surrey, Tr. Ter. 27 Geo. 3. B.R. 2 Ter. Rep. 5.*

The bailiff of a liberty who has the return and execution of writs, is liable to an action of debt for an eſcape, if he remove a priſoner, taken in execution, to the county gaol, ſituate out of the liberty, and there deliver him into the cuſtody of the ſheriff.—This was an action of debt againſt the defendant, who was chief bailiff of the liberty of Hallamſhire, for an eſcape. *The declaration* ſtated, that, the plaintiff had recovered 37l. againſt one *John Woolhouſe*; that he ſued out a *ca. ſa.* directed to the ſheriff of Yorkſhire, who made his mandate thereon to the defendant, requiring him to arreſt the ſaid *John Woolhouſe*, ſo that the ſheriff might have his body at the return of the writ; upon which the defendant afterwards arreſted *Woolhouſe*, and had and detained him in his cuſtody, *in the gaol of the ſaid chief bailiff* &c. until, &c. he *permitted and ſuffered* the ſaid *Woolhouſe* to eſcape, &c.—The defendant pleaded, 1ſt. *Nil debet.* 2dly. That until the time of his removal and delivery into the cuſtody of the ſheriff of Yorkſhire, as thereinafter mentioned, he, the ſaid defendant, did ſafely and ſecurely, keep in his cuſtody, within the liberty of Hallamſhire, the body of the ſaid *Woolhouſe*. That as ſoon as conveniently might be, after ſuch taking and arreſting, &c. and before the return of the ſaid writ of *ca. ſa.* to wit, &c. he, the ſaid defendant, for the delivery of the body of the ſaid *Woolhouſe* into the cuſtody of the ſheriff of Yorkſhire, in order that the ſaid ſheriff might have the body of the ſaid *Woolhouſe*, at the return of the ſaid writ, he, the defendant, did, *by the neareſt and moſt convenient way, and with all reaſonable expedition, neceſſarily remove and carry away the body of the ſaid* Wool-

Woolhouſe, *from and out of the ſaid liberty of Hallamſhire, to and into the common gaol or priſon of the ſheriff of Yorkſhire, at the caſtle of York*, &c. as he, the ſaid defendant, was, by the ſaid mandate in that behalf, required, &c. To this plea there was a general demurrer and rejoinder. On the argument of the demurrer, THE QUESTION was, Whether, under the circumſtances diſcloſed by theſe pleadings, the defendant had or had not ſubjected himſelf to an action of eſcape, for permitting the defendant, in the original action, to go out of his cuſtody?—ASHHURST, J. It appears from the *retorna brevium*, and the *officina brevium*, that when the ſheriff returns that he has commanded the bailiff, and returns the bailiff's anſwer, he is diſcharged; ſo that this Court muſt take notice of particular liberties. The ſheriff is likewiſe bound to take notice of all the liberties within his county; and if he were to infringe on any of them, he would ſubject himſelf to an action by the owner of the franchiſe. Therefore, when a writ is directed to him to be executed within any liberty in his county, all that he can do is to command the bailiff of that liberty to execute the writ; but he is not anſwerable for the acts of the bailiff. And after the ſheriff has returned the bailiff's anſwer to him, the plaintiff, in the original action, cannot rule the ſheriff to bring in the body, but the bailiff himſelf muſt be ruled. The ſheriff has no right to take bail for the appearance of any perſon arreſted within any liberty in his county; ſo that he has no means of bringing in the body. As far as the old authorities go (1), it appears that *the execution was complete, by the defendant's arreſting the priſoner within his bailiwick; if ſo, the priſoner could not be removed to the ſheriff of the county, without ſome legal warrant.* This is as much an eſcape in the defendant, as if he had carried the priſoner into any other county. Therefore this *action* is well brought; the plea contains no ſufficient anſwer, and there muſt be judgment for the plaintiff.—BULLER, J. It has been argued for the defendant, that the circumſtance of this action being brought againſt the bailiff of a liberty, is in favour of the defendant: but if any thing depended upon favour, I think that circumſtance weighs againſt him; for he is the owner of a particular liberty, which takes away ſo much from the general juriſdiction of the ſheriff, and, therefore, is entitled to no favour. However, in this caſe, there muſt be judgment for the plaintiff. Formerly there was ſome doubt, whether the bailiff of a liberty, or the ſheriff, ſhould be amerced, if the ſheriff returned that he had commanded the bailiff of the liberty, who anſwered that he had taken the body, and had not the body there. 2 *H.* 4. 16. *Kitch.*

(1) *Retorna Brevium*, 168, 9. *Offic. Brev.* 216. *Bro. Abr.* tit. Eſ. pl. 44.

*Ret. Brev.* 568. Then *Kitchen* proceeds to ſay, "See 11 *H.* 4. *fol.* 41. that the bailiff ſhall be amerced, and not the "ſheriff." He cites alſo 5 *Ed.* 4. 6. And in 47 *Ed.* 3. 25. 14 *Ed.* 4. 1. & 36 *H.* 6. 1. a *diſtringas ballivum* was awarded to bring in the body. So that, notwithſtanding the doubt in 2 *H.* 4. 16. yet in the other caſes the Court agreed that the *diſtringas* ſhould go againſt the bailiff, and not againſt the ſheriff. If the *diſtringas* go againſt the bailiff, to have the body of the defendant at the return of the writ, he ought to have the cuſtody of the body in the mean time; for if he were obliged to ſuffer the body to go out of his cuſtody in the mean time, it would be abſurd to call on him for a return of the writ. There are ſeveral caſes collected in *Kitchen* (1), 8 *Hen.* 6. 56. 4 *Hen.* 6. 25. and others, where it is ſaid that, if the bailiff make a return to the ſheriff, which is bad in law, and the ſheriff return it, he ſhall be anſwerable, becauſe he is bound to know what the law is; therefore, he ſhould return that the bailiff made no return. *When the bailiff has once arreſted a defendant, he, and not the ſheriff, is afterwards called on to bring in the body.* And it would be monſtrous if the law were otherwiſe; for then the bailiff would have all the profits and advantages, without bearing the burden, which he would by theſe means throw on the ſheriff. But the profits are in reſpect of the riſk he runs; and here the defendant, having arreſted the priſoner, muſt be anſwerable.—GROSE, J. In *Brook's Abridgment*, title, *Retorne de Briefe*, there are many inſtances where the ſheriff, on being called upon to return a writ, is allowed to ſet out the return which the bailiff of a liberty made to him. And the caſes where it appears that the ſheriff has been amerced, are for not taking care that the bailiff made a good and legal return to him. The Court firſt look to the ſheriff for the execution of a writ; but if the defendant be within a bailiwick, a peculiar juriſdiction, the ſheriff makes out his mandate to the bailiff, who then becomes anſwerable. In *Boyton's* caſe (2), where the bailiffs of a particular diſtrict in Suffolk, in bringing the plaintiff to Weſtminſter, at the return of the writ, carried him at his own requeſt to Lambeth, which was out of the way from Suffolk to Weſtminſter, the queſtion was, Whether that was not an eſcape? I only mention this caſe to ſhew, that as the bailiffs of a peculiar juriſdiction had arreſted the priſoner, they (not the ſheriff) were called on to return the writ. In the preſent caſe, *the defendant having carried the priſoner out of his bailiwick, has ſubjected himſelf to an action for the eſcape.* Inſtead of delivering the priſoner into the cuſtody of

(1) 568. 3d edition. (2) 3 *Co.* 43.

the

the ſheriff, he ſhould have kept him within his own bailiwick; and then he ſhould have made his return to the ſheriff, which the ſheriff would have returned to this Court. The defendant receives all the profits ariſing from the execution of writs within his privilege, and therefore he is liable to all the diſadvantages attending it.—Judgment for the plaintiff.

Hawkins *et al.* Aſſignees of Froſt, *v.* Plomer and Hart, Sheriffs of Middleſex, Hil. Ter. 16 Geo. 3. C. B. 2 *Black.* 1048.

Debt lies againſt a ſheriff for an eſcape, to recover the *whole* debt and damages, if a defendant, *taken in execution*, be afterwards ſeen at large, for any the ſhorteſt time, even before the return of the writ.—This was debt for 49l. The declaration ſtated, that the plaintiffs had obtained judgment for 49l. againſt one *Foſter*, and ſued out a *ca. ſa.* returnable *Octab. Pur.* which was delivered to the defendants, who arreſted *Foſter* thereon the 1ſt of February, but, on the 2d of February, ſuffered him to eſcape, and go at large. Plea *Nil debet.* On the trial it was proved, that the defendant was arreſted on the *ca. ſa.* on the 27th of December, and carried to a ſpunging-houſe, where he continued till the 2d of February, *on which day he was ſeen at large, at noon-day, in the Temple, nobody being with him.* That, on the ſame day, he returned into the ſame cuſtody, where he continued till the return of the writ, and was then, by *habeas corpus*, committed to the Fleet in execution. THE QUESTIONS were, 1ſt, Whether the ſheriff is liable to this action for an eſcape? and, if liable, 2dly, Whether the plaintiff is entitled, by law, to recover the whole debt of 49l.? And, if not, then the jury gave a proviſional verdict for 1s. damages, and 40s. coſts. PER CURIAM: As to the firſt queſtion, we are all of opinion, that, *if the defendant, when taken in execution, is ſeen at large for ever ſo ſhort a time, as well before as after the return of the writ, it is an eſcape in the ſheriff.* It is his duty to obey the writ, and the writ commands him to take the defendant, and him ſafely keep, ſo that he may have him ready to ſatisfy the plaintiff. *In arreſts upon meſne proceſs, it is ſufficient if the ſheriff brings in the body on the day of the return*; and, therefore, in *Noy*, 72. a diſtinction is taken, that in actions for eſcape, on *meſne* proceſs, the writ ſhall ſurmiſe, that *ad largum ire permiſit, et non comparuit ad diem.* On proceſs of execution, *ad largum ire permiſit* is ſufficient; and ſo are the precedents, *Raſt.* 171. 1 *Saund.* 35. 2 *Saund.* 100: all of which are for eſcapes, between the caption of the defendant and the return of the writ. Indeed, in *Grey* and *Gambier*, *Pr. Reg.* in the Common Pleas, 199, and *Chambers* and *Gambier*, *Comyns*, 554, it is held, that if the eſcape be involuntary, and the defendant returns before action brought, the gaoler may *plead* it, as he may a retaking on freſh purſuit, *Goldſb.* 180: but that is not the preſent caſe. The ſheriff is bound to

have the defendant always ready to bring before the Court if commanded by *habeas corpus*, or otherwiſe. Lord *Raym.* 775. 7 *Mod.* 29. And, even upon *habeas corpus*, the warden and marſhal ſhall have only a convenient time to bring the priſoner into court, and back again, which, if they exceed, it is an eſcape. See *Cro. Car.* 14. *Hob.* 202. *Hardr.* 476. 1 *Mod.* 116. *Hutt.* 129. The reſolutions in which books obviate the inconvenience of the doctrin laid down in 3 *Rep.* 44. On the other queſtion we are equally clear, that in an action of debt, which goes for a ſpecific thing, the *whole* muſt be recovered, or nothing. So are the precedents before cited in *Raſtal* and *Saunders*; ſo it is held, *Fitz. Abr.* tit. *Damages*, 81. *Alford* and *Tatnell*, 1 *Mod.* 170.—Judgment for the plaintiff *pro toto*.

Benton *v.* Sutton, Ea. Ter. 37 Geo. 3. C.B. 1 *Pul.* & *Baſ.* 24.

So if a ſheriff's officer, having *taken a priſoner in execution*, permit him to go about with a follower of his, before he takes him to priſon, it is an eſcape.—This was debt againſt the defendant, as ſheriff of Surrey, for an eſcape of a priſoner in execution. In a ſuit, in which *Benton* was the plaintiff, and one *Evans* the defendant, a writ of *ca. ſa.* returnable on the 3d of November, was ſued out on the 1ſt of June, againſt *Evans*, and delivered at the ſheriff's office, and a warrant made out thereon to *Donolly* and *Benton* (the plaintiff's father). Soon after, a ſimilar writ iſſued againſt *Evans* at the ſuit of one *Tibbits*, returnable on the 7th of November, and a warrant was made out thereon to one *Purkiſs*, the ſheriff's officer: by virtue of which laſt writ, *Evans* was arreſted on the 27th of September, and carried to a lock-up-houſe belonging to the officer. *On the 2d of October, he was permitted by* Purkiſs *to go in company with one of his followers, of the name of* Iſaacs, *to his own houſe, for the purpoſe of ſettling his affairs, and, on the* 3d, *was ſeen riding in St. George's Fields, in a chaiſe-cart, attended by the ſame perſon.* On theſe facts, the judge being of opinion, that no eſcape had been made out, directed a nonſuit. It was afterwards moved, that the nonſuit might be ſet aſide, and a new trial granted, on the ground that there is a diſtinction between *execution* and *meſne proceſs*. On the latter, the ſheriff may let the priſoner go, upon his honour or promiſe, and is not liable to be puniſhed, provided he have him at the return of the writ. But, with reſpect to the former, it is different; there, if the bailiff voluntarily permit the priſoner to go at large, though only for a minute, he cannot afterwards retake him; and for this was cited *Atkinſon* v. *Mattiſon*. Eyre, Ch. J.—What ſhall be deemed being at large, and, therefore, an eſcape, may be difficult to aſcertain; and whether, in this particular caſe, the indulgence ſhewn to the priſoner will be an eſcape, may admit of conſiderable doubt. But, in this caſe, *Evans* was in no

cuſtody

cuſtody at all, under the circumſtances of this caſe. The cuſtody of the follower, after the writ once executed, amounted to nothing; he could have no power to detain the priſoner if he had choſen to eſcape, and the warrant would have been no juſtification to him, if any miſchief had happened; which reduces the caſe to this point, that the priſoner was found abſolutely at large. On this narrow ground, I am prepared to ſay, that the nonſuit was wrong: on the general one, I think it would require ſome conſideration. Undoubtedly, the effect of proceſs of execution is to operate immediately by the dureſs of impriſonment; and caſes may be put, where, if the officer attempted to juſtify any length of indulgence, under colour of the priſoner being always in his preſence, the Court would ſay, that it was an eſcape. Suppoſe the officer wore the livery of the priſoner, and rode with him to a horſe-race, this would be contrary to the exigency of the writ. Whether any diſtinction can be ſafely drawn, between this laſt ſtrong caſe and the laudable and compaſſionate one, of accompanying the priſoner to his houſe, for the purpoſe of enabling him to examine his books, and ſettle the means of diſcharging his debt, I ſhould have conſiderable doubt. On the narrow ground, however, it is clear that the priſoner was not in legal cuſtody. BULLER, J.—Wherever the priſoner in execution is in a different cuſtody from that which is likely to enforce payment of the debt, it is an eſcape. It has been aſked, whether an action on the caſe would lie for not arreſting on the earlieſt opportunity: I have no doubt but that it would; but the damages muſt depend on the particular circumſtances. Let us put a caſe. The laſt day of laſt Trinity term was the 15th of June; ſuppoſe a *ca. ſa.* to have iſſued on that day, and proof that the officer, to whom the warrant was directed, was in company with the perſon named in the writ on the 16th, and that he omitted to arreſt him; on the 4th of November he does arreſt him, and on the 6th brings the body into court. If on the 16th of June, when the officer was in company with the priſoner, he was in good circumſtances, and between that day and the 4th of November he has become a bankrupt, the plaintiff may ſay to the officer, I have loſt my debt by your not putting the party in reſtraint ſooner; I have ſuſtained damages, and am entitled to recover them by an action. When a priſoner is removed by *habeas corpus*, if the officer carry him out of the direct road, it is an eſcape. HEATH, J.—What is ſaid in *Hobart*, 202 (1), is very material. The

(1) In *Balden* v. *Temple*, Lord *Hobart* ſays, "Let keepers of priſons beware, "when they receive an *habeas corpus* from Chancery, or any other court, bearing "teſte

The rule ſeems to be, that a party muſt be taken to priſon in a convenient time. What is convenient is a queſtion for the determination of the judge, who will admit of all reaſonable delay: but if that be made uſe of by the officer, as a means of giving more liberty than he ought, he will be liable for an eſcape. ROOKE, J.—I think the nonſuit wrong, on the ground which my Lord has ſtated, that the priſoner was not in legal cuſtody. I ſhall give no opinion on the general ground: I have no doubt, however, that where a party has been really injured by the ſheriff's neglecting to arreſt on the earlieſt opportunity, an action will lie for the injury ſuſtained.—Rule abſolute.

Aliſept *v.* Eyles, Tr. Ter. 32 Geo. 3. C.B. 2 *Hen. Black.* 108.

And an action of *debt* will lie againſt a gaoler, for the eſcape of a priſoner in execution, though the eſcape were *without the knowledge of, and without any fault whatever on the part of, the gaoler*, who, in ſuch caſe, can avail himſelf of nothing but the act of God, or the king's enemies, as an excuſe.—This was an action of debt againſt the warden of the Fleet, for the eſcape of *Francois Gabriel de Vertillac, a priſoner in execution.* The pleas were, 1ſt, *Nil debet*; 2dly, That the defendant *took all due and poſſible care in his power to prevent the eſcape*; that, notwithſtanding ſuch care, the ſaid *Francois Gabriel, without the conſent, privity, or knowledge, of the defendant, or his ſervants, &c. did contrive, conſpire, confederate, and agree*, together with two other perſons, whoſe chriſtian names were unknown, but whoſe ſurnames were *Valmer* and *Imber, unlawfully to break the ſaid priſon by and in behalf of the ſaid* Francois Gabriel, *and to effect his eſcape from and out of the ſame*; that the ſaid unlawful combination, conſpiracy, &c. having been ſo entered into, the ſaid two perſons unknown, in purſuance of ſuch unlawful combination, &c. and in order to effect the eſcape of the ſaid *Francois Gabriel*, and, juſt before the ſaid eſcape in the declaration mentioned, did unlawfully, ſecretly, and clandeſtinely, and without the conſent of the defendant, or his ſervants, &c. *fling, caſt, and throw, and cauſe to be flung, caſt, and thrown over, and acroſs a certain external wall of the ſaid priſon, contiguous and next adjoining to a certain houſe, part of certain premiſes, ſituate in London aforeſaid, commonly called and known by the name of the Bell Savage Inn, not then and there belonging to the ſaid priſon, a certain rope*

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" teſte in the end of a term, to have the body of one in execution in the Court the
" next term, that they do not, by colour of ſuch writs, ſuffer the party to go at
" large all the mean time (as it is ſometimes practiſed); for the writ warrants no
" more but that he be brought out of priſon only for that purpoſe, and only for ſo
" much time as, in judgment of law, ſhall be convenient and neceſſary for the
" execution of the writ, and no more; which, in *privilegiis adverſis*, muſt ever be
" ſtrict."

*ladder,*

*ladder, then and there being faſtened to, and ſuſpended from, one of the windows of the ſaid houſe, ſo contiguous and adjoining to the ſaid priſon as aforeſaid, overlooking the ſaid wall of the ſaid priſon, for the purpoſe of thereby, then, and there, effecting the eſcape of the ſaid* Francois Gabriel, *from and out of the ſaid priſon, over the aforeſaid wall thereof; and the ſaid* Francois Gabriel *did thereby, &c. ſecretly, privately, and clandeſtinely, eſcape, &c.* That, immediately after the ſaid eſcape, he made freſh purſuit, &c.; that, notwithſtanding ſuch freſh purſuit, the ſaid *Francois Gabriel*, together with the ſaid two other perſons, fled and departed from this kingdom, &c.; and alſo, at the time of the ſaid eſcape of the ſaid *Francois Gabriel*, he, the ſaid *Francois Gabriel*, and the ſaid other two perſons, *were aliens, and each and every of them was an alien, born out of the liegeance of our ſaid lord the now king, to wit, in the ſaid kingdom of France, of parents then and there being ſubjects of that kingdom; and that they, the ſaid* Francois Gabriel, *and the ſaid two other perſons, have not, nor had, either of them, at any or either of the times aforeſaid, any lands, tenements, or other property, in this kingdom, whereby they could be amenable to the laws or juſtice of this country, for, or in reſpect of, the ſaid eſcape of the ſaid* Francois Gabriel, *&c.*—*The replication* to the ſecond plea, proteſting againſt the ſeveral matters alleged in it, concluded with a traverſe: "without this, that the ſaid "*Francois Gabriel* did eſcape from and out of the ſaid priſon, "*without any negligence or default in the ſaid defendant*, "or any or either of his deputies or ſervants, &c. &c." The rejoinder took iſſue, and, at the trial, a verdict was found for the plaintiff. BUT a rule was now obtained to ſhew cauſe, why the verdict ſhould not be ſet aſide, and a new trial granted. The grounds on which this rule was moved for were two; ONE, that an action of debt would not lie for a *negligent* eſcape; THE OTHER, that the matters diſcloſed in the plea, which were proved, ſhewed that there was, in fact, no negligence on the part of the defendant. PER CURIAM: In this caſe the plaintiff is entitled to judgment, it being clear that an action of debt will lie for the eſcape of a priſoner in execution. In the year-book, 33 *Hen.* 6. c. 1. pl. 3. the action was debt for an eſcape, which was evidently involuntary. In *Plowden*, 35. it is debated, whether the action lay at common law, by the ſtatute *Weſt.* 2. or by that of *Ric.* 2; and an inſtance is cited, 45 *Ed.* 3. before the time of *Ric.* 2. of debt being brought for an eſcape: but the Court held, that whether it was by the common law, or by either of thoſe ſtatutes, yet that the action laid. Lord *Coke*, in 2 *Inſt.* 382. refers the action to the conſtruction of the ſtatute of *Weſt.* 2; and in *Plowden*, it is ſaid, that the ſtatute of *Ric.* 2. extends to all gaolers,

gaolers, like the ſtatute *de circumſpectè agais*, 13 *Ed.* 1. ſt. 4. to all biſhops, as well as the biſhop of Norwich. To the ſame effect alſo is 1 *Ventr.* 217. The queſtion, therefore, is not now open to argument, and the verdict muſt be entered for the whole ſum. With reſpect to the other point, it is impoſſible to take that ground. As the law ſtands, nothing but the act of God, or the king's enemies, will be an excuſe. I take the notion of fire being an excuſe, to have ariſen from ſome ſhort expreſſions in the books. In the year-book, the words are, "*ſudden tempeſt* of fire"(1); but *Rolle*, 1 *Roll. Abr.* 808. pl. 6. in his abridgment, and *Dyer*, 66 b. from whom he cites, ſays, "fire, which is the act of God," which ſeems to mean fire by lightning.—Judgment for the plaintiff.

Weſt *v.* Eyles, Hil Ter. 16 Geo 3. C.B. 2 *Black.* 1059.

The affidavit of the warden to be annexed to his plea, according to the ſtat. 8 & 9 *Will.* 3. & 27. ſ. 6. that an eſcape, for which debt is brought, was without his knowledge, may be conditional, "if any ſuch eſcape there was;" for if the defendant knows nothing of any eſcape, he is not to be bound to admit by his affidavit, that an eſcape has actually happened.

Planck *v.* Anderſon, *et al.* Sheriff of Middleſex, Mic. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 37.

If a ſheriff, having arreſted a defendant on *meſne* proceſs, keep him in his cuſtody after the return of the writ, and then carry him to priſon, he is not liable to an action on the caſe as for an eſcape, if the jury find that the plaintiff has not been delayed or prejudiced in his ſuit.—The declaration ſtated, that the defendant, on the 11th of January, by virtue of a ſpecial *capias ad reſp.* returnable in eight days of St. Hilary, had arreſted Lord *William Murray*, &c. and after the time appointed for the return of the ſaid writ, to wit, on the 1ſt of March, 1792, *voluntarily permitted him to eſcape*, &c.—It appeared at the trial, that Lord *W. M.* being in the cuſtody of the ſheriff's officer at the ſuit of another creditor, the plaintiff's writ was ſerved on him on the 11th of January, 1792, returnable the 20th. That *to prevent his being ſent to gaol, another writ*, as mentioned in the ſecond count of the declaration, *was, with the plaintiff's conſent, iſſued on the* 20th, *returnable as there mentioned.* That a writ of *habeas corpus cum cauſâ*, teſted the 28th of November, 1791, returnable immediately before a judge of B. R. was iſſued and delivered to the ſheriff ſome little time previous to the 20th of January, 1792, for removing Lord *W. M.* into the cuſtody of the marſhal, but that in fact he was not brought up nor committed till the 21ſt of April, being the day before the eſſoin-

(1) But, in the latter part of the caſe, the expreſſion is, "*Si fuit per ſodein aventure de feu*," &c.

day

day of Eaſter term; after which the plaintiff filed a declaration againſt him. That *from the time of the firſt arreſt till the commitment, Lord* W. M. *remained in the cuſtody of the ſheriff's officer.* There was a verdict for the plaintiff; but the jury found that he had not been delayed or prejudiced in his ſuit; and the queſtion was reſerved for the opinion of the Court, WHETHER *under theſe circumſtances the plaintiff was entitled to recover?*—Lord KENYON, Ch. J. The form of the precept, under which the defendant acted, is, that he ſhall take the body of the debtor, and have him ready to produce on a certain day. If, therefore, the ſheriff had taken him, and returned *cepi corpus*, and the debtor were not afterwards forth-coming, then the exigency of the writ would not have been anſwered: but here the exigency of the writ was performed, ſo far that the debtor was forth-coming when the plaintiff called upon him to anſwer his demand. Not finding any authority in the books, which ſays that the ſheriff is anſwerable under theſe circumſtances, but on the contrary, ſeeing that caſes may be put where the debtor cannot be carried to priſon before the return of the writ, as where he is taken juſt before the return, I think the verdict muſt be ſet aſide, and a nonſuit entered.---BULLER, J. There is a difference between caſes where a party is in cuſtody in execution, and on *meſne proceſs*. In the former, a creditor has a right to the body of his debtor every hour till the debt is paid; and, if the priſoner eſcape, may bring an action of debt upon the ſtatute againſt the ſheriff, in which he *may* (without conſidering how far he *muſt*) recover the whole debt. But where the priſoner eſcapes out of cuſtody on *meſne proceſs*, the creditor cannot bring an action of debt, but is driven to his action upon the caſe, which is founded on the damage ſuſtained; and if no damage be ſuſtained, the creditor has no cauſe of action. The damage, which a creditor may ſuſtain in ſuch a caſe as the preſent, is the delay and prejudice in recovering his debt ſo ſoon as he otherwiſe might: but in this caſe, the jury found that, in point of fact, the plaintiff was not delayed or prejudiced. I have not met with any caſe like the preſent; but the reaſoning of *Whitrow* v. *Edwin*, 1 *Lutw* 128. is applicable. There to an action for an eſcape on meſne proceſs, the ſheriff pleaded that the debtor was reſcued out of his cuſtody as he was carrying him to Newgate; to which the plaintiff replied, that the debtor ought to have been carried to priſon *within a convenient time* after the arreſt, and that he was reſcued becauſe the defendant neglected, &c. but the Court thought the replication bad, and gave judgment for the defendant. That caſe therefore eſtabliſhes this point, that the ſheriff was not bound to carry the debtor to priſon the firſt moment, nor even within (what is there called) a convenient time, after the arreſt. Thus it ſtood before the ſtatute 2 *Geo.* 2. c. 22. which enacts, that the ſheriff ſhall not carry the debtor to priſon within twenty-

twenty-four hours after the arreſt. Then *what is the time within which the ſheriff muſt carry the debtor to gaol? At the return of the writ; afterwards the ſheriff keeps him at his peril, in caſe the creditor is delayed.* But in this caſe the jury have expreſsly found that he was not delayed or prejudiced, and therefore the plaintiff has no cauſe of action.—GROSE, J. concurred.

Alexander *v.* Macauley, *et al.* Ea. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 611.

In an action againſt the ſheriff, for the eſcape of a priſoner on meſne proceſs, if the plaintiff cannot prove any debt againſt the priſoner who eſcaped, he muſt be nonſuited, and cannot recover nominal damages (1).

Webb *v.* Herne, *et al.* Sheriff of Middleſex, Tr. Ter. 38 Geo. 3. C.B. 3 *Pul.* & *Boſ.* 281

In eſcape againſt the ſheriff, if the plaintiff aver in his declaration, that *J. S.* was arreſted "under a writ indorſed for bail by virtue of an affidavit now on record," he muſt produce the affidavit in evidence, though the latter part of the averment was unneceſſary.—On the trial of this action, which was eſcape againſt the ſheriff, it appeared that the plaintiff, in his declaration, ſtated that *J. S.* was arreſted "under a writ indorſed for bail, *by virtue of an affidavit now on record,*" and the plaintiff not being able to produce the affidavit, *Eyre*, Ch. J. nonſuited him. It was moved for a rule *niſi* to ſet aſide the nonſuit,—SED PER BULLER, J. I remember a caſe in Lord *Mansfield*'s time, where it was held unneceſſary to produce the affidavit, but the declaration there differed from the preſent one, ſince it only ſtated generally, that a writ was ſued out "indorſed for bail —— l." EYRE, Ch. J. If I had underſtood this to have been ſuch a caſe, I ſhould have left the evidence to the jury: but it appeared to me that *there was a ſubſtantive allegation of the exiſtence of an affidavit, which muſt be proved.*—Rule refuſed.

## Eſſoin.

Anſon *v.* Jefferſon, Ea. Ter. 3 Geo. 3. C.B. 2 *Wils.* 164.

IF an attorney appear on the face of the entry to have caſt an eſſoin for a defendant, it is void.—This was a plaint in replevin, levied in the county court of Norfolk, which was removed by the plaintiff into the C. B. by a *recordari facias loquelam*, returnable on the morrow of the purification of the bleſſed *Mary*; the plaintiff ſued out a *pone* to compel the defendant to enter his appearance, but inſtead of appearing, he *(by attorney)* caſt an *eſſoin*, which is entered with the clerk of the *eſſoins* in the following words, viz. "On the morrow of "the purification of the bleſſed *Mary*, *Norfolk*, *eſſoin* for "*John Jefferſon*, at the ſuit of *Anſon* by *Heuzell* and *Lodge*;"

(1) See the caſe of *Gunter* v. *Cleyton*, 2 *Lev.* 85. as deciding the preſent.

and

and the defendant's attorney entered a rule, that unleſs the plaintiff ſhould adjourn the *eſſoin* a *non pros* would be ſigned the plaintiff did not adjourn the *eſſoin*, ſo a *non pros* was ſigned.—IT WAS MOVED, that the *eſſoin* and the *non pros* ſhould be ſet aſide.—PRATT, LD. CH. J. I cannot ſay that *eſſoins* may not be allowed in perſonal actions, becauſe *Coke* in 2 *Inſt.* on the ſtat. of *Marlbridge*, fo. 125, 126, 137. ſays that *eſſoins* are allowed in perſonal actions; but this is a very obſolete practice, and a great abuſe of the law, as it is an unneceſſary delay of juſtice; and if the practice is to be revived, it will be neceſſary to make a new order of court.—*Bathurſt*, J. By the ſtatute of *eſſoins*, 21 *Ed.* 2. ſ. 12. *an eſſoin lieth not where the party hath an attorney in his ſuit*; and by ſ. 4. *an eſſoin lieth not where the party was ſeen in court.* An *eſſoin* lies for an attorney, though he is an officer of the court, but if he be ſeen in court, he cannot *eſſoin*, as was the caſe of a ſecondary of this court, and an attorney, and attended the holding the *eſſoin* upon the *eſſoin*-day of the ſame term, wherein he *eſſoined*.---LD. CH. J. It was ſaid, the *pone* was a ſummons, and therefore the defendant might well *eſſoin*; but it is not ſo, it is only a prefixing of the day for the defendants to appear at Weſtminſter; here an attorney appears to have entered the *eſſoin*, and therefore it is void, and muſt be ſet aſide, and all proceedings thereon.

The plaintiff ſued out a writ againſt the defendant, who was a peer of Great Britain, in a perſonal action, returnable the ſecond return of Eaſter term. At the return, the defendant caſt an eſſoin, which was not adjourned to any particular day. And on the firſt day of Trinity term, the plaintiff delivered his declaration. It was moved that the defendant might have an imparlance to Michaelmas term, the declaration not having been delivered before the eſſoin-day of Trinity term.---PER CURIAM: In the caſe of *Argent* v. the Dean and Chapter of St. Paul's, *E.* 23 *G.* 3. B. R. it was held, firſt, that a corporation was not entitled to an eſſoin, and ſecondly, that there could be no eſſoin in a perſonal action; and there the Court quaſhed the eſſoin. Where an eſſoin is caſt, the parties ſhould adjourn it to a particular day: but as that was not done here, and as no motion was made to quaſh the eſſoin, the declaration could not be delivered till the firſt day of the term. But the defendant is not entitled to an imparlance where the plaintiff is prevented from declaring before the eſſoin-day, by an eſſoin caſt. And the Court will be glad to uſe any means to prevent ſuch a delay attempted by the defendant.---Rule diſcharged.

Rooke *v.* the Earl of Leiceſter, Tr. Ter. 27 Geo. 3. B.R. 2 *Ter. Rep.* 16.

If a writ be pleaded as ſued out on a day between the eſſoin-day and the firſt day of term, and there be a ſpecial demurrer for that cauſe, the objection will not prevail, though the Court do not ſit in fact till the *quarto die poſt*.---This was an action of treſpaſs and falſe impriſonment; to which the defendants pleaded

Belk *v.* Broadbent and Wife, Ea. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 85.

pleaded a juſtification under a bill of Middleſex, ſued out on the 8th of April, the Court then and ſtill being at Weſtminſter. &c. To this plea there was a ſpecial demurrer, becauſe the writ was ſued out on the 8th of April, *when the Court were alleged to be ſitting*, whereas the 8th of April was in the vacation.---Lord KENYON, Ch. J. There is no doubt but that, in the eye of the law, the eſſoin-day is for many purpoſes the firſt day of the term: the *quarto die poſt* is only an indulgence.---ASHHURST, J. of the ſame opinion.---BULLER, J. With reſpect to this objection, which is founded upon a fiction, any other fiction is ſufficient to over-rule it. Though in point of fact we know that writs do iſſue in vacation time, yet that difficulty is obviated by teſting them in term time. So, on the other hand, though the Courts do not actually ſit on the eſſoin day, yet in law it is conſidered as the firſt day of the term.---GROSE, J. agreed.

## Eſtate.

Doe, *ex dim.* Thomas Davies and James Williams the younger, *v.* Thomas Williams, T. Ter. 28 Geo. 3. C.B 1 *Hen. Black.* 25.

*What will paſs by a general deſcription in a deed.*]—A deed of releaſe containing the words "all land, &c. belonging, uſed, occupied, and enjoyed, or deemed, taken, or accepted as part thereof, &c." was held to paſs leaſehold lands, which anſwered that deſcription, as well as freehold, eſpecially againſt the releaſor.—On the trial of an ejectment for three acres of land, called Portway, the title of the leſſors of the plaintiff was founded on an indenture of releaſe of the 23d of October, 1781, between *James Williams* the elder, *James Williams* the younger (the leſſor of the plaintiff), and *Thomas Williams* (the defendant), of the firſt part; *James Maddey* of the ſecond part; and *Thomas Davies* (leſſor of the plaintiff) of the third part; by which the parties of the firſt part conveyed all that meſſuage, mill, and lands, called Clock Mills, in the poſſeſſion of *James Williams* the elder, *James Williams* the younger, *Thomas Williams*, or ſome, or one of them, *and all lands and meadows to the ſaid meſſuage or mill belonging, or uſed, occupied, and enjoyed, or deemed, taken, or accepted as part thereof*, to *Thomas Davies*, as a truſtee for the payment of an annuity to *James Williams* the elder, for life, remainder to *James Maddey* for forty years, to raiſe portions, &c. remainder to *James Williams* the younger, in fee. The lands in diſpute were holden for the remainder of a term of 1000 years, but had been occupied with, and reputed part of, the Clock Mill eſtate, from the year 1748 to 1785.—THE QUESTION was, Whether the leaſehold land paſſed by this deed? Lord LOUGHBOROUGH: This being a caſe ariſing on a deed, is to be diſtinguiſhed from thoſe of a like nature which have ariſen on wills

wills (1). In general, where there is a queſtion on the conſtruction of a will, neither party has done any thing to preclude himſelf from the favour of the court. But in the preſent inſtance the rule of law applies, that "*a deed ſhall be conſtrued moſt ſtrongly againſt the grantor.*" For if it be determined that the lands in diſpute did not paſs by the releaſe of 1781, the defendant will be permitted, after an interval of near forty years, to invalidate his own conveyance, for the purpoſe of obtaining an unjuſt poſſeſſion.—GOULD, J. Even if a deviſe had been made in ſuch ſpecific and particular words as are contained in this deed of releaſe, I ſhould have very little doubt but that all lands would paſs, as well leaſehold as freehold. The word "grant" is as proper to convey leaſehold as freehold property.—HEATH, J. of the ſame opinion.—WILSON, J. A conveyance by leaſe and releaſe is certainly moſt properly uſed to paſs eſtates of inheritance, but *it may alſo convey a leaſehold intereſt.* If the leaſehold lands had been expreſſed as ſuch in this deed, they would clearly have paſſed; if the intention of the parties at the time was to convey them, they ſhall alſo paſs. That ſuch was their intention ſufficiently appears from the circumſtance of the caſe, and from the lands having been conſidered as part of the Clock Mill eſtate, during ſuch a number of years. The defendant, who was one of the grantors, ſhall not be ſuffered to deny the effect of his own deed.

*What will create an eſtate for life.*]—By a gift from father to ſon, by deed poll, of lands to hold to him, and his *aſſigns*, for ever, charged with 100l. to his younger brother, at the end of his apprenticeſhip, againſt all men, the ſon takes only an eſtate for life.—On a motion for a new trial, the queſtion was, What eſtate one *John Allingham* took under a certain deed poll, dated the 8th of January, 1742, *coming* 3, whereby (without mentioning any conſideration) *Henry Allingham* gave, granted, bargained, and ſold unto the ſaid *John Allingham*, his ſon, the premiſes in queſtion? *To hold to the ſaid* John, *and his aſſigns for ever;* upon condition to pay unto his brother, *Richard Allingham*, younger ſon of the grantor, 100l. at the end of the apprenticeſhip of the ſaid *Richard Allingham*. *Henry Allingham* reſerves to himſelf the rents of the premiſes during his natural life: and in caſe the ſaid 100l. be not paid to the ſaid *Richard*, by the ſaid *John*, at the time aforeſaid, it ſhall be lawful for *Richard* to enter upon, have, and enjoy the premiſes as his own proper goods, until the payment of the ſame, by the ſaid *John*, to the ſaid *Richard:* which he, the ſaid *John*, truly paying and performing, the ſaid *Henry*, will for every warrant, againſt all others unto the

Wright *ex dem.* Allingham *v.* Dowley and Wife, Hil. Ter. 18 Geo. 3. C.B. 2 *Bla. Rep.* 1135.

(1) See caſes on *Wills* in this reſpect, in p. 49, 50, *ante.*

ſaid

ſaid *John*, the peaceable and quiet poſſeſſion, and enjoyment of the premiſes.—PER CURIAM: *John Allingham*, took only an eſtate for life under this deed.

Thomas Wills and Ann his wife, *et al.* *v.* Henry Palmer, Eſq. *et al.* Ea. Ter. 30 Geo. 3. B.R. 5 *Burr.* 2615. 2 *Black.* 687.

*What will create an eſtate-tail.*]—In a grant to *A. B.* remainder to his *own heirs male*, his heirs male take by deſcent.—But if ſuch a limitation is made by will, or by a third perſon in a deed, the heir male takes by purchaſe.—On a caſe for the opinion of the judges of the court of King's Bench, from the court of Chancery, it was ſtated, that in conſideration of a marriage intended between *John Palmer*, the ſon of *Archdale Palmer*, by a firſt wife, and *Ann Danvers*, the ſaid *Archdale Palmer*, by indenture of ſettlement, and fine and recovery, conveyed certain eſtates to truſtees, to the uſe of *Archdale Palmer*, his heirs and aſſigns, until the intended marriage; and as to all the premiſes in Thurcaſton, ſix meſſuages, &c. in Wanlip, and one yard-land in Loughborough, and the ſaid meſſuage, &c. in Birſtall, to the uſe of the ſaid *John Palmer* for life, *without impeachment of waſte*; remainder to truſtees, to ſupport contingent uſes; remainder to the uſe of the intended wife, for life; remainder to the firſt ſon of the body of the ſaid *John Palmer*, by his ſaid intended wife, and the heirs male of the body of ſuch ſon; remainder to the uſe of the ſecond, third, fourth, fifth, and other ſons; remainder to truſtees, for the term of 500 years; and after the end, or other determination, of the ſaid term, to the uſe of the firſt ſon of the body of the ſaid *John Palmer*, by any *other* woman, he ſhould marry, and the heirs male of the body of ſuch firſt ſon; remainder to the ſecond and other ſons of the ſaid *John Palmer* by any other woman, and their heirs male ſucceſſively; REMAINDER TO THE USE OF THE HEIRS MALE OF THE BODY OF THE SAID ARCHDALE PALMER; remainder to the uſe of the heirs of the body of *John Palmer*; remainder to the uſe of *John Palmer*, *his heirs and aſſigns for ever*. And as for, and concerning, the ſaid manor of Wanlip, with the royalties and appurtenances, and the advowſon, &c. of Wanlip, the capital meſſuage in Wanlip, in the occupation of *Archdale Palmer*, and all, &c. thereto belonging, or therewith uſed; from and after the ſolemnization of the ſaid marriage, to the uſe of *Archdale Palmer*, for life; remainder to *John Palmer* for life; remainder to truſtees, to ſupport contingent remainders; remainder, after the deceaſe of *Archdale* and *John Palmer*, and the ſurvivor, to the uſe of the intended wife of the ſaid *John Palmer* for life. And as for the reſidue of the premiſes, whereof no uſe was therein before limited.—From and after the ſolemnization of the ſaid intended marriage, to the uſe of the ſaid *Archdale Palmer* for life; remainder to the truſtees, for the term of 300 years; and after the end, or other determination, of the ſaid 300 years, to the uſe of *John Palmer* for life; remainder to truſtees, to ſupport contingent

contingent remainders; remainder to truſtees, for 400 years: and as for the premiſes contained in the ſaid term: from and after the end, or ſooner determination, of the ſaid term of 400 years, and as *for* the ſaid manor of Wanlip, with the rights and appurtenants, and the advowſon of the ſaid church of Wanlip, and the capital meſſuages in Wanlip, with the appurtenances before limited to the ſaid *Archdale Palmer*, *John Palmer*, and *Ann*, his intended wife, in remainder, one after another for their reſpective lives.—From and after their ſeveral deceaſes, to the uſe of the firſt ſon of the ſaid *John Palmer*, by the ſaid *Ann*, his intended wife, and the heirs male of the body of ſuch firſt ſon;—remainder to the uſe of the ſecond and other ſons ſucceſſively, &c. remainder to *John Palmer*, and the heirs male of his body; remainder to *Archdale Palmer*, his heirs and aſſigns for ever.—The term of five hundred years was declared to be limited to the ſaid truſtees, upon truſt, to raiſe portions for daughters. The term of 300 years was declared to be limited to truſtees, &c. upon truſt, that after *Archdale Palmer*'s deceaſe, the ſaid truſtees ſhould raiſe 500l. and pay the ſame to ſuch perſons as the ſaid *Archdale Palmer* ſhould, by deed or will, appoint.---The term of 400 years was declared to be limited to the truſtees, for raiſing 1500l. for the portion of younger children (of which there were none), payable as there is mentioned. *The marriage took effect*; *and, about the 24th of Auguſt*, 1726, *the ſaid* John Palmer *died, in the life-time of his father*, Archdale Palmer, *leaving the ſaid* Ann *his widow, and only one child by her, viz.* Ann *(now the plaintiff*, Ann Wills), *his heir at law, and no other iſſue.*—On the death of *John Palmer*, his widow, *Ann*, under the ſettlement, took poſſeſſion of that part of the eſtate which was limited to her in jointure, and continued in poſſeſſion thereof till her death, which happened on the 27th of December, 1764. *Archdale Palmer*, the grantor, had married *two wives*, and, by the *firſt*, had iſſue, the ſaid *John*, who died in his life-time; *William*, who ſurvived him, and *was living at his death*; and ſeveral other children, who died infants, or without iſſue: and, by his *ſecond* wife, he had *Henry*, the preſent claimant, and ſeveral other children, who are living.—*Archdale Palmer*, by his will, dated the 10th of December, 1729, after reciting the ſaid ſettlement, and that certain lands were conveyed to truſtees for 300 years, to raiſe 500l. in the manner abovementioned, did direct and appoint, that the ſaid truſtees ſhould raiſe the ſame, and pay the ſame, when raiſed, to his executrix, as part of his perſonal eſtate thereinafter to her given. And then the teſtator deviſed in theſe words following: AND WHEREAS, by the deceaſe of my eldeſt ſon, *John Palmer, without leaving any iſſue male, that part of my eſtate at Wanlip, which is now in my own poſſeſſion, is, by the*

*ſaid marriage ſettlement, veſted in me and my heirs in fee-ſimple*, ſubject to the ſaid term of 300 years, *I do hereby give and deviſe the ſaid eſtate, with all and ſingular the appurtenances thereto belonging, to my ſon* William Palmer, *for and during the term of his natural life; and, after his deceaſe, to his firſt and ſecond, and all and every other ſon and ſons by him lawfully begotten, or to be begotten, ſucceſſively*, as they ſhall be in ſeniority of age and priority of birth, and the heirs male of the body and bodies of ſuch ſon and ſons, reſpectively iſſuing; AND FOR WANT OF SUCH ISSUE, TO THE HEIRS MALE OF MY BODY BEGOTTEN; and for want of ſuch iſſue, to *my own right heirs for ever.*—*Archdale Palmer* died on the 4th of September, 1731, leaving the plaintiff, *Ann Wills*, his grand-daughter, and heir at law; and alſo leaving his ſon *William Palmer* ſurviving him.—At the death of *Archdale*, the ſaid *William Palmer*, his ſecond ſon by his ſaid firſt wife, was heir male of his body, and next brother, of the whole blood, to *John Palmer.*—*William Palmer* died in 1738, *after* the death of *Archdale*, and without having ſuffered any recovery, having had two ſons; *Charlton*, who died in 1736, *before* him, without iſſue, and *Henry*, who died *after him*, in July, 1743, without having ſuffered any recovery, and left a *ſon*, *Henry John Palmer*, who died an infant, without iſſue, in December, 1762.—Upon the death of *Henry-John*, the defendant, *Henry Palmer*, the eldeſt ſon, and *heir male of Archdale Palmer*, by *Ann Charlton*, his ſecond wife, entered upon *that part* of the eſtate in his will mentioned to have veſted in him on the death of his ſon *John*, without iſſue male, and which was by *Archdale Palmer*'s will deviſed to the *heirs male of his body.*—In December, 1764, *Ann Palmer*, the widow of *John*, died.—And upon her death, *Henry Palmer, as heir male of the body of Archdale*, took poſſeſſion of the manor, fiſhery, and lands, which the ſaid *Ann* held by way of jointure for her life.—The ſaid *Ann Palmer*, the widow of *John Palmer*, died, leaving the plaintiff, *Ann Wills* (then *Ann Norwood*), her only daughter; and who is heir of the body of *John Palmer*, and heir at law of *John Palmer*, her father; of *Archdale*, her grandfather; and of *Henry-John Palmer*, her couſin german; and who has iſſue, three daughters.—In Hilary term, 1767, a bill was brought by *Thomas Wills* and *Ann*, and the other plaintiffs, againſt the ſaid *Henry Palmer*, and the other defendants: and by ſuch bill, THE PLAINTIFFS, THOMAS WILLS, AND ANN, HIS WIFE, IN HER RIGHT, AS SHE IS HEIR AT LAW, AND HEIR OF THE BODY OF JOHN PALMER, AND HEIR GENERAL OF THE FAMILY, CLAIMED, UPON FAILURE OF ISSUE MALE OF THE WHOLE BLOOD, *to be entitled, by virtue of the ſettlement, to the reverſion in fee of that part of the ſettled eſtate of which the reverſion in fee was limited by the*

*ſettlement*

*ſettlement to* John Palmer; *and likewiſe claimed as heir at law of* Archdale, *the manor, advowſon, and capital meſſuage of Wanlip, and all the eſtate of which the reverſion in fee was limited to Archdale,* AS NOT DEVISED BY HIS WILL; and therefore prayed iſſues at law for trying ſuch title; and to have poſſeſſion, and an account of the rents and profits of the eſtates.—The ſaid defendant, HENRY PALMER, *by his anſwer claimed the eſtates firſt mentioned in the ſettlement, and comprized in the* 500 *years' term, as* HEIR MALE OF THE BODY *of* ARCHDALE, *under the limitations in the ſettlement; and the reſt of the eſtates, as* HEIR MALE OF THE BODY *of* ARCHDALE, by virtue of the deviſe in his *will*.—THE QUESTION was, "WHETHER *any* and *what* eſtate paſſed *by the ſaid* "INDENTURE dated the 15th day of May, 1723, to the de- "fendant, HENRY PALMER, *as* HEIR MALE OF THE BODY "*of* ARCHDALE PALMER, *the grantor?*" And "Whether *any* "and *what* eſtate paſſed to the ſaid defendant, HENRY PAL- "MER, *as* HEIR MALE OF THE BODY of the ſaid ARCH- "DALE PALMER, *by his* WILL, dated the 10th day of "December, 1729?"—PER CURIAM: We are of opinion, that the defendant, *Henry Palmer, by the indenture*, dated the 15th of May, 1723, took by DESCENT, as heir male of the body of *Archdale Palmer*, the grantor.—In caſe a *third perſon* had been the grantor, we ſhould have thought that *Henry Palmer* would have taken an eſtate in tail male by PURCHASE, under the deſcription of "Heir male of the body of *Archdale* "*Palmer*."—And we are of opinion, that an eſtate in tail male paſſed to the defendant, *Henry Palmer*, as heir male of the body of the ſaid *Archdale Palmer, by his will*, dated the 10th day of December, 1729.

*William Creſwick*, on the 27th of January, 1730, by *deed of feoffment*, in conſideration of his intended marriage with *Sarah Dearnally*, and 150l. marriage-portion, conveyed the premiſes to *John Dearnally* (father of *Sarah*) and *Thomas Creſwick*, and the ſurvivor of them and his heirs; upon truſt, as to part, that they ſhould ſtand ſeiſed, from the marriage, to the uſe of the ſaid *William Creſwick* and *Sarah*, for their lives and the life of the ſurvivor, in part of her jointure and dower; remainder to the uſe of the "HEIRS *of the ſaid* William "Creſwick *on the* BODY *of the ſaid Sarah* lawfully begotten "or to be begotten; *the* MALE *to be preferred before the* "FEMALE, *and the* ELDER *before the* YOUNGER."—There was iſſue of the marriage, two ſons—[FIRST, *William Creſwick* (the eldeſt), who died in 1750, leaving iſſue—*Mary*, who died, leaving iſſue *William Froggatt*, one of the defendants;]——[SECOND, *John Creſwick*, who died, leaving iſſue two ſons, viz. *John Creſwick*, his eldeſt, who died without iſſue, and *William Creſwick*, his ſecond, the leſſor of the plaintiff.]—The *leſſor of the plaintiff*, the grand-

Denn, *ex dim.* William Creſwick, *v.* Joſeph Hobſon, *et al.* Eaſter Term 10 Geo. 3 B.R. 5 *Burr.* 2609. 2 *Black. Rep.* 695.

ſon, claimed as heir male, under this ſettlement.---The queſtion was, " Whether this limitation was in tail male; " or whether it was either a limitation in tail general, or " elſe a void limitation, for its uncertainty, ſo that *Mary*, " the daughter of the eldeſt ſon of old *William*, might " claim as heir at law to old *William*, the ſettler of the " eſtate?" In either of the two latter caſes, the claim of the leſſor of the plaintiff, as heir in tail male, would be at an end.-- And the counſel for the defendant endeavoured to ſhew, that there was nothing to hinder the deſcent to the heir at law, though claiming through a female. That the limitation is to all the heirs of the body, &c. and the words, " The male to be preferred before the female, and the elder " before the younger," were therefore mere words of form and operate nothing; and may be referred to the immediate children of the marriage, to ſhew how they ſhould take.--- BUT THE WHOLE COURT agreed, " That it was an eſtate " in tail male."

Roe *ex dim.* Aiſtrop *v.* Aiſtrop, Mic. Ter. 19 Geo. 3 C.B. 2 *Black.* 1228.

A ſettlement was made before marriage, of a freehold eſtate, to the huſband and wife, for life; and after their deceaſe, to the heirs of the huſband on the wife; and of copyhold, in borough Engliſh, to the huſband and wife, for life; and after their deceaſe, to the heirs of their two bodies, in like manner, and to the ſame uſes, as the freehold—held that the youngeſt ſon ſhall ſucceed as heir in tail to the copyhold.—*Charles Aiſtrop*, the father, being ſeiſed in fee of a freehold eſtate, and alſo of the premiſes in queſtion (being copyhold of inheritance, deſcendible, by the cuſtom of the manor, to the youngeſt ſon), by leaſe and releaſe, of the 11th of October, 1733, previous to his marriage, ſettled his freehold eſtate to the uſe of himſelf and *Ann*, his intended wife, for their lives, and the life of the ſurvivor; and, after their deceaſe, to the uſe of the heirs of the body of the ſaid *Charles*, on the body of the ſaid *Ann* to be begotten, with remainder to his own right heirs. And alſo covenanted to ſurrender the copyhold " to the uſe of himſelf and his ſaid in- " tended wife, and the heirs of their two bodies, to be be- " gotten, *in like manner*, and to the ſame uſes, as the free- " hold, lands, and tenements, thereinbefore mentioned, are " ſettled and conveyed." The marriage took effect, and the 1ſt of October, 1735, the ſaid *Charles Aiſtrop* ſurrendered the copyhold premiſes to the uſe of himſelf, and *Ann* his wife, for their lives, and the life of the ſurvivor; and after their ſeveral deceaſes, to the uſe of the heirs of their two bodies lawfully begotten, or to be begotten; and for want of ſuch iſſue, to ſaid *Charles Aiſtrop*, his heirs and aſſigns, for ever; and the 2d of October, 1736, ſaid *Charles* and *Ann* were admitted accordingly. *Ann* died in 1757, and *Charles* in 1760; leaving iſſue of the marriage the defendant, their eldeſt ſon, and the leſſor of the plaintiff, their youngeſt,

born

born in 1750.—THE QUESTION was, Whether the leſſor of the plaintiff is ntitled to recover?—PER CURIAM: There is reaſon to ſuppoſe that the parties might not mean the two eſtates to go in a different channel. But this is only a ſuppoſition; and, if certain, ſtill *as this is a legal eſtate, it is not in the power of the parties to alter the legal courſe of deſcent.* It is an eſtate executed, and ſeems to be an eſtate tail in the father and mother. Had it been executory, and upon articles, then, according to lord *Hardwicke*'s doctrine in *Dixwell*'s caſe, the Court might have conſidered the word heir as a word of purchaſe: but, in the preſent caſe, it is impoſſible.---GOULD, J. agreed.---BLACKSTONE, J. I think the freehold is clearly veſted in the father only, in ſpecial tail; the copyhold in both father and mother. So far there is a difference made in the outſet; notwithſtanding the words, *in like manner*, &c. I conceive there appears no intention in favour of either ſon excluſively; they are left to the diſpoſition of the law. The heir is intended to ſucceed; but who that heir ſhall be, muſt be left to the legal courſe of deſcent. In the freehold, it is the eldeſt ſon; in the copyhold, the youngeſt; and had there been only two daughters, both would have ſucceeded in both. In like manner, only means that both eſtates ſhall be intailed. To prove it an eſtate tail, ſee *Doe* ex dim. *Creſwick* & *Hobſon*, B.R. Ea. Ter. 10 *Geo.* 3. (*ante* p. 371.)---NARES, J. of the ſame opinion.---Poſtea to the plaintiff.

A limitation in a deed, to the uſe of *A.* for life, with remainder to the firſt ſon of the body of *A.* lawfully iſſuing; and for default of ſuch iſſue, to the ſecond, third, and other ſons of *A.* and of the ſeveral heirs male of the body and bodies, of all and every ſuch ſon and ſons reſpectively iſſuing, gives an eſtate in tail male to the firſt ſon of *A.*---In the year 1769, *George Smyth*, the elder, had four children, viz. *George Smyth*, his eldeſt ſon, then married, *Nicholas*; his ſecond ſon, then married; *John*, his third ſon, then unmarried; and *Sally*, his only daughter, then the wife of *Samuel Sandys*.---By indenture of feoffment, of the 18th of July, 1769, certain lands were conveyed by *George Smyth* the father, and *George Smyth* the ſon, to truſtees, to ſuch uſes as *George Smyth* the father, and *George Smyth* the ſon, ſhould appoint; and in default of ſuch appointment, to the uſe of *George Smyth* the father, for life; remainder to *George Smyth*, for life; remainder to truſtees to preſerve contingent remainders; remainder to the firſt ſon of the body of the ſaid *George Smyth* the ſon, to be begotten, and of the heirs male of the body of ſuch ſon, lawfully iſſuing; remainder to the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and other ſons; remainder to the uſe of *Nicholas Smyth*, the ſecond ſon of *George Smyth* the father, for life; remainder to truſtees to preſerve contingent remainders; remainder "to the uſe and

Owen *v.* Smyth, Hil. Ter. 36 Geo 3. C.B. 2 *Hen. Black.* 594.

" behoof of the firſt ſon of the body of *Nicholas Smyth*, " lawfully iſſuing; and for default of ſuch iſſue, to the uſe " and behoof of the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, " 10th, and of all and every other ſon and ſons of *Nicholas* " *Smyth*, lawfully iſſuing, whether born in his life-time, or " after his death, ſeverally and ſucceſſively in remainder, " one after another, as they and every of them ſhall happen " to be in priority of birth, and ſeniority of age; and of the " ſeveral heirs male of the body and bodies, of all and every " ſuch ſon and ſons reſpectively iſſuing; ſo that the elder of " ſuch ſons, and the heirs male of his and their bodies, ſhall " be always preferred." &c.—Remainder to truſtees for a " term of 800 years, *and ſubject thereto to* John Smyth, *the* " *third ſon, for life, and to his firſt and other ſons, in tail male.*— " Remainder to the daughter, *Sally Sandys*, for life, and to " her firſt, and other ſons in tail:—remainder, to the right " heirs of the ſurvivor of *George Smyth* the father, and " *George Smyth* the ſon."—There were alſo jointuring powers giving to *George*, *Nicholas*, and *John*, the ſons of *George Smyth* the father, the words of the power, as it related to *John Smyth*, being, " It ſhall and may be lawful to " and for the ſaid *John Smyth*, in caſe he ſhall ſurvive both " the ſaid *George Smyth* the ſon, and the ſaid *Nicholas Smyth*, " and they both ſhall depart this life, without leaving any " iſſue male of any of their bodies lawfully begotten, by " any deed or deeds, &c." The truſts of the term of 800 years were, if the ſaid *George Smyth* the ſon ſhould depart this life without leaving any iſſue of his body, lawfully begotten, as aforeſaid; *and the ſaid* Nicholas Smyth *ſhall happen to have* NO ISSUE MALE of his body lawfully begotten, born in his life-time, or after his deceaſe, *or there being ſuch iſſue male, all of them ſhould happen to die without iſſue male of any* of their bodies before any of them ſhould attain the age of twenty-one years, and there ſhould be iſſue, one, or more, daughter, or daughters, of the body of the ſaid *Nicholas Smyth*, lawfully iſſuing, then the truſtees of the term, *after failure of iſſue male of* Nicholas Smyth, *and after his deceaſe*, ſhould raiſe portions, &c.—*George Smyth* the father, and *George Smyth* the ſon, both died, the latter without iſſue, and they made no joint appointment. *Nicholas Smyth*, the ſecond ſon, died, leaving the plaintiff (who had taken the name of *Owen*) his only ſon and heir at law. AND THE QUESTION for the opinion of the Court was, What eſtate the plaintiff took in the premiſes in queſtion? On the part of the plaintiff it was argued, that it was clear, upon the face of the deed, from the jointuring power, that the intention of the parties to it was that the firſt ſon of *Nicholas Smyth* ſhould take an eſtate-tail.—On the other hand, it was argued for the defendant, that as the limitation in the deed is to *the firſt ſon of the body of* Nicholas

cholas Smyth, *lawfully iſſuing*; without any other words ſuperadded, ſuch firſt ſon could only take an eſtate for life, notwithſtanding the intent might have been to have given him an eſtate-tail.—Lord Ch. J. EYRE: There is demonſtration plain on the face of the feoffment, that it was the intent of the parties that an eſtate-tail ſhould be limited to the eldeſt ſon of *Nicholas Smyth*. No man can read this deed without ſeeing the intent I have mentioned, though by ſome ſtrange blunder the uſual words are omitted. If, indeed, it had ſtopped at the limitation to the firſt ſon of *Nicholas*, I ſhould have agreed with the counſel for the defendant; for it certainly does not follow, that becauſe one can ſee an intent on the face of a deed, therefore that the words uſed are ſufficient to effectuate that intent. But the intent here does not reſt on the firſt expreſſions, but, the other parts of the deed reſpecting the truſts and other limitations, which refer to an eſtate-tail in the firſt ſon of *Nicholas Smyth*. The intent then being plain, the queſtion is, Whether we can find ſufficient words? I for one adhere to the rule which forbids the raiſing eſtates by implication in deeds, and think that we ought not to grant the ſame indulgence to inaccuracy in the conſtruction of deeds, as we do in wills. But here it is not neceſſary to reſort to implication, or to inquire whether the ſame latitude is to be allowed to conveyances, to uſes, as to wills. For here there are ſtrict technical words capable of being applied to the limitation to the firſt ſon of the body of *Nicholas Smyth*, ſo as to give him an eſtate-tail. The limitation is to the firſt ſon, and for default of ſuch iſſue the whole line of ſons is taken in without any particular limitation to them and the heirs of their bodies *nominatim*, but it is "to the ſeveral heirs male of the body "and bodies of all and every ſuch ſon and ſons reſpectively "iſſuing." Fortunately it is not ſaid, "to the heirs male of "the body and bodies of *ſuch ſecond, third*, and other ſons "&c;" if it had been ſo, perhaps it could not have been got over. But the limitation is to the heirs male of the body and bodies of "every ſuch ſon." Now the caſe of *Doe* v. *Martin* (1) is an authority to warrant the application of thoſe words to the limitation to the firſt ſon of *Nicholas Smyth*, as well as to the others. But this caſe is ſtronger than *Doe* v. *Martin*, for it does not even require the aſſiſtance of punctuation. *Upon the whole, therefore, it is clear that the plaintiff took an eſtate-tail under the limitation in the deed to the firſt ſon of the body of* Nicholas Smyth.—HEATH, J. and ROOKE J. were of the ſame opinion.

If an eſtate be limited, by deed, to huſband and wife, and the heirs ON the body of the wife by the huſband to be begotten, both have an eſtate-tail. But if the remainder be

Denn *ex dim.* Trickett *v.* Gillot *et al.* Ea. Ter. 28 Geo. 3 B.R. 2 *Ter. Rep.* 431

(1) *Infra*, vol. IV. under title LIMITATIONS.

limited to the heirs of the body of the wife, by the huſband to be begotten, the eſtate-tail veſts in the wife ſolely.—*George Crawſhaw*, being ſeiſed in fee, in conſideration of a marriage then intended between him and *Mary Roper*, covenanted and granted to truſtees, that he and his heirs would ſtand ſeiſed of, and in, the premiſes, to the uſe of himſelf the ſaid *G. Crawſhaw*, and his heirs, until the marriage ſhould take effect, *remainder to the uſe of the ſaid* G. Crawſhaw *and* Mary, *for their natural lives, and the life of the longer liver of them*, "remainder to the uſe of the heirs ON the body of "the ſaid *Mary*, by the ſaid *G. Crawſhaw*, lawfully to be "begotten, and for default of ſuch iſſue, to the uſe of the "right heirs of the ſaid *G. Crawſhaw* for ever." The marriage afterwards took effect, and there was iſſue of that marriage four daughters, viz. *Martha*, the mother of the leſſor of the plaintiff, *Sarah*, *Ann*, and *Mary*. *G. Crawſhaw* ſurvived his wife, and continued in poſſeſſion of the premiſes until the time of his death. *G. Crawſhaw*, on the 17th of November, 1783, his wife being then dead, levied a fine to the uſe of ſuch perſon and perſons, as he ſhould afterwards, by deed or will, appoint. And on the 18th of November, 1783, he by will deviſed all his real eſtates unto his daughters *Ann*, the wife of *Richard Gillott*, one of the defendants, and *Mary*, then the wife of *Thomas Hobſon*, but ſince deceaſed, and their heirs, as tenants in common, and in Auguſt, 1785, died without altering his will. *John Trickett*, the leſſor of the plaintiff, is the only ſon and heir of the body of *Martha*, one of the four daughters of *G. Crawſhaw*, by *James Trickett*, her huſband. The leſſor of the plaintiff, on the 26th of October, 1787, made an actual entry, to avoid the fine before the demiſe laid in the ejectment.—THE QUESTION was, Whether the limitation "to "the uſe of the heirs ON the body of *Mary*, by *G. Craw-* "*ſhaw*, lawfully to be begotten," raiſed an eſtate-tail ſolely in the wife, or a joint eſtate-tail in the huſband and wife?—ASHHURST, J. If the words of this limitation had been "the heirs of the body of the wife by the huſband to be be-"gotten," the caſes would be in favour of the plaintiff: but as the word is *on*, and not *of*, all the determinations are the other way: particularly thoſe in 3 *Ed.* 3. and in *Styles*, 325. If we were at liberty to go into the intention of the parties, I ſhould have been inclined to have read the word *of* inſtead of *on*; becauſe the wife ought to be conſidered as a purchaſer: but we are tied down by expreſs authorities to give judgment for the defendant.—BULLER, J. The limitations of real property are, in general, technical. No rule is better eſtabliſhed than this, that *where there is an eſtate limited to a perſon for life, with remainder to the heirs of the body of the ſame perſon, it is an eſtate-tail*; but the limitation

tation of the remainder muſt be to the heirs of the body of that perſon alone. Therefore, if an eſtate be limited to *A.* for life, remainder to the heirs of the bodies of *A.* and *B.* it is not an eſtate-tail. That was ſettled in *Goſage* v. *Taylor Styles*, 325. which was cited by *Bathurſt*, J. in the caſe of *Frogmorton* dem. *Robinſon* v. *Wharrey* (1); the doctrine of which caſe particularly applies to the preſent: "there Sir *R. Frank*, on the marriage of his ſon, levied a fine, and declared the uſes to himſelf, during the joint lives of himſelf and his ſon *Leventhorp Frank*; and after the deceaſe of either of them, to the uſe of *Suſan Cotele*, for her life, and after her deceaſe, to the uſe of the iſſue male of the ſaid *Suſan* and *Leventhorp*, and the heirs of their bodies; and in default of ſuch iſſue, to the uſe of the heirs to be begotten on the body of *Suſan*, by the ſaid *Leventhorp*, remainder to the right heirs of ſir *Richard Frank*. The marriage took effect, and *Suſan* died, leaving five daughters, but no ſon. Sir *Richard* died, leaving *Leventhorp*, his ſon and heir. A QUESTION aroſe on the eſtate which *Leventhorp* took; AND THE COURT reſolved, *firſt*, that if he had been joint-tenant with the wife for life, this had been an eſtate tail in both, as the word heirs is not applied to any body particularly; as *Lit. ſ.* 28. *Secondly*, that neither the huſband nor wife had an eſtate-tail: not the huſband, becauſe he had no prior eſtate for life; nor the wife, becauſe, though ſhe took an eſtate for life, yet the heirs are not applied to her body. And, *thirdly*, that it was a contingent remainder to the heirs of both their bodies."—GROSE, J. This is a joint eſtate-tail in the huſband and wife.—Poſtea to the defendant.

A cuſtom to bar the entail of a copyhold *by ſurrender*, may ſubſiſt, concurrently with a cuſtom, to bar *by a recovery*, though the inſtances are much leſs frequent.—On the trial of an ejectment, THE QUESTION was, Whether, by the cuſtom of this manor, an eſtate-tail can be barred by a mere ſurrender, or whether there muſt be a common recovery for that purpoſe? For the leſſor of the plaintiff, who maintained the neceſſity of *a recovery*, parol evidence was given by the ſteward, and an ancient copyholder, aged eighty-four, that they always underſtood, that a recovery was neceſſary to bar an entail. They alſo produced a cuſtomary, to ſhew that there was a cuſtom of ſuffering recoveries in that manor; and it appeared from the court rolls, that fifty-ſeven recoveries had, in fact, been ſuffered, between 1631 and 1770, one of which, in 1735, was upon a purchaſe of

Doe *ex dim.* Wightwick v. Truby *et al.* Ea. Ter. 14 Geo. 3. C.B. 2 *Black.* 944.

(1) *P.* 10 *Geo.* 3. C.B. 2 *Bl. Rep.* 728. 3 *Wilſ.* 125. 144. *ante*, vol. II, p. 628.

Mr.

Mr. Serjeant *Birch*, afterwards a judge of C.B.—For the defendant were produced nine inſtances, wherein eſtate-tail had been barred *by ſurrender only*, two or three of which were ſomewhat doubtful, and the other very clear. And, afterwards, copies and abſtracts being laid before the Court, it appeared, on an accurate examination, that of theſe fifty-ſeven recoveries, thirty-one only were ſuffered, in order to bar eſtates-tail, viz. fourteen between 1663 and 1720, and ſeventeen between 1720 and 1770. That, till 1663, there appears no recovery for barring an entail; but that, in 1643 and 1649, two entails were barred by ſurrender only. That, in 1663 and 1664, there were *two* bars by recovery; from 1664 to 1696, no bar by recovery, but there were (in 1678, 1683, and 1686) by ſurrender only. The judge left it to the jury (which was ſpecial), whether there was any cuſtom in this manor, *to bar eſtates tail by ſurrender*, which they found in the negative, and, in conſequence, gave a verdict for the plaintiff; and the judge was well ſatisfied with the verdict.—It was afterwards moved for a new trial. PER CURIAM: This kind of limitation of copyholds is improperly called an entail, for the ſtatute *de donis* does not extend to copyholds. It is true, that Lord *Coke* ſays, 1 *Inſt.* 60. *a.* that cuſtom, co-operating with the ſtatute, may make an entail. But the contrary is held in 3 *Rep.* 8. and *Cro. Car.* 42. *Rowdex* and *Malſter*, it is ſaid, that copyholds cannot be entailed but by cuſtom. But, not to enter into theſe niceties concerning the denomination of ſuch eſtates, it is certain, that by cuſtom, in very many manors, eſtates may be limited to qualified heirs, and particularly to the heirs of the body; and, when ſo limited, they would create a perpetuity, unleſs there were ſome means deviſed to bar them: theſe are principally three; 1ſt, By *forfeiture and regrant*. *Co. Copyh.* and *Kitch.* 176, 178, mention this as well as recoveries; but the only inſtance of it in the books is in 2 *Saund.* 422, as occurring in the manor of Wakefield. 2d, By *common recovery*, grounded on what *Littleton* ſays, that plaints, in the nature of writs at common law, will lie in the lord's courts. *Kitch.* 178. 1 *Roll. Abr.* 506. *Raym.* 162. 1 *Lev.* 136. The objections to this mode of barring ſuch eſtates, are well ſtated by *Burnet*, Juſtice, in 2 *Vez.* 606. The validity of them does not depend on any recovery over in value, for that cannot be had in the Lords' court, but upon the cuſtom ſettled, that this ſhall be the mode of conveyance.—3d, *By ſurrender only*. That this is ſufficient, where there is no cuſtom to exclude it, appears from *Skinn.* 307. 2 *Vern.* 702. *Carr* and *Singer*, C.B. 1750, cited in *Moor* and *Moor*, 2 *Vez.* 602, 603. And that a cuſtom to bar by ſurrender, may be concurrent with a cuſtom to bar by recovery, is reſolved in *Everall* and *Smalley*, 1 *Wilſ.* 26.

*Stra.*

*Stra.* 1196.—As, therefore, the preſent verdict excludes the power of barring by ſurrender, the only queſtion is, Whether there is evidence enough of a cuſtom to bar by ſurrender only? And ſuch cuſtom appears to have been at leaſt coeval with, and, in two inſtances, prior to, any cuſtom to bar by recovery; therefore, there ought to be a new trial.

Doe, *ex dim.* James Gregory and Dicnes Geere, *v* John Whichelo, Ea. Ter. 30 Geo. 3. B.R. 8 *Ter. Rep.* 211.

The rule of *poſſeſſio fratris* does not apply to eſtates-tail, nor to inheritances in fee-ſimple, without an actual poſſeſſion of the brother of the whole blood; therefore, where *A.* and *B.* took eſtates-tail, and *A.* afterwards conveyed his moiety to *B.* in fee, by leaſe and releaſe, with a covenant to levy a fine; that created a baſe fee in *B.* which eſtate was afterwards confirmed by the fine, though that was not levied till after the death of the releaſee. — *Elizabeth Lemmon*, widow, being ſeiſed in fee, deviſed the premiſes in queſtion "to her ſon, *Richard Lemmon*, and her daughter *Elizabeth*, "wife of *E. Baldy*, and their heirs, for ever, provided that, "if her ſaid ſon and daughter ſhould both have iſſue, then "both their dividends aforeſaid were to go to the iſſue of "their own bodies; but, if but one of them ſhould have "iſſue, then the premiſes ſhould go to that iſſue, whether it "be the child of her ſon or daughter aforeſaid: but, if they "both died without iſſue of their own bodies, then imme-"diately to the right heir at law, and his heirs for ever." On the deviſor's death, her ſon and daughter entered, and became ſeiſed of the eſtate, by virtue of the will. Afterwards, by indentures of leaſe and releaſe (executed after the death of *Edward*, the huſband of *Elizabeth Baldy*), dated the 21ſt and 22d of November, 1748, *Richard Lemmon* granted all his undivided moiety to *Elizabeth Baldy* in fee, and thereby covenanted to levy a fine *ſur cognizance de droit come ceo*, &c. unto the ſaid *Elizabeth Baldy*, and her heirs, of the ſaid moiety, which fine was thereby declared to enure to the uſe of the ſaid *Elizabeth* in fee. *Elizabeth Baldy* had two ſons, who died in her life-time, without iſſue, and alſo one daughter, *Elizabeth*, who intermarried with *Thomas Allen*, and died in the life-time of *Elizabeth Baldy*, leaving an only daughter, *Elizabeth Allen*. *Elizabeth Baldy*, by will, dated the 6th of October, 1744, deviſed to her grand-daughter, *Elizabeth Allen*, in fee, "*all that her part and parcel of freehold lands lying in Jevington and Folkington*, &c." *Elizabeth Baldy*, after purchaſing a moiety of the eſtate from her brother, *Richard Lemmon*, did not make any alteration in her will, but died inteſtate as to that moiety, *without having barred the entail of her original moiety*, and before any fine was levied by her ſaid brother, purſuant to the deeds of leaſe and releaſe. And, upon the death of *Elizabeth Baldy*, on the 15th of December, 1487, *Elizabeth Allen*, her grand-daughter, entered into poſſeſſion of the whole eſtate. A fine

was

was afterwards levied, in Trinity term, 1749, of the moiety, wherein *Elizabeth Allen* was plaintiff, and the ſaid *Richard Lemmon*, the elder deforciant, but no deed to lead the uſes of ſuch fine was then, or at any time afterwards, executed. On the 27th of July, 1749, *Elizabeth Allen* intermarried with *Benjamin Brooker*, and died in April, 1790, without iſſue, and inteſtate. *Richard Lemmon*, the elder, had iſſue by his firſt wife one ſon, named *Richard Lemmon*, and a daughter, *Martha*; and by his ſecond wife had iſſue three daughters, *Ann*, *Elizabeth*, and *Grace*, all of whom ſurvived their father. *Richard Lemmon*, the ſon, afterwards died without iſſue, and inteſtate, leaving his ſiſter *Martha* of the whole blood, and his three ſiſters of the half blood, and the ſaid *Elizabeth Brooker*, him ſurviving. His ſiſter *Martha* intermarried with *John Whichelo*, and afterwards died, leaving *John Whichelo*, the preſent defendant, her eldeſt ſon and heir at law, who, on the death of *Elizabeth Brooker*, entered into poſſeſſion of the premiſes which he now retains. *Ann*, the eldeſt daughter of *Richard Lemmon* the elder, by his ſecond marriage, is dead, leaving *James Gregory*, one of the leſſors of the plaintiff, her grandſon, and heir at law. *Elizabeth*, the ſecond daughter of *Richard Lemmon* the elder, by the ſecond *ventre*, died in June, 1789, without iſſue; and *Grace*, the third daughter, is alſo dead, leaving *Dionee Geere*, the other leſſor of the plaintiff, her only ſon, and heir at law.—THE QUESTION was, Whether the plaintiff was entitled to recover the ſaid two third parts, or either of them? If ſo, the verdict to ſtand; if one only, the verdict to be entered accordingly; if neither, a verdict to be entered for the defendant. The leſſors of the plaintiff, one of whom was the grandſon, and the other the great-grandſon, of *R. Lemmon* the elder, through his daughters by his ſecond marriage, claimed to be entitled each to one third, and the defendant, who claimed through the eldeſt daughter of *Richard Lemmon* the elder, claimed to be entitled to the remaining third. Lord KENYON, Ch. J.—In the caſe of eſtates tail, the half blood, coming within the deſcription of the entail, may inherit as effectually as the whole blood. There the rule of *poſſeſſio fratris* does not apply; neither does it in the caſe of peerages: nor does that rule hold even with reſpect to inheritances in fee-ſimple, unleſs there be an actual poſſeſſion of the brother, or that which has been deemed equivalent; for, in that reſpect, there is a difference between freehold and chattel leaſes outſtanding. In the former caſe, unleſs the elder brother afterwards obtain poſſeſſion, by the receipt of rent, or other acknowledgment, the deſcent will be to the younger brother of the half blood, in preference to the ſiſter of the whole blood: but, in the caſe of a chattel leaſe outſtanding, the

poſſeſſion

poſſeſſion of the tenant is the poſſeſſion of the landlord, and there the rule of *poſſeſſio fratris* attaches (1). In this caſe it clearly appears, that the children of *Elizabeth Lemmon* took eſtates tail under her will. But it alſo appears to me, if it were neceſſary to enter into that queſtion, that the conveyance by *Richard Lemmon*, one of the tenants in tail, of his moiety to his ſiſter, having created a baſe fee (2), that eſtate ſo created was afterwards confirmed (3) by the fine, which, though not levied until after the death of the releaſee, was governed by the previous deed to lead the uſes of it. *Per Curiam:* Verdict to be entered for the plaintiff for two thirds.

Driver, *ex dem.* Burton, *v.* Huſſey, *et al.* Tr. Ter. 29 Geo. 3. C B. 1 *Wm. Black.* 269.

In order to diſcontinue an eſtate-tail, it is neceſſary that the party diſcontinuing ſhould be actually ſeiſed by force of the entail.—By a marriage ſettlement, *Mary Burton* was tenant for life of the premiſes in queſtion, remainder to *Richard Williams* (the intended huſband) for life; remainder to truſtees, to preſerve contingent remainders; remainder to *Sarah Biſhop* (the intended wife), for life, in bar of dower, &c.; remainder to the firſt and other ſons of *Richard Williams* and *Sarah Biſhop*, in tail male; remainder to their daughters, as tenants in common in tail general; *remainder to* Mary Burton *in fee.*—The marriage took effect, and, ſome time afterwards, *Henry Burton*, the huſband of *Mary Burton*, joined with her in levying a fine, *ſur cognizance de droit tantum*, with releaſe and warranty of her remainder in fee, to her uſe for life; remainder to the uſe of the heirs of her body by the ſaid *Henry Burton*, or any future huſband, in tail general; remainder to *Henry Burton* in fee. *Richard Williams* died in the life-time of *Sarah* (*Biſhop*), his wife, but left no iſſue. *Henry Burton* alſo died without leaving iſſue, having deviſed all his eſtates, &c. whatever, to *Michael Burton*, his brother and heir at law, under whom the leſſor of the plaintiff claimed. Afterwards, *Mary Burton* and *Sarah Williams* (late *Biſhop*), joined in levying a fine, *ſur cognizance de droit come ceo*, &c. of the premiſes, to the uſe of certain perſons in fee, under whom the defendant claimed. On this caſe, a doubt was ſuggeſted, whether the eſtate tail, which *Mary Burton* took by the fine, *ſur cognizance de droit tantum*, was not diſcontinued by the fine, *ſur cognizance de droit come ceo*, &c. and the remainder over to *Henry Burton*, diveſted and turned to a mere right, ſo as to take away the right of entry, and put the plaintiff to the neceſſity of bringing a real action. SED PER CURIAM: As *Mary Burton* was tenant for life under the ſettlement, when

(1) *Doe* v. *Keen*, 7 Ter. Rep. 390. inſerted in this vol. under title, HEIR. *Co. Lit.* 15 *a.* and *Jenk.* 242.

(2) Vide *Marſhall* v. *Clarke*, 2 Ld. *Ray.* 779. *Goodright* d. *Tyrrel* v. *Hall*, and *Stilſon*, 3 *Burr.* 1703, and inſerted in this vol. under title FINES and RECOVERIES; and *Doe* d. *Neville* v. *Rivers*, 7 *Ter. Rep.* 276, *ante* p. 139.

(3) Vide *Stapilton* v. *Stapilton*, 1 *Atk.* 8.

ſhe

ſhe joined in levying the fine, *ſur cognizance de droit come ceo*, &c. there was no diſcontinuance of the eſtate tail in remainder; for it is a ſettled rule of law, that in order to work a diſcontinuance of an eſtate tail, it is neceſſary that the party diſcontinuing ſhall be actually ſeiſed by force of the entail. *Litt. ſ.* 637.—*Bredon's Caſe*, 1 *Co.* 76.—*Earl of Clanricard's Caſe*, *Hob.* 273. (1).—*Stephens* v. *Britteridge*, 1 *Lev.* 34.—1 *Roll. Abr.* 634.—*Gilb. Ten.* 117.—*Cruiſe*, on Fines, 254, 255.

Goodright *ex dim.* Burton *v.* Rigby, *et al.* Tr. Ter. 32 Geo. 3. C.B. 2 *Hen. Black.* 46.

By a marriage ſettlement, lands were limited to truſtees, viz. as to the premiſes in the firſt demiſe, to the uſe of *Mary Burton* for life; remainder to *Sarah Biſhop*, till the marriage; remainder to *Richard Williams* for life; remainder to truſtees, to preſerve, &c.; remainder to *Sarah Biſhop* for life; remainder to truſtees for 500 years; remainder to the firſt and other ſons of *Richard Williams* and *Sarah Biſhop*, in tail male; remainder to the daughters in common, in tail general; remainder to the heirs of the body of *Sarah Biſhop*; remainder to *Mary Burton* in fee.

As to the premiſes in the ſecond demiſe to *Sarah Biſhop*, till the marriage; remainder to *Richard Williams* for life; remainder to truſtees, to preſerve, &c.; remainder to *Sarah Biſhop* for life; remainder to the firſt and other ſons of *Richard Williams* and *Sarah Biſhop*, in tail male; remainder to the daughters, as tenants in common, in tail general; remainder to the heirs of the body of *Sarah Biſhop*; remainder to *Mary Burton*, in fee.

*Henry Burton*, and *Mary* his wife, in her right, entered into the premiſes, in the firſt demiſe. The marriage between *Richard Williams* and *Sarah Biſhop* took place, and *Richard Williams* entered into the premiſes, in the ſecond demiſe. Afterwards *Henry Burton*, and *Mary* his wife, by a deed of the 24th of May, 1739, covenanted to levy a fine, *ſur conuſance de droit tantum*, of her reverſion in fee, to her uſe for her life; remainder to the heirs of her body; remainder to *Henry Burton* in fee; which fine was levied accordingly. Afterwards, *Richard Williams* became bankrupt, and an act paſſed, for veſting his eſtates in the aſſignees under the commiſſion, for the payment of his debts, &c. whereby it was enacted, that after payment, &c. the lands in queſtion ſhould be and remain to and in the truſtees, to preſerve contingent remainders, named in the ſaid indenture *quadripartite* [the marriage ſettlement], and their heirs, during the life of the ſaid *Richard Williams*; and after the deceaſe of the ſaid *Richard Williams*, the ſame ſhould be and remain to and in the ſaid *Sarah Williams*, *for the term of her natural life*,

(1) *S. C.* 2 *Danv.* 577. Sir *Thomas Raym.* 36. 1 *Siderf.* 83.

without

*without impeachment of waſte, with ſuch ſeveral remainders over, as are limited of the ſaid laſtmentioned premiſes, in the ſaid indenture* quadripartite, *to take effect after her deceaſe, in ſuch order, courſe, and manner, as the ſame were thereby limited and appointed of and concerning the ſame premiſes.* After the making of the ſaid indenture of the 24th day of May, 1739, and after the levying the fine thereinmentioned, and after the making the ſaid act of parliament, the ſaid *Henry Burton* made his will, and deviſed all his real eſtates to his brother, *Michael Burton*, in fee, by virtue whereof *Michael* became ſeiſed of the reverſion, and afterwards died; and thereupon the reverſion of and in the ſaid premiſes deſcended to the leſſor of the plaintiff. *Richard Williams* died without iſſue; *Mary Burton* alſo died without iſſue; and, upon their deaths, *Sarah Williams* entered upon the ſeveral tenements, with the appurtenances in the ſaid declaration mentioned, and became ſeiſed of ſuch eſtate therein, as might legally paſs to her, under and by virtue of the ſeveral premiſes aforeſaid; and afterwards, by a certain indenture, *on the 19th of November*, 1778, ſhe, the ſaid *Sarah Williams*, conveyed the premiſes to *Richard Woodford*, to make a tenant to the *præcipe*, in order to ſuffer a recovery, to enure to ſuch uſes as *Sarah Williams* ſhould appoint; which recovery was accordingly ſuffered by *Sarah Williams*. On the part of the plaintiff, one of the points of argument was, *that* Sarah Williams *had not a ſufficient eſtate-tail veſted in her, to enable her to ſuffer a recovery, and bar the remainders over.* As to the which point, it was ſuggeſted, that under the marriage ſettlement an eſtate for life was limited to *Sarah Williams* (then *Biſhop*), and, after other eſtates interpoſed, a remainder to the heirs of her body; but that, by the act of parliament which paſſed on the bankruptcy of *Richard Williams*, her eſtate for life was taken away, and a new one created, the limitation to the heirs of her body remaining unaltered; ſo that there were two eſtates created by two different inſtruments, which could not unite, ſo as to give her a veſted eſtate tail, and enable her to ſuffer a recovery, and bar the remainder in fee, which was become veſted in *Henry Burton*. BUT THIS OBJECTION THE COURT IMMEDIATELY OVERRULED, and ſaid, there could be no doubt on the words of the act, that it operated merely to confirm the eſtate tail which *Sarah Williams* took by the marriage ſettlement: that the ſame objection had been made in the caſe of *Driver* v. *Huſſey* (1), and the validity of it denied.

(1) *Ante*, p. 381. But as the principal point in that caſe was of a different nature, and this objection but ſlightly mentioned, and not inſiſted upon, it was omitted by the reporter.

*Eſtate*

Green *ex dim.* Crew *v.* King. Tr. Ter. 18. Geo. 3. C.B. 2 *Black.* 1211.

*Eſtate in fee ſimple.*] A ſurrender of a copyhold "to huſband "and wife, and the ſurvivor, and after the death of the ſurvivor to "the right heirs of both," veſts an immediate fee-ſimple in the huſband and wife by *entireties*, and the huſband cannot *aliene* or deviſe any part of it, but on his death the whole ſurvives to the wife.—On the trial of an ejectment there was a verdict for the plaintiff, ſubject to this ſpecial caſe: The premiſes were copyhold, parcel of the manor of *Aſhford*, and were ſurrendered in 1734 by *John Beauchamp* "to the uſe of "*John Fitzwalter* and *Elizabeth* his wife, and the longer "liver of them: and after the death of the longer liver "of them, to the right heirs of the ſaid *John* and *Elizabeth* for "ever." And they were admitted accordingly. On the 4th of September, 1769, *John Fitzwalter* having purchaſed other copyhold eſtates in the ſaid manor, made a general ſurrender of all his copyhold eſtates to the uſes of his will. And on the 23d of June, 1770, made his will, by which (after deviſing all his freehold and copyhold eſtates to his wife for life, and after her deceaſe a certain eſtate, not now in queſtion, to *Thomas Merrick* in fee) he gives "All the reſt, reſidue, and "remainder of his real eſtate, both freehold and copyhold, to "*Joſeph King*, to hold to him and to his heirs and aſſigns "for ever." *John Fitzwalter* died in April, 1761, and *Elizabeth* his wife ſurvived him, but neither of them had iſſue of their bodies. After his death ſhe ſurrendered her eſtates in the ſaid manor to the uſes of her will, and on the 4th of March, 1772, deviſed her copyhold eſtate in *Aſhford* to *Thomas Crew*, his heirs and aſſigns for ever, and died on the 4th of March, 1773. The queſtion was, If *Thomas Crew*, the leſſor of the plaintiff, is entitled to recover?—De Grey, Ch. J. The queſtion is not on a will, or a marriage ſettlement, ſo as to require us to deſert the legal operation of the words, in order to effectuate a ſuppoſed intention to the contrary. It is on a purchaſe made by the huſband after marriage, which muſt have exactly the ſame conſtruction as a voluntary ſettlement by deed. Nothing can be collected but from the words of the ſurrender itſelf. The wife is not bound by it, but might diſagree to it after the death of her huſband; but it being for her benefit, her conſent is therefore preſumed. *The word heirs muſt be taken in its legal ſenſe, as a word of limitation, as there is no proof that it was meant as a word of purchaſe.*—Taking then the caſe in this light, it falls exactly within a nice diſtinction, laid down in our ancient books, and which having never been over-ruled, continues law at this day. The ſame words of conveyance which would make two other perſons joint-tenants, will make a huſband and wife tenants of the entirety; ſo that neither can ſever the jointure, but the whole muſt accrue to the ſurvivor. What is laid down in *Litt.* ſect. 525. and co. *Litt.* 299. b. will

will govern this caſe. And indeed could the huſband have ſevered the jointure and diſpoſed of the wife's property, his deviſe would not effect it; for the ſurvivorſhip or *jus accreſcendi* accrues *per mortem*, the right of the deviſee is *poſt mortem*. Therefore the plaintiff muſt recover. *Blackſtone*, Juſtice :— The vendor has conveyed, by the words of his ſurrender, as complete a fee-ſimple, "to *John* and *Elizabeth* and their right "heirs for ever," as words can poſſibly create. I entirely agree with the Lord Chief Juſtice as to the law of this caſe; which, though ancient, has been recognized in *Pureſoy* and *Rogers*, 2 *Lev.* 39.—And *Back* and *Andrews*, 2 *Vern.* 120. is a caſe directly in point, and upon a copyhold ſurrender alſo. This eſtate differs from joint-tenancy, becauſe joint-tenants take by moieties, and are each ſeiſed of an undivided moiety of the whole, *per my & per tout*, which draws after it the incident of ſurvivorſhip, or *jus accreſcendi*, unleſs either party chuſes in his life-time to ſever the jointure. But huſband and wife being conſidered in law as one perſon, they cannot during the coverture take ſeparate eſtates; and therefore upon a purchaſe made by them both, they cannot be ſeiſed by moieties, but both and each has the entirety. They are ſeized *per tout* and not *per my*. The huſband therefore cannot alien or deviſe that eſtate, the whole of which belongs to his wife, as well as himſelf. But had they been joint tenants, while ſole, and afterwards intermarried, they ſtill would remain ſeiſed of their reſpective moieties, and the huſband might ſever the jointure, and aliene his own moiety. *Bro. Abr. Cui in vita.* 8. This is on ſuppoſition that the ſurrender of 1734 operated as a grant of an immediate eſtate to both *John* and *Elizabeth* in fee; which I hold to be its true operation.

If the legal intereſt in land deſcend in fee ſimple *ex parte maternâ*, and the equitable intereſt in fee ſimple *ex parte paternâ*, or *vice verſâ*, the equitable eſtate ſhall merge in the legal, and both follow the line through which the legal eſtate deſcended.—On the trial of this ejectment, a verdict was found for the plaintiff, ſubject to the opinion of the Court, on a caſe, which, as far as is material to be ſtated, was as follows: *James Selby*, ſerjeant at law, agreed for the purchaſe of the eſtate in queſtion, and paid for it, but died before any conveyance was made of it to him, having by his will [made ſubſequent to the agreement] deviſed—"All the reſt of my real and perſonal eſtate "whatſoever, and wheresoever, to my ſaid wife in truſt, that "ſhe do thereout educate and maintain my ſaid ſon, until he "ſhall attain the age of 21 years, and until he ſhall have ſufficiently ſettled and ſecured to, and upon, my ſaid wife, "what is to be ſettled upon, and given to, her as aforeſaid, "and afterwards, in truſt, to convey and diſpoſe of all the "then reſt of my real and perſonal eſtate, and the produce "thereof, to my ſaid ſon, his heirs, executors, and aſſigns; "but, in caſe my ſaid ſon ſhall die without iſſue before he ſhall

Goodright, leſſee of Alton v. Wells *et al.* Fr. Ter. 21 Geo. 3 B.R. 2 *Doug.* 763, 770, 771.

"attain his age of 21 years, then in truſt, &c."—After the teſtator's death, a conveyance by leaſe and releaſe, of the eſtate in queſtion, was made to Mrs. *Selby* the widow, who died before the ſon attained his age of 21 years, which he afterwards did attain, and died in 1772, having been always in poſſeſſion of the eſtate after the death of his mother, and having deviſed it to charitable uſes, which deviſe was void by the ſtatute of mortmain (1). *The leſſor of the plaintiff was his heir at law* ON THE PART OF THE MOTHER, and the *defendants his heirs at law* ON THE PART OF THE FATHER'S MOTHER. The caſe was fully argued, and the Court took time to conſider, after which the opinions of the judges were delivered in the following manner:—Ld MANSFIELD, J. (after ſtating the caſe)—Serjeant *Selby*, after his purchaſe, was owner of the equitable eſtate, and had a right to go into *Chancery* to compel a conveyance. After his death, the vendor conveyed to the widow, which conveyance, on the condition of the ſon's living till 21, and making a certain proviſion for her, was to be abſolutely in truſt for him. He outlived his mother, and, on her death, the truſt eſtate was completely veſted in him (the ſubſequent limitations in the will being on contingencies which never happened), and the legal eſtate deſcended to him from her. THE QUESTION is, *To whom the whole eſtate deſcended on the death of the ſon?* for it did deſcend, the deviſe to charitable uſes being void. *If it deſcended from the mother, the leſſor of the plaintiff takes as heir at law.* But, it was contended, that, though he is heir, there is a truſt for the paternal heirs; and it was ſaid to be ſettled, that the court will not ſuffer a truſtee to recover in ejectment, againſt the *ceſtui que truſt*. When this was mentioned on the trial, I ſaid, as I did the other day in the caſe of *Doe* v. *Pott* (*vide title* MORTGAGE), that this rule is ſubject to the qualification, of its being clearly the caſe only of a mere truſt, for then, by taking notice of it, the Court prevents delay and expence; but it will not decide when there is a doubt, but leave the queſtion to a juriſdiction which regularly takes cognizance of matters of truſt. The council ſaid, there might, perhaps, be caſes on the ſubject, and the parties wiſhed to have the opinion of the court. Now who is to be conſidered as heir at law on this ejectment? It would be ſufficient, for the judgment which I ſhall deliver, to ſay, that it is not a clear caſe, that the leſſor of the plaintiff is a mere truſtee, for, that point being doubtful, he is entitled to recover at law, as he certainly has the legal right. But I will go farther, and throw out ſome obſervations, to ſhew that it is not only doubtful, but that the inclination of my opinion is, that you cannot ſupport ſuch a truſt. A caſe ſo circumſtanced, in every particular, probably never exiſted before, and, perhaps, never may happen again. But caſes muſt often

(1) 9 *Geo.* 2, c. 36

have

have happened on which the general queſtion would ariſe, viz. *Whether, when* ceſtui que truſt *takes in the legal eſtate, poſſeſſes under it, and dies, the legal and equitable eſtate ſhall open on his death, and be ſevered for the different heirs?* Conſider it, firſt, upon authority; and, ſecondly, upon principle. 1. No caſe has ever exiſted where it has been ſo held; none where the heir at law of one denomination has, on the death of the anceſtor, been conſidered as a truſtee for the heir at law of another denomination, who would have taken the equitable eſtate, if that and the legal eſtate had not united. 2. On principle, it ſeems to me impoſſible; for the moment both meet in the ſame perſon, there is an end of the truſt. He has the legal intereſt, and all the profits, by his beſt title. A man cannot be a truſtee for himſelf. Why ſhould the eſtates open upon his death? What equity has one ſet of heirs, more than the other? He may diſpoſe of the whole as he pleaſes, and if he does not there is not room for chancery to interpoſe, and the rule of law muſt prevail. The caſe of *Doe*, leſſee of *Balch* v. *Patt*, &c. Tr. Ter. 8. *Geo.* 3. in the Common Pleas, is an authority, if it went on this ground, and I am told it did. There the *ceſtui que truſt* taking the legal eſtate as a purchaſer, the deſcent was altered (1). *Quâcunque vitâ datâ*, therefore, the leſſor of the plaintiff is entitled. If the queſtion is doubtful, then, in this court, the legal right muſt prevail: and, if the weight of opinion and argument is, that the legal eſtate muſt draw the truſt after it, the caſe is ſtill ſtronger againſt the defendants. WILLES, J.—I entirely agree with my Lord as to the legal eſtate, but my doubt is, what is become of the equitable

(1) The circumſtances of *Doe*, leſſee of *Balch*, v. *Patt* and others were theſe:—It was an ejectment tried before HEWITT, Juſtice, at the Aſſizes for Somerſetſhire, and a ſpecial verdict found, which ſtated, that *Mary Mortimer*, being ſeiſed in fee of an eſtate of which the premiſes in queſtion were an undivided moiety, on her marriage, conveyed to truſtees and their heirs, to the uſe of them and their heirs, upon truſt, to permit her to receive the rents and profits to her ſeparate uſe during life, and to grant and convey the eſtate, or any part thereof, to the uſe of ſuch perſon or perſons in fee, or otherwiſe, as ſhe, whether married, or ſole, by deed, or will, ſhould appoint, and, for want of ſuch appointment, to the uſe of the huſband for life; remainder to her firſt and other ſons in tail; remainder to her daughters in tail, as tenants in common; remainder to her right heirs; that the marriage took effect, and ſhe died, leaving her huſband and an only daughter, an infant; that the huſband afterwards died, and then the daughter died, being ſtill under age, and without iſſue; that the leſſor of the plaintiff, and one *Newton*, were the heirs at law of the daughter *ex parte materná* (being the ſons of two deceaſed ſiſters of the mother), and that, on the daughter's death, they entered on the eſtate; that the leſſor of the plaintiff, and the ſurviving truſtee, by leaſe and releaſe—reciting as above, and that *Newton* had, for a certain ſum, agreed to purchaſe the leſſor of the plaintiff's moiety—had, in conſideration of the ſtipulated price, conveyed that moiety to *Newton* in fee; that, on the ſame day, by leaſe and releaſe, alſo reciting as above, the truſtee had conveyed the other moiety in fee to *Newton*;

equitable uſe. Let us ſee how the facts ſtand. The money was paid by the father, but he died before any conveyance, deviſing as ſtated in the caſe. Now, what was the ancient uſe? It was to the heirs *ex parte paternâ*. I do not agree, that there is no difference as to the different heirs. When the queſtion is between thoſe of the paternal and thoſe of the maternal line, the law always gives the preference to the former. After the father's death a conveyance was made to the widow and her heirs, in truſt. So, the eſtate in her was not abſolute, but charged with the truſt. Suppoſe the ſon, in his life-time, had called in the legal eſtate, and become a purchaſer, there is not a doubt but in that caſe the paternal heirs would have ſucceeded. There having been no ſuch conveyance to him, the legal eſtate deſcended to him from the mother. But I think he took it clothed with the truſt, and ſubject to the ancient uſe. I do not ſay he was a truſtee for himſelf, but this ancient uſe remained uncontrolled, and revived, as between the different heirs, on his death, no act having been done to alter it. If, therefore, the queſtion were to come before me in another court, I ſhould decree a truſt in the leſſor of the plaintiff. But he certainly is entitled to the legal eſtate, and that is enough here. ASHHURST, J.—We all agree, that if there is a doubt as to the truſt, the leſſor of the plaintiff is entitled to the eſtate in this court, and therefore it is not neceſſary to give any opinion on the other point. But, as it has been moved, I will mention, that I am inclined to be of opinion, that the truſt, as well as the legal eſtate, ſhall go to the heirs *ex parte paternâ*. To ſupport the contrary poſition, it muſt be ſaid that the ſon took as truſtee for himſelf and his paternal heirs, for I do not ſee how the eſtate ſhall open for the heirs, if he was not himſelf a truſtee. I never knew any caſe where the Court held, when an eſtate came by deſcent, that the heir was a truſtee although the anceſtor was not. The caſe in the Common Pleas goes a great way to determine this queſtion; for it ſhews, that, where the truſt and legal eſtates join, they ſhall both go according to the legal eſtate. Buller, J.—I am entirely of the ſame opinion with my Lord, and my brother ASHHURST, on both points. On the firſt, we are all agreed. As to the ſecond, it is obſervable that no caſe has been cited, nor do I believe any ever exiſted, where, in a court of equity, an heir of one ſort has been determined to hold as truſtee for an heir of the other ſort. In a

that *Newton* died, ſeiſed of all the eſtate, leaving the leſſor of the plaintiff, his heir at law *ex parte maternâ*, and the defendant, his heirs at law, *ex parte paternâ*. The queſtion on the ſpecial verdict was, Whether the moiety conveyed by the ſurviving truſtee alone to *Newton* (for which moiety only the action was brought) belonged to the leſſor of the plaintiff, or to the defendents? The Court unanimouſly decided in favour of the latter, though it was contended, that the legal eſtate ſhould follow the old uſe, which had come to *Newton* by deſcent, *ex parte maternâ*, 2 *Doug.* 772.

court

court of law, try the queſtion by this principle, viz. that, where two titles unite, the party ſhall be in of the beſt. What is the better title here? The clear fee-ſimple eſtate which deſcended from the mother. I think there is a miſtake in taking the heirs on either ſide into conſideration. They had no intereſt during the life of the anceſtor; the whole was in him. The only perſon to be conſidered is the anceſtor, who was ſeiſed in fee both of the legal and equitable eſtate. A caſe has been put, which does not, in my opinion, vary the queſtion, viz. the caſe of the ſon's having called for a conveyance. However, as the mother died before he came of age, and ſhe was not directed to convey till then, that caſe does not apply. We are to take the facts as they ſtand. To be ſure, if he had taken the legal eſtate by purchaſe, the paternal heirs would have been entitled; but, as he took it by deſcent from his mother, (and the caſe would have been the ſame if we ſuppoſe her to have lived beyond his age of 21, and that he never called for a conveyance,) I think the truſt was merged and gone.—Poſtea to the plaintiff.

## Evidence.

### *What Perſons may be admitted to give Evidence.*

A factor who ſells for the plaintiff, and is to have ſo much in the pound for commiſſion, is a good witneſs to prove the contract and ſale; for as a factor he is concerned both for the vendor and vendee: he is a mere *go-between*, and may be a good witneſs for either of them.

Dixon, *et al. v.* Cooper, Mic. Ter. 10 Geo. 3. C. B. 3 *Wils.* 40.

So alſo a perſon who is employed to ſell goods, and is to have for himſelf whatever money he can procure for them beyond a ſtated ſum, is a competent witneſs to prove the contract between the ſeller and the buyer.—On the trial of an action for goods bargained and ſold, brought to recover the price of a quantity of indigo, which was ſold for three ſhillings a pound weight, one *Bennet, the broker, who was employed by the plaintiff, was called as a witneſs to prove the contract*, and being examined on the *voir dire*, ſtated that by his agreement with the plaintiff he was to have for his own profit whatever ſum he could get for the indigo above half-a-crown for the pound, which price the plaintiff had fixed for himſelf, but not an allowance of ſo much *per cent.* on the ſale, by way of commiſſion, in the uſual way. THE LD CH. JUS. at the trial thought this was an objection to the competence of the witneſs on the ſcore of intereſt, and that as he did not come within the deſcription of a broker or factor, the exception to the general rule made in favour of their teſtimony being admiſſible to prove contracts

Benjamin *v.* Porteus, Hil. Ter. 36 *Geo.* 3 C B. 2 *Hen. Black.* 590.

made by them, was not applicable to him, and as he refuſed to releaſe, the plaintiff was in conſequence nonſuited. Afterwards a new trial was moved for; and Lord Ch. Juſt. EYRE at firſt retained his former opinion. BUT THE OTHER JUDGES thought that this witneſs was admiſſible.—HEATH, J. With great reſpect for my Lord Chief Juſtice, I think this witneſs was admiſſible. *I cannot diſtinguiſh him from a broker:* he muſt, I think, be conſidered as a broker, and not as a principal; he is only paid for his trouble in a particular manner. The reaſon for admitting him is the neceſſity of the thing, for it is often for the benefit of trade that bargains of this kind ſhall be kept ſecret. It appears to me to be equally the intereſt of a broker, who is to have a per centage to ſcrew up the price, as it was of this perſon. It is indeed his duty to ſcrew up the buyer; he muſt tell the whole truth reſpecting the commodity, but having done that, it is his duty to aſk the higheſt poſſible price. I cannot conſider a broker as the agent for both parties; he appears to me to be ſolely the agent of the vendor.—ROOKE, J. I agree with my brother *Heath* in thinking this evidence ought to have been admitted. I ſee no difference in point of intereſt between a perſon who ſells upon commiſſion, and one who is to have a ſhare of the profit: nor can I make a diſtinction between this witneſs and a common broker. He is an agent who makes a bargain between two others, and whoſe evidence is admiſſible from neceſſity, which is a neceſſity created by the parties themſelves.—Ld Ch. J. EYRE then ſaid: My brothers have ſtated it as a principle, upon which they reſt their opinions, that there is no difference between an agent taking to himſelf a part of the price for which he bargains, and taking a commiſſion from his employer upon that price. If this principle can be ſupported, I agree that the evidence ought to have been received.—Let there be a new trial.

Low *v.* Jolliffe, Ea. Ter 2 Geo. 3. B R. 1 *Black*, 365.

An executor in truſt, who has acted, may be examined as a witneſs. In this caſe, on a trial at bar, it was objected to the competency of a witneſs, 1ſt, As being an executor in truſt, and ſo liable to actions. 2dly, As having acted under the truſt; whereby, if the will was ſet aſide, he became liable to anſwer.—LORD MANSFIELD, CH. JUS. In a modern caſe of *Holt* and *Tyrrel* (which appears in 1 *Barnard. Rep.* K.B. 12. it was held in a trial at bar, that a truſtee might be a witneſs without releaſing; and where is the difference between an executor in truſt, and another truſtee; his being liable to actions makes no difference; for ſo are all agents, and yet they are allowed to be witneſſes.—WILMOT, J. I remember another trial at bar, wherein it was held, that a deviſee in truſt might be a witneſs. And no diſtinction was taken, between his acting or not. *Holt* and *Tyrrel* was then cited, and relied upon.

So alſo in this caſe, it was held that an executor who takes no beneficial intereſt, is a competent witneſs to prove the ſanity of the teſtator.—And that if a perſon who is intereſted execute a ſurrender or releaſe of his intereſt, he may be examined as a witneſs, although the ſurrenderee, &c. refuſe to accept the ſurrender or releaſe.—On the trial of an ejectment, one *Hearle*, who was named executor in the will, and was alſo deviſee of a reverſionary intereſt, expectant on an eſtate for life, in ſome copyhold lands part of the eſtate deviſed, was called, on the part of the plaintiffs, who claimed under the will, to prove the ſanity of the teſtatrix, which was impeached by the defendant. To obviate the objection of intereſt, he had ſurrendered his eſtate in the copyhold lands, to the uſe of the heir at law, but he had refuſed to accept the ſurrender, it was inſiſted for the defendant, that *Hearle* was an incompetent witneſs; 1ſt. Becauſe the ſurrender was ineffectual, and did not extinguiſh his intereſt, not having been accepted; 2dly. Becauſe he had acted in the executorſhip, having paid different legacies, and, therefore, had rendered himſelf liable to be ſued, if the will ſhould be ſet aſide.—But Lord MANSFIELD over-ruled both objections, and there was a verdict for the plaintiff.—On a motion for a new trial, beſides the two objections to *Hearle*'s evidence, which had been made at the trial, it was contended, that, as executor, he was entitled to the reſidue of the perſonal eſtate not diſpoſed of by the will, and was, therefore, intereſted, on that account, to ſupport it. Lord MANSFIELD, Ch. J. The objection that he was intereſted, becauſe, if the will ſhould be ſet aſide, he would be anſwerable for having acted *de tort*, was not taken at the trial. Now, on ſuch a motion as the preſent, no objection to a witneſs ſhould be received which was not made at the trial. If this new objection had been made then, it might, perhaps, have been ſhewn, that there was no reſidue, or a releaſe might have been given, &c.—As to the other objections, 1. The bequeſt to the witneſs would certainly have gone to his competency, if he had not parted with his intereſt; but, as he has parted with it, as far as depends upon him, third perſons have a right to his teſtimony, and the ſurrenderee ſhall not deprive them of it, by refuſing to accept the ſurrender. 2. It is contended, that, in an action concerning land, an executor is not a competent witneſs, becauſe he may be ſued for his adminiſtration of the perſonalty. But he certainly has no immediate intereſt in the action; and it was determined by Lord *Hardwicke*, on a petition for a commiſſion of review, and afterwards by the delegates, that it is no objection to an executor's teſtimony, that he may be liable to actions as executor *de ſon tort* (1).—WILLES, J.

Goodtitle Leſſee of Fowler, *et el.* *v.* Welford, Eaſter. 19 Geo 3. B.R. 1 *Doug.* 139.

(1) *Vide Baillie* v. *Wilſon*, 15 Jan. 1744, cited 4 *Burr.* 2254, 2255.

It is clear that an executor in truſt may be a witneſs (1). —Ashhurst, J. Every objection of intereſt proceeds on the preſumption that it may bias the mind of the witneſs; but this preſumption is taken away, by proof of his having done all in his power to get rid of the intereſt.

Gould *v.* Jones, Trinity 2 Geo. 3. B.R. 1 *Black. R.* 384.

On the trial of an iſſue out of Chancery, it was diſputed, whether the name of one *William Jones*, ſubſcribed to a declaration of truſt, was genuine; and, to prove the handwriting forged, a witneſs was produced, who had frequently correſponded with *Jones*, but had never ſeen him write. And, upon debate, Lord *Mansfield* held him to be a good evidence, and his teſtimony was accordingly admitted.

Camden *v.* Cowley, Ea. Ter. 3 Geo. 3 B.R. 1 *Black.* 417.

Evidence of the general opinion of merchants, is allowed to be given to prove the cuſtom of merchants.—Lord *Mansfield*, Ch. J. ruled in this cauſe, which was an action on a policy of inſurance, that inſurance-brokers and others might be examined, as to the general opinion and underſtanding of the perſons, concerned in the trade; though they knew no particular inſtance in fact, upon which ſuch opinion was founded.

Granger *et al.* Aſſignees of Lloyd *v.* Furlong, *et* Ea. Ter. 19 Geo. 3. C.B. 2 *Black.* 1273.

A creditor, having ſold his chance of recovering his debt, is a good witneſs to ſupport a commiſſion of bankrupt.—In order to prove the petitioning creditor's debt, only one *Iſaac Surcombe* was called, who had proved a debt of his own to the amount of 105l. under the commiſſion. Upon which it was objected, that he was intereſted to ſupport the commiſſion. In anſwer to which there was produced, 1. A receipt given by *Surcombe* to *Granger* for 26l. in conſideration of which *Surcombe* ſold his ſaid debt to *Granger*, and undertook to aſſign it, when required. 2. A deed of releaſe from *Surcombe* to the aſſignees and the bankrupt, of the ſaid debt of 105l. The judge thought this eſtabliſhed his competency, and admitted his evidence.—It was now inſiſted, that there was ſtill a poſſible intereſt remaining in *Surcombe*, ſufficient to bias his teſtimony; for if it ſhould turn out that the party was not a bankrupt, *Granger* might recover back from *Surcombe* the 26l, as paid without any conſideration.—Sed per Cur.: *Granger* could recover nothing; for he buys the whole riſque of *Surcombe*'s debt, at leſs than 5s. in the pound, and muſt take his chance for the payment of it, whether by dividend or otherwiſe.

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(1) In *Goſs* v. *Tracey*, *Canc. M.* 1715, Lord *Cowper* determined, "That a "grantee, when he appears to be a bare truſtee, is a good evidence, to prove the "execution of the deed to himſelf." 1 *P. Will.* 287. 290. And, in *Fountain* v. *Cake*, *B. R. E.* 26 *Car.* 2. 1 *Mod.* 107. it is ſaid by Lord *Hale*, "An executor may "be a witneſs in a cauſe concerning the eſtate, if he have not the ſurpluſage given "him by the will; and ſo I have known it adjudged.

A par-

A perſon liable to be contributory to a defendant, for damages recovered, is an incompetent witneſs for him. Theſe were two diſtinct actions, of covenant brought againſt two part-owners of a ſhip, by the huſband of it, who had been appointed to that office, by a deed executed by all the joint-owners: by which deed they impowered him generally to do and act as huſband of the ſhip, as is cuſtomary; and to advance or lend, &c; and, for all payments made on account of the ſhip, to retain, &c. He inſured the ſhip; and now brought theſe actions, for the money paid by him for inſuring it: it was not a demand of their reſpective proportions; but a demand from each, of the whole ſum paid. Both cauſes ſtood together for trial: that againſt *Backhouſe* came on firſt. *It was then agreed* (AND SO THE COURT NOW CLEARLY HELD), that the huſband had no right to inſure for any part-owner, without his particular direction; nor for all the owners in general, without their general direction, or ſomething equivalent to it. *In the preſent caſe, it was not pretended that he had received any expreſs general direction from all the owners: but it was inſiſted, on the part of the plaintiff, that they were informed of it, and acquieſced in it.* And the plaintiff's counſel called a witneſs to prove this. The defendant's counſel denied it; and inſiſted that they were never informed of it before the bringing of the action. *And this they offered to prove, by calling Mr.* Foulſton, *the defendant in the ſecond cauſe.* The plaintiff's counſel objected to his competency. The defendant's counſel anſwered and inſiſted, that there was no objection to his competency; whatever there might be to the degree of credit to be given to his teſtimony. Lord *Manſfield* held him an incompetent witneſs, and rejected his teſtimony upon that foot. A verdict was given for the plaintiff. And it was now moved, on behalf of the defendant, for a new trial.—And after cauſe ſhewn, THE COURT diſcharged the rule for a new trial; being clearly of opinion, "That the witneſs was incompe-"tent." The point to be left to the jury was, "Whe-"ther the other joint-owners being informed of the inſur-"ance and acquieſcing in it was ſufficient evidence of their "directing it?" and this other joint-owner could not be called as a witneſs to diſprove it; becauſe his giving ſuch evidence would tend to diſcharge himſelf (1): for theſe actions are brought, not againſt each defendant for his proportion of the inſurance-money; but againſt each, for the whole of it: in which caſe, it is an objection; and is like the caſe of an action brought againſt one partner for the whole debt due from the copartnerſhip.

French v. Backhouſe, & French v. Foulſton, Ea. Ter. 11 Geo. 3. B.R. 5 *Ter. Rep.* 2727.

(1) But ſee the ſtat. 28 Geo. 3. c. 56. for regulating ſea inſurances.

A per-

Walton *et al.* Aſſignees of Sutton *v.* Shelley, Tr. Ter. 26 Geo 3. B.R 3 *Ter. Rep.* 296.

A perſon is not a competent witneſs to impeach a ſecurity which he has given, though he is not intereſted in the event of the ſuit (1).—Upon a motion to ſet aſide the verdict and grant a new trial, the caſe reported was as follows: "This was an action upon a bond given by the defendant "to *Sutton*, to which there was a plea of *non eſt factum*, and "another of the ſtatute of uſury. It was proved by one "witneſs, for the defendant, that the bond was given in "conſideration of delivering up two promiſſory notes made "by Mrs. *Perry*, payable to *Birch*, or order, the one in"dorſed by *Birch* and *Davenport Sedley*, the other by *Birch*, "*Corbin*, and *Davenport Sedley*, to *Sutton*. *Davenport Sedley* "*was then called by the defendant, to prove that the conſidera*"*tion for the notes was uſurious*. But his evidence was ob"jected to on two grounds; 1ſt, That he was called to in"validate a ſecurity which he had given; and that *an in*"*dorſer of a note, independently of any queſtion of intereſt*, "*could not be permitted to prove a note void*, which he himſelf "had indorſed; 2dly, That he was intereſted in the queſ"tion, which was meant to be put to him; for if the notes "were given for an uſurious conſideration, he would never "be liable to pay them; though by overturning the bond, "they might be ſet up again. For theſe reaſons the wit"neſs was rejected, as being incompetent." And this motion was made upon the ground, that *Davenport Sedley* was a competent witneſs, and ought to have been admitted to prove the fact of the uſury.—Lord MANSFIELD, Ch. J. The old caſes, upon the competency of witneſſes, have gone upon very ſubtle ground. But of late years the courts have endeavoured, as far as poſſible, conſiſtent with thoſe authorities, to let the objection go to the credit, rather than to the competency, of a witneſs. In this caſe, it ſeems to me that the witneſs had no intereſt in the preſent queſtion, for either way he is diſcharged. If the bond be good, it puts an end to the notes; if bad, the ſame ground, that vacates the bond, vacates the notes; therefore, in point of intereſt, I think there is no objection to his competency. But what ſtrikes me, is the rule of law founded on public policy, which I take to be this; that *no party, who has ſigned a paper or deed, ſhall ever be permitted to give teſtimony to invalidate that inſtrument which he hath ſo ſigned*. And there is a ſound reaſon for it; becauſe every man who is a party to an inſtrument, gives a credit to it. It is of conſequence to mankind, that no perſon ſhould hang out falſe colours to deceive them, by firſt affixing his ſignature to a

(1) See the caſe of *Jordaine* v. *Laſhbrooke*, *ante* vol. II. p. 457.

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paper, and then afterwards giving teſtimony to invalidate it. It is emphatically right in the caſe of notes; for in conſequence of different ſtatutes, two very hard caſes have ariſen. Firſt, with reſpect to a gaming note, which, though in the poſſeſſion of a *bonâ fide* purchaſer, without notice, is void (1). It is ſimilar in the caſe of uſury; a note given for an uſurious conſideration, though in the hands of a fair indorſee, is equally void. And, therefore, whenever a man ſigns theſe inſtruments, he is always underſtood to ſay, that, to his knowledge, there is no legal objection whatever to them. The civil law ſays, *nemo allegans ſuam turpitudinem eſt audiendus*. Now apply this general maxim to the preſent caſe, with the diſtinction which has been taken. It has been argued at the bar, that this rule only holds where the action is brought upon the notes themſelves, and, therefore, not relevant to this caſe. But I take the caſes to be exactly the ſame. For the queſtion on the validity of the bond involves in it the validity of the notes. The obligee of this bond truſted to the notes; he gave them up as a conſideration for the bond; he truſted to the name of the indorſer, and that he knew of no objection to the notes; and yet this ſame perſon was afterwards called to ſay that they were given for an uſurious and illegal conſideration; therefore, on that ground, I am of opinion that he was an incompetent witneſs. WILLES, J. *The general rule is, that no man ſhall be permitted to invalidate, by his own teſtimony, an inſtrument to which he is a party*; *and there* has been no caſe cited in which this rule has been impeached. There has indeed been an inſtance, where a man was ſuffered to *explain his own deed*. That was a caſe before me at the laſt aſſizes at Lancaſter. Two brothers joined in an aſſignment of a ſhip; and the queſtion was, Whether one of them had any intereſt in the veſſel at the time of the aſſignment. He was called to prove that he had none. His evidence was objected to, on the ground that he ought not to be permitted to contradict his own deed; but I was of opinion, that he was a competent witneſs, becauſe he came to ſwear againſt his own intereſt, that he had no property whatever in the veſſel, and he explained it in this manner; that the perſon to whom the aſſignment was made thought, that this witneſs had an intereſt in the veſſel, and would not accept the aſſignment unleſs he were joined in it.—It is better, in general, that objections of this kind *ſhould go to the credit than to the competency of the witneſs*. But the preſent queſtion falls within the general rule, that no man ſhall be permitted to allege his own turpitude in having given credit to a falſe and illegal ſecurity.—ASHHURST, J. The general rule is, that

(1) Vide vol. II. p. 453, 454.

where

where a man *is not intereſted in the event, he ſhall be a competent witneſs*, though he may have a bias upon his mind with regard to the ſubject-matter. As if a perſon bring two ſeveral actions againſt two defendants for the ſame battery; in the action againſt one, the other may be a witneſs, becauſe he is not intereſted in the *event*. Any objections to ſuch teſtimony, ſhould go to the *credit* rather than to the *competency* of the witneſs: therefore, if the preſent objection had reſted ſolely on the queſtion of intereſt, I ſhould have been of opinion that *Sedley* was a good witneſs. But he is inadmiſſible on another ground, that no man ſhall be permitted to invalidate his own act; and here he has been a party to the fraud, by affixing his name to the notes, and giving them a ſanction; and having done that, he ſhall not be admitted upon any account, to ſay that thoſe notes were void.—BULLER, J. It is a ſettled principle, that no man ſhall be permitted to invalidate his own act. If an action be brought on a note againſt the drawer, an indorſer cannot be called as a witneſs for him, though he is not intereſted in that cauſe; and if a verdict be given againſt the drawer, and ſatisfaction obtained from him, the indorſer is diſcharged. In that caſe it is his intereſt to charge the drawer; therefore there is no difference between an action upon the notes againſt the drawer, and the preſent action upon the bond.—As to the queſtion of *intereſt*, it is much to be lamented that there is ſuch confuſion in the caſes. I have always been of opinion, that the beſt rule to go by, was to conſider *whether the witneſs was to derive any advantage from the event of the cauſe:* but many caſes tend ſtrongly to contradict that idea. The material thing to be conſidered is, whether there is any diſtinction between the intereſt which the witneſs may have in the *iſſue of the cauſe*, and the *queſtion* to be put to him. I am ſtrongly inclined to think that the moſt ſolid ground is, to confine the objection to *an intereſt in the event of the cauſe:* but in doing that we muſt overturn many caſes. As in the caſe of commoners; if the iſſue be on a right of common, which depends on a cuſtom pervading the whole manor, the evidence of a commoner is not admiſſible, becauſe, as it depends upon a cuſtom, the record in that action would be evidence in a ſubſequent action brought by that very witneſs to try the ſame right: therefore there is a good reaſon for not receiving his teſtimony in ſuch caſe. But the ſame reaſon does not hold where common is claimed by preſcription in right of a particular eſtate; becauſe it does not follow, if *A.* has a preſcriptive right of common belonging to his eſtate, that *B.* who has another eſtate in the ſame manor muſt have the ſame right; neither would the judgment for *A.* be evidence for *B.* and yet there are caſes, which lay it down as a general rule, that one commoner is in no caſe a witneſs for another.—Then in the caſe of policies of inſurance, it has been held, that

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one under-writer cannot be a witneſs for another. *Ridout* and *Johnſon*, Eaſt. 11 *Ann.* And the Eaſt-India Company and *Goſling*, Mich. 16 *Geo.* 2. *cor. Lee*, Ch. J. (1).—In theſe caſes if the evidence offered tend to invalidate and deſtroy the inſtrument itſelf, that may be a reaſon for rejecting ſuch teſtimony: but where ſuch evidence is offered for any other purpoſe, there does not ſeem to be any good reaſon why it ſhould not be received; for that verdict could not be given in evidence in another action upon the ſame policy againſt the witneſs or another under-writer. The caſes on this ſubject, which have ſtaggered me moſt, are two late ones in this court, by the names of *French* v. *Backhouſe*, and *French* v. *Foulſton*, E. 11 *G.* 3. p. 392, *ſupra*. There the ſecond defendant was certainly not intereſted to ſupport the defence in the firſt cauſe; for if the plaintiff had recovered in that, the ſecond defendant who was offered as the witneſs could not have been charged with any part of the damages recovered in the firſt action.—Therefore, if there be any difference between an intereſt in the queſtion, and an intereſt in the event of the cauſe, and an intereſt in the queſtion diſables a witneſs, I think theſe caſes prove that this witneſs was incompetent; for the queſtion put to him was upon the validity of the notes.—Rule diſcharged.

Bent v. Baker, *et al.* in error, Hil. Ter. 29 Geo. 3. B R. 3 *Ter. Rep.* 27.

So in this caſe it was held, that a perſon is a competent witneſs, unleſs he be intereſted in the event of the ſuit; but that in ſome caſes, *even an intereſted perſon* is a competent witneſs, from neceſſity.—This was an action of *aſſumpſit* on a policy of aſſurance brought in the court of Common Pleas, to which the defendant pleaded the general iſſue. At the trial, the counſel for the defendant below produced one *George Bowden, an inſurance broker, as a witneſs, to prove circumſtances tending to ſhew that the under-writers on the ſame policy were not liable to pay the loſs*; who being ſworn, ſaid that he was employed as a policy-broker by the plaintiffs, to procure the policy of aſſurance in the declaration mentioned to be ſubſcribed by the defendant and the ſeveral other perſons whoſe names are ſubſcribed thereto as aſſurers. *And that he, as ſuch policy-broker, procured the ſame to be ſubſcribed by the defendant as an aſſurer for* 100l. in ſuch manner as in the declaration is in that behalf mentioned; *and that he*, within the ſpace of one hour after the ſaid policy had been ſo ſubſcribed by the defendant, and the other perſons whoſe names are ſubſcribed thereto prior to the witneſs, *ſubſcribed the ſame policy for the ſum of* 200l. *and became an aſſurer to the* ſaid *Peter Baker* and *John Dawſon*; *and that an action had been commenced againſt him at the ſuit of the plaintiffs, and was then*

(1) *Bull. Niſ Pri.* 283.

*depending*

*depending in his majeſty's court of the Bench at Weſtminſter, as ſuch aſſurer for the ſaid* 200l. for and in reſpect of the ſaid loſs alleged in the declaration; and in which action the ſame queſtion was depending as in this action againſt the defendant; *and that he expects to contribute to the expence of defending this action againſt the defendant. And alſo, that he, together with the defendant and ſeveral other under-writers upon the ſame policy, had filed a bill in equity in the court of Exchequer againſt the plaintiffs, for a diſcovery of divers matters reſpecting the policy and aſſurance, for the purpoſe of avoiding the ſame, and alſo praying to be relieved againſt the ſame; which bill in equity was then depending in the court of Exchequer.* And thereupon the counſel for the plaintiffs objected to the admiſſion of the ſaid *George Bowden* as a witneſs; and inſiſted that he was not a competent witneſs on behalf of the defendant; *whereupon the ſaid defendant and his attorney produced a releaſe duly executed by them to the ſaid* George Bowden, *of all demands for any proportion or contribution of any coſts, either at law or in equity, to be paid by him, the ſaid* George Bowden; *and it was offered, on the behalf of the defendant and the witneſs, by their attorney, to pay to the plaintiffs the coſts of the ſuit in equity, and that they would, at their own expence, procure the bill in equity to be diſmiſſed as to them;* which offer the plaintiffs did not accept, alleging that the ſaid ſuit was ſtill depending, and there were other plaintiffs therein, beſides the defendant and *George Bowden; whereupon the* Judge, Lord LOUGHBOROUGH, *refuſed to admit the evidence of the ſaid* George Bowden. And the counſel for the defendant THEN EXCEPTED to the opinion of the Chief Juſtice: inſiſting that the ſaid *George Bowden*, was a competent witneſs for the defendant touching the matters in queſtion. *The whole of this proceeding appeared on the bill of exceptions*, which was tendered to, and ſigned by, Lord *Loughborough*. And it having been removed into this Court by a writ of error, and errors aſſigned, it was fully argued; and on the argument, three objections were taken to the competency of the witneſs: 1ſt, That he had a *direct intereſt in the ſuit*, inaſmuch as he expected to contribute to the coſts of it. 2dly, That he had an *intereſt in the queſtion* put to him, as being an under-writer on the ſame policy. 3dly, That he had a *collateral intereſt*, ariſing from his being a party to a ſuit in equity, which might be affected by the deciſion of this ſuit.—Lord KENYON, Ch. J. The queſtion is, WHETHER, under all theſe circumſtances, *Bowden* was, or was not, a competent witneſs? I premiſe with mentioning what was ſaid by Lord *Mansfield*, in *Walton* v. *Shelley*, on this ſubject, That "the "old caſes upon the competency of witneſſes, have gone upon "very ſubtle grounds. But, of late years, the courts have en- "deavoured as far as poſſible, conſiſtent with thoſe authorities, "*to let the objection go to the* CREDIT, *rather than to the*

"COMPETENCY

« COMPETENCY of a witneſs." And if the opinion of ſo great a judge ſtood in need of any ſupport, it would have it from the ſentiments of Lord *Hardwicke*, in the caſe of *King* v. *Bray*, *Rep. Temp. Hard.* 360. who ſaid, that whenever a queſtion of this ſort aroſe on which a doubt might be raiſed, he was always inclined *to reſtrain it to the credit, rather than to the competency, of the witneſs*, making ſuch obſervations to the jury as the nature of the caſe ſhould require. Now, fortified with two ſuch authorities as theſe, I have no ſcruple in declaring my concurrence that, *wherever there are not any poſitive rules of law againſt it, it is better to receive the evidence of the witneſs, making nevertheleſs ſuch obſervations on the credit of the party, as his ſituation requires.* Then it is to be conſidered, What is the queſtion put to a witneſs on his *voir dire? It is, Is he really intereſted in the cauſe?* Sometimes indeed the counſel enter into the detail, and aſk *how he is intereſted.* But the general queſtion involves in it all the others, and amounts to this, *Whether the record in that cauſe will affect his intereſt* (1)? Upon that ground has the caſe of commoners proceeded: it is very probable that in *preſcriptive* rights of common, other perſons living in the ſame manor may have correſpondent rights: yet, unleſs the queſtion turns on a *cuſtom* equally beneficial to them all, the teſtimony of one muſt be admitted to prove his neighbour's right. But if the right be claimed under a *cuſtom* that all the inhabitants of the pariſh ſhall have a right of common, all thoſe who fall under that deſcription are intereſted, becauſe the verdict in that cauſe may afterwards be uſed as evidence to eſtabliſh the ſame right in the reſt. Now in this caſe, the objections made to this witneſs are reſolvable into the three mentioned by the plaintiff's counſel. Firſt, that he had a direct intereſt in the ſuit. *It is true that he had an intereſt when he came into court to give his evidence, by virtue of that engagement which he had made: but the bill of exceptions alſo ſtates, that a releaſe was executed to him, which entirely removed that objection.* The next objection is, that the witneſs was party to a ſuit in equity, and that eventually he might be liable to the coſts: but no perſon but the plaintiffs below could call on him for thoſe coſts; now the defendant below, and the witneſs, offered that the bill ſhould be diſmiſſed as to them at their own coſts, which however was refuſed: but after ſuch a refuſal, neither in juſtice or common ſenſe can we ſuffer thoſe parties to make the objection. Then the remaining objection is, that he was an under-writer on the ſame policy. I muſt acknowledge that there have been various opinions upon this ſubject, and that it is impoſſible to reconcile all the caſes. Then we have only to conſider what are the principles and good ſenſe to be extracted from them all. I think the principle

(1) Vid. *Trelawney* v. *Thomas*, *infra*.

is

is this; *if the proceedings in the cauſe cannot be uſed for him, he is a competent witneſs, although he may entertain wiſhes upon the ſubject, for that only goes to his credit, and not to his competency; as where he ſtands in the ſame ſituation with the party for whom he is called to give evidence, there is no doubt but that it may influence his teſtimony; or where a father is giving evidence for the ſon: but this does not render him incompetent, and ſuch circumſtances are always open to obſervation.* So here the witneſs might have had his wiſhes; his ſituation might have created an influence on his mind; but the queſtion ſtill is, Whether he was a competent witneſs? On the grounds I have already ſtated, I think he was. But there is alſo another reaſon for admitting the evidence of this witneſs, on the authority of the caſe in *Skinner*; where it was ruled by Lord Ch J. *Holt*, that where a perſon made himſelf a party in intereſt, after a plaintiff or defendant has an intereſt in his teſtimony, he may not by this deprive the plaintiff or defendant of the benefit of his teſtimony. Then what was the ſituation of theſe parties? We muſt recollect that *the broker, who effects the policy, is the witneſs whoſe teſtimony muſt be reſorted to by both parties in caſe of any diſpute.* He afterwards ſigned the policy himſelf, which he could not have done without the concurrence of the aſſured themſelves, who had before entered into the contract with the defendant below, through the medium of this broker; and therefore he was to be deprived of the benefit of his witneſs by the very act of the plaintiffs themſelves, who objected to his teſtimony at the trial. Then it has been ſaid, that a perſon cannot be permitted to give evidence to invalidate an inſtrument which he himſelf has executed: but I cannot aſſent to that as a general propoſition; for I remember a caſe of a trial at the bar of this Court (1), where all the ſubſcribing witneſſes to Mr. *Jolliffe*'s will were permitted to give evidence of the inſanity of the teſtator at the time of making it. Now in that caſe they came to deſtroy the inſtrument which they had atteſted: and though their teſtimony was ultimately diſcredited, yet no doubt was entertained reſpecting their competency. I therefore entirely agree with the diſtinction taken by BULLER, J. *that where a perſon has ſigned a negotiable inſtrument, he ſhall not be permitted to invalidate it by his teſtimony.* But that is not the caſe here. However, theſe are only the ſmall points in the cauſe. And I again recur to that which is the principal ground of my opinion, namely, that *the witneſs was not intereſted in the cauſe then depending, neither could the verdict by any poſſibility be produced by him in any ſubſequent ſuit.*—ASHHURST, J. In ordinary caſes, one under-writer cannot be examined as a witneſs for or

(1) *Lewis* v. *Jolliffe*, 1 *Bl. Rep.* 365. and p. 350. *ante.*

againſt

against another on the same policy: but the particular situation in which this witness stood, makes a great difference; for he had acted as the broker, and could not by any act of his own, deprive either party of his testimony by his afterwards signing the policy. From the nature of his situation, he must be the best witness for many purposes; and if he knew of any previous secret circumstances which would invalidate the policy, he was committing a fraud on the rest of the under-writers. And if we were to reject the testimony of this witness, it would be open to this further objection, that the assured might collude with the broker, after he had obtained other subscriptions, and prevail on him to subscribe the same policy, in order to deprive the under-writers of the benefit of his evidence.—BULLER, J. This case involves in it the question which has been so repeatedly agitated in courts of law, *What objections go to the* CREDIT, *and what to the* COMPETENCY, of the witness? than which no question is more perplexed. With regard to two of the objections which have been argued at the bar, they are not entitled to much consideration. *The first* of them is, that the witness was interested, because he was to contribute to the costs: the release is a clear and decisive answer to that. *The other is*, that he was liable to pay the costs in the suit in equity; and the answer to that is, that he did every thing which he could to discharge himself from that objection, by offering to dismiss his bill at his own costs. The case of *Goodtitle* v. *Welford*, *Dougl.* 134. and p. 390, *ante*, shews, that if a person who is tendered as a witness does every thing in his power to get rid of any objection to his testimony, it shall not be competent to the other party, by an obstinate refusal, to prevent his being examined. *Then the remaining and principal question is*, WHETHER *this witness, having subscribed this policy as an under-writer, has thereby rendered himself altogether incompetent?* because, if he were competent to answer *any* questions, he ought not to have been rejected *generally*. On the principle of necessity alone, I think this witness ought to have been received. If the question intended to be put to him were as to any representation made by him to the under-writers at the time of subscribing, he must be admitted as a witness from necessity; for he was the only person who from the nature of the thing could speak to that transaction, and as such the under-writers had a right to call on him for his testimony. For it is scarcely possible that that which he alleged to the under-writers when they subscribed, could be proved by any other person. Besides it is admitted, that if he had been called as an agent, he might have been examined: now *non constat*, but that was the case here; and as he was rejected generally, the judgment must be reversed. ON THE GENERAL GROUND, *whether one under-writer can be examined*

*for another who has ſubſcribed the ſame policy, I incline to think there is no objection to his competency.* When the caſe of *Walton* v. *Shelly* was argued here, I looked into all the caſes on the ſubject, and particularly into thoſe on this head. The Court, in that caſe, approved of what was laid down by Lord *Hardwicke* in *R.* v. *Bray, that it was better to lean againſt objections to the competency, and to let them go to the credit of the witneſs.* The true line I take to be this, *is the witneſs to gain or loſe by the event of the cauſe?* Now this witneſs could not gain or loſe by the event of this cauſe, becauſe the verdict could not be evidence either for or againſt him in any other ſuit. This has been likened to caſes where witneſſes have been rejected on the ground, that they ſhall not be permitted to invalidate inſtruments which they themſelves have ſigned: but the ground of that objection is, that it is holding out falſe credit to the world, and muſt be confined to negotiable inſtruments. If a perſon were permitted to ſet aſide ſuch an inſtrument, it would enable him to commit a fraud.—GROSE, J. So much has already been ſaid on this ſubject, that I am ſatisfied with declaring my aſſent to the rule, that, *unleſs the witneſs be intereſted in the event of the ſuit, he ſhall be admitted*, except in thoſe exceptions which have been eſtabliſhed by ſolemn deciſions. On the other ground, that a witneſs ought to be received from neceſſity, I think this falls within the caſe of a wager; for in the caſe of *George* v. *Pearce*—*Gould*, J. held that it was no objection to the competency of a witneſs, *that he had laid a wager on the event of the cauſe:* ſo that the rule is, *that a perſon, in whoſe evidence another has gained an intereſt, ſhall not by his own act deprive the other of the benefit of his teſtimony.* Now, in this caſe, the witneſs was the broker who effected the policy, and was the only perſon who could ſpeak to many facts material to the cauſe. Therefore, he ought to have been admitted. And if he were competent to anſwer any queſtion, he ought not to have been rejected.—Judgment reverſed, and a *venire de novo* awarded.

Green v. the New River Company, Ea. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 589.

In an action againſt a maſter for the negligence of a ſervant, the latter is not a competent witneſs to diſprove the negligence, without a releaſe.—In this caſe, on the trial of an action for conſequential damage to the plaintiff's horſe, by reaſon of the burſting of a pipe belonging to the New River works, owing to the negligence of the defendants. The defendants' counſel offered to call a turncock, to diſprove the evidence of a witneſs produced on the part of the plaintiff; which the plaintiff objected to, without a releaſe; and none ſuch being prepared, he was rejected, as incompetent; becauſe he came to diſprove his own negligence, which, if eſtabliſhed by the verdict, would be the ground of an action againſt himſelf by his employers. It was afterwards moved to ſet aſide the verdict, which

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was found for the plaintiff, on the ground that he was a witneſs from neceſſity, in like manner as coachmen and ſailors are admitted to give evidence, to diſprove their own negligence in actions againſt their maſters and employers; or a ſervant of a tradeſman, who is permitted to prove the delivery of goods. *Per Curiam:* The laſt inſtance cited is an exception to the general rule; ſuch a perſon is admitted to give evidence merely from neceſſity. But the exception does not extend to the two other caſes mentioned of the coachman and the ſailor: the verdicts againſt the proprietors of thoſe may be reſpectively given in evidence, in actions to be brought by them againſt their ſervants, as to the quantum of damages, though not as to the fact of the injury. So the verdict in this caſe may be given in evidence, in an action by the defendants againſt the witneſs; and, therefore, he is an incompetent witneſs without a releaſe.

A corporation being lord of a manor, and having approved part of a common, and leaſed it, a freeman is not a competent witneſs to prove that a ſufficiency of common was left for the commoners; for the rent muſt be reſerved for the uſe of the corporation, and, therefore, the objection muſt prevail, however ſmall the intereſt may be in reality. Burton *v.* Hinde, Ea. Ter. 33 Geo. 3. B.R. 5 *Ter. Reſt.* 174.

In aſſumpſit for work and labour, with the common money counts, the plaintiff recovered a verdict for the amount of money advanced by him for the purpoſes of an election for members of parliament for the city of Briſtol, viz. 44l. together with a certain ſum for his attendance.—The ſubſtance of the evidence on the part of the plaintiff was, that the defendant, who was a member of a committee at Briſtol, for carrying on the election in favour of *Peach* and *Cruger*, had taken upon himſelf an active part in engaging the plaintiff to advance money, and attend in collecting the voters reſident in London, and conveying them to Briſtol. On the other hand, the defendant endeavoured to prove, that he acted merely as the agent of *Peach*, and by his authority; for which purpoſe he called, beſides other evidence, two witneſſes, *Lidiard* and *Ewbank*; but they being examined on a *voir dire*; *Ewbank* ſaid, he had given a bond to *Peach*, for the payment of a ſum of money, which, it was underſtood between them, was to be applied towards indemnifying him from the expences of the election; and *Lidiard* acknowledged, that he had entered into a written agreement to the ſame effect.—From this account, Lord *Loughborough* thought they were intereſted in the event of the cauſe, inaſmuch as by procuring the plaintiff to be nonſuited, or a verdict againſt him, they would ſave themſelves from the conſequences of this action, ſince, if he gained a verdict, as the defendant would call upon *Peach* to be reimburſed the damages and coſts, they would be liable, by their engagements to *Peach*; and if the plaintiff, having Trelawney *v.* Thomas, Mic. Ter. 30 Geo. 3. C.B. 1 *Hen. Black.* 303.

failed in this action, ſhould bring another againſt *Peach*, they (the witneſſes) might tender to *Peach* the amount of the plaintiff's demand, and thereby eſcape the coſts; for if *Peach* ſhould proceed againſt them on their ſecurities, he would be reſtrained in equity from having execution for more than the damages recovered by the plaintiff in the former action, which would have been tendered. On a motion for a new trial it was urged, that the defendant was merely the agent of *Peach*, and, therefore, not perſonally liable; and that the evidence of the witneſſes rejected ought to have been admitted. The Court held the defendant, under the circumſtances of the caſe, to be clearly liable to this action(1); and, with reſpect to the objection to the witneſs, the Court (*contra Wilſon*, J.) held, that there was a moſt direct intereſt in theſe two witneſſes, becauſe the money to be recovered by this verdict would be part of the money for ſecuring the payment of which the agreement was entered into, and the bond was given; and that they, therefore, appeared to be intereſted to procure a nonſuit, if they poſſibly could, for the plaintiff, or a verdict againſt him. And *Gould*, J. mentioned the caſe of *Fotheringham* v. *Greenwood*, 1 *Strange*, 129, where a witneſs anſwered to the *voir dire*; that though he was not under any legal obligation to bear out the coſts, yet he conſidered himſelf under an obligation in point of honour, and that repelled him.

Turner, *et al.* v. Pearte, Ea. Ter. 27 Geo. 3 B.R. 1 *Ter. Rep.* 717.

But an objection to the competency of witneſſes, diſcovered after a trial, is not a ſufficient ground, of itſelf, for granting a new trial, but it may have ſome weight with the Court, where the party applying appears to have merits.—This action was brought for withdrawing ſuit from the mill of the plaintiffs, ſituated within the manor of Leeds. The defendant, at the trial, ſet up an exemption, as being ſituated within another manor, viz. the manor of Whitkerk, *cum membris*. It appeared, that the manor of Whitkerk extended into the manor of Leeds, and the defendant brought evidence to prove, that the houſes, in reſpect of which this exemption was claimed, were ſituated within that part of Whitkerk, *and were diſtinguiſhed by the mark of a croſs*. The jury found a verdict for the defendant, and a new trial was moved for, upon two grounds; FIRST, that it was a verdict againſt evidence; SECONDLY, *upon an affidavit, that it had been diſcovered ſince the trial, that five, out of nine, of the witneſſes on the part of the defendant were intereſted in the event of the cauſe, and, therefore, were incompetent, and ought not to have been received.* The ground of their incompetency was ſtated to be, that they contributed towards

(1) See vol. I. p. 285. 312.

the

the relief of the poor of Leeds, and that the overſeers of the poor had contributed twenty guineas towards carrying on this ſuit in reſpect of the work-houſe, which was one of the houſes, and claimed a ſimilar exemption. In anſwer to this, an affidavit was made by thoſe witneſſes, that they did not know of this ſubſcription at the time they gave their teſtimony. *Upon the merits, the Court* were of opinion, that the weight of evidence was in favour of the verdict, and they diſcharged the rule on that ground, BUT *they firſt gave their opinions upon the other point.* ASHHURST, J.—The regular time for objecting to the competency of witneſſes, is at the trial. The ancient doctrine on this head was ſo ſtrict, that if a witneſs were once examined in chief, he could not afterwards be objected to, on the ground of intereſt. Perhaps that ſtrictneſs may, in ſome degree, be relaxed by the cuſtom of ſuffering witneſſes to be examined conditionally, which is only waiving the objection for the time: but ſtill the objection muſt be made at the trial. BULLER, J.—Anciently, no doubt, the rule was, that if there were any objection to the competency of the witneſs, he ſhould be examined on the *voir dire*; and it was too late after he was ſworn in chief. In later times, that rule has been a little relaxed; but the reaſon of doing ſo muſt be remembered: it is not that the rule is done away, or that it lets in objections which would otherwiſe have been ſhut out; it has been done principally for the convenience of the Court, and it is for the furtherance of juſtice. The examination of a witneſs, to diſcover whether he be intereſted or not, is frequently to the ſame effect as his examination in chief; ſo that it ſaves time, and is more convenient, to let him be ſworn in chief in the firſt inſtance: and, in caſe it ſhould turn out that he is intereſted, it is then time enough to take the objection. But there never has yet been a caſe, in which the party has been permitted, *after trial*, to avail himſelf of any objection, which was not made at the time of the examination. Where it appears that one or more material witneſſes, who were examined on a trial, were intereſted, it may afterwards weigh with the Court, as a circumſtance for granting a new trial, provided the merits of the caſe are doubtful; but, as a ſubſtantive objection, it ought not to be allowed.—GROSE, J. agreed.—Rule diſcharged.

Witneſſes ought not to be admitted to give evidence againſt their own atteſtation.—There are caſes where *one* witneſs has ſupported a will, by ſwearing that the other two atteſted, though thoſe other two have denied it. Lord MANSFIELD.—I have ſeveral caſes, both upon bonds and wills, where the atteſtation of witneſſes has been ſupported by the evidence of the other witneſſes, againſt that of the atteſting witneſſes, who denied their own atteſtation. It is of

Goodtitle, *ex dim.* Alexander, *et al. v.* Clayton, *et al.* Ea. Ter. 8 Geo. 3. B.R. 4 *Burr.* 2225.

terrible conſequence, that witneſſes to wills ſhould be tampered with, to deny their own atteſtation.

Moſtyn *v.* Fabrygas, Mic. Ter. 15 Geo. 3. B.R. *Cowp.* 174.

If a party wants the teſtimony of witneſſes, whom he cannot compel to attend, the Court may compel the other ſide to conſent, that the witneſſes may be examined upon interrogatories, and that the depoſitions thereon taken ſhall be read on the trial; for, in the caſe of a criminal proſecution of a woman, who had received a penſion as an officer's widow, it being charged in the indictment, that ſhe never was married to him, ſhe alleged a marriage in Scotland, but that ſhe could not compel her witneſſes to come up to give evidence. AND THE COURT obliged the proſecutor to conſent, that the witneſſes might be examined before any of the judges of the court of ſeſſion, or any of the barons of the exchequer in Scotland, and that the depoſitions ſo taken ſhould be read at the trial; and they declared, that they would have put off the trial of the indictment for ever, unleſs the proſecutor had ſo conſented. The witneſſes were examined before the lord reſident of the court of ſeſſion.

Goodtitle *ex dim.* Revett *v.* Braham, Hil. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 497.

A clerk of the poſt-office, accuſtomed to inſpect franks for the detection of forgeries, may be examined as a witneſs, to prove that the hand-writing of an inſtrument is an imitated, and not a natural hand, and alſo to prove that two writings, ſuſpected to be imitated hands, were written by the ſame perſon.—On the trial of this ejectment at bar, the leſſor of the plaintiff claimed as the heir at law, the defendant as the deviſee, of Mrs. *Elizabeth Braham*, the perſon laſt ſeiſed. The plaintiff ſtated his pedigree, which was admitted; and the defendant proved the will, which was impeached on various grounds, but chiefly on thoſe of forgery, and undue influence. The plaintiff's caſe, as to the forgery, conſiſted of evidence, that the teſtatrix was incapable of writing a paper of ſuch length as theſe inſtructions, and hardly able to ſign her name; of declarations in her life-time, that ſhe never would make any will; and of ſome contradictions by the atteſting witneſſes. *The plaintiff then called two clerks of the poſt-office, who ſwore that they were uſed to inſpect franks, and detect forgeries.* They were then aſked, whether, from their general knowledge of writing, the inſtructions were a natural or an imitated hand: this queſtion was objected to, but allowed by the Court; *and the clerks ſwore that the hand was imitated.* They were then aſked, if they could judge whether the inſtructions were written by the perſon who wrote the memorandum. This queſtion was alſo objected to, as being a compariſon of hands; but allowed by the Court. Lord *Kenyon*, Ch. J. mentioned a caſe, where a decypherer had given evidence of the meaning of letters, without explaining the grounds of his art, and where the priſoner

priſoner was convicted and executed. And *Buller*, J. ſaid, it was like the caſe of Wells-harbour, where perſons of ſkill were allowed to give evidence of opinion. *The clerks then ſwore, that from their knowledge of the ſimilarity of hands, they were ſure that the inſtructions and memorandum were written by the ſame perſon. They alſo ſwore, that all the ſignatures to the will, and the ſignature to a power of attorney, to ſurrender copyholds to the uſe of the will executed afterwards, were imitated, and not natural writing.* On croſs-examination they admitted, that they had never detected an imitation of the hand of a very old perſon, who wrote with difficulty, and might be ſuppoſed frequently to ſtop; that their principal means of knowing was, by ſeeing whether the letters were *painted*, that is, gone over a ſecond time with the pen, which they admitted might happen to any perſon, from a failure of ink. Other ſignatures of the teſtatrix, proved by unſuſpected perſons, were then ſhewn to theſe witneſſes; one of theſe ſignatures was ſworn to be genuine by one of them, and by the other to be imitated.—Lord *Kenyon*, in ſumming up to the jury, ſaid, he ſhould leave the queſtion of forgery on the evidence they had heard, without any obſervations.

A witneſs may be aſked whether he has not been in the pillory for perjury. On an application to bail the priſoner, one of the bail was aſked, whether he had not ſtood in the pillory for perjury; this queſtion was objected to as tending to criminate him, but the Court over-ruled the objection, ſaying there was no impropriety in the queſtion, as the anſwer could not ſubject him to any puniſhment. The King *v.* E. Edwards, Mic. Ter. 32 *Geo.* 3. B. R. 4 *Ter. Rep.* 440.

## *What may be received in Evidence.*

*Copies.*] Cloſe copies of proceedings in any court may be given in evidence in another court, without any but the common ſtamps.—At the trial, the plaintiff offered in *evidence* a paper-writing, purporting to be a true copy *of a bill in Chancery*; (and it was proved to have been examined with the record:) which *copy* ſo offered in evidence was *written* CLOSE, on TWO *ſheets* of paper, containing *forty* OFFICE-*copy* ſheets in quantity; and *each of the* two ſheets of paper was STAMPED with a *triple* SIX-*penny* ſtamp *only*. It was objected, "that *ſuch copies* ought not "to be *read*; becauſe *not* PROPERLY *ſtamped*, according to "the ſtatutes." But a verdict was given for the plaintiff, ſubject to the opinion of the Court, "Whether ſuch *copies* are "PROPERLY *ſtamped*, ſo as to entitle the plaintiff to have "them read in evidence?"—Ld. MANSFIELD: How does it appear that it is *neceſſary* that a copy of a proceeding in Chancery, given *in evidence*, muſt be an OFFICE-copy? An OFFICE-copy is, in the ſame court and in the ſame cauſe, *equivalent to the record*: but in *another court*, or in *another cauſe*, in the ſame court, the copy muſt be PROVED. Before the firſt act which Denn, *ex dim.* Lucas, *v.* Fulford, Tr. Ter. 1 *Geo.* 3 B. R. 2 *Burr.* 1177.

gave the ſingle penny duty, a copy of a proceeding in one court might be given *in evidence* in another, written as *cloſe* as the writer pleaſed. Each party in a cauſe in Chancery muſt take an *office*-copy of the *adverſe* pleadings: but he may read the *draught* of his *own*. Reading the *office*-copy is equivalent to reading the record itſelf. The act of parliament did not mean to alter the rule, as to the giving copies *in evidence*; if it had, it would have been a heavy charge upon the ſuitor. The *practice* of a party's giving the office-copies in evidence, very often is to be accounted for, by their having thoſe office-copies in their poſſeſſion already: ſo that it is, in ſuch caſe, even cheaper to them to uſe theſe than any others. At the time of making the acts, there were *two ſorts* of copies of proceedings: one ſort was a *cloſe*-copy, which might be given in evidence, in another court; the other ſort was an *office*-copy; and this was equivalent to the record itſelf, *when made uſe of in the ſame court and in the ſame cauſe*. This *office*-copy was then fixed at a certain determinate number of words in a ſheet, in order to aſcertain the fees of the officers of the reſpective courts: but copies to be given in evidence might, at that time, be written as cloſe as the writer pleaſed. Thus the ſtamp-acts found it. And they did not mean to *alter* the manner of making copies to be given in evidence, or to fix *them* to ſo many words in a ſheet: they only meant to prevent any fraud upon the ſtamp-duties, with regard to the OFFICE-*copies*, by the parties compounding with the officers for their fees, and then writing more than the uſual number of words in a ſheet of *them*.

Jones *v.* Randall, Hil. Ter. 14 Geo. 3. B. R. *Cowp.* 17.

On a motion for a new trial it was objected, that the evidence given, at the former, *to prove the reverſal of a decree of the Court of Chancery*, was inſufficient: 1ſt, Becauſe a copy of the reverſal only, and not the minute book itſelf, was produced; 2dly, That if ſuch copy was admiſſible, yet it ought to have been upon ſtamps; 3dly, That the previous proceedings ought to have been ſhewn, whereas the decree only was produced. PER CURIAM:—The minutes of the judgment are the ſolemn judgment itſelf; not a word is added upon the journals; and a copy of them may certainly be read in evidence; for the inconvenience would be endleſs, if the journals of the Houſe of Lords were to be carried all over the kingdom. As to ſuch copy being upon ſtamps, it was decided in Queen Ann's time by the opinion of all the judges of England, that copies of the proceedings of parliament need not be ſtamped.—Formerly a doubt was entertained, whether the minutes of the Houſe of Commons were admiſſible, becauſe it is not a court of record. But the journals of the Houſe of Lords have always been admitted, even in criminal caſes. (*Rex* v. *Oates*, 6 Stat. Tri. 44.) As to the previous proceedings, the Court held there was no neceſſity to ſhew them; for the ſingle fact in iſſue at the trial was, *whether the decree of the Court of Chancery*

*cery was reverſed*, not what the previous proceedings were; and therefore proof of the decree and of its being reverſed was clearly ſufficient.

It has been ſolemnly determined, that in a criminal proſecution you may give notice to the defendant to produce a paper in his poſſeſſion; and, in caſe he neglects to produce it, you may give other evidence of it. This was an information grounded on the ſtatute 7 *Geo.* 1. *c.* 21. *ſ.* 9. for importing tea into *Guernſey* without having firſt been laden and ſhipped in *Great Britain*, which ſubjected the goods and the veſſel to a forfeiture. In the courſe of the trial, the Attorney-General *offered to read ſome letters concerning this tea, which had been ſent by the defendant to* Channon, *a witneſs for the Crown*, which letters were proved to have come to the defendant's hands under an order made by the Lord Chancellor for the delivery up to him of all papers and letters ſeized under a commiſſion of bankrupt againſt *Channon*, among which were theſe letters, *The ſolicitor of the exciſe had contrived to take copies of them whilſt they were in the hands of the clerk of the commiſſion: and notice having been given to the defendant to produce the original letters, and that being refuſed, the Attorney-General offered to read theſe copies.* This was objected to by the counſel for the defendant, upon the ground principally, that *a defendant in a criminal caſe was never bound to produce evidence againſt himſelf*; that he was guilty of no crime in not producing them; and that the Attorney-General had no right to call upon him to produce them, or aſk a ſingle queſtion concerning them; conſequently no copies could be admitted in evidence. But EYRE, BAR. admitted the evidence. It was afterwards moved that there might be a new trial.—Ld. CH. BAR. The queſtion is, Whether theſe copies of letters were properly admitted as evidence or not? And that depends upon the exceptions which were taken to it on the motion for a new trial. *Firſt*, It was objected, that copies of letters or papers in the hands of the adverſary ought not to be read in criminal caſes; *ſecondly*, That ſuppoſing they ought to be admitted, yet in this particular inſtance the notice which was given was not ſufficient. As to the firſt objection, that copies are not admiſſible in any criminal caſe, becauſe that would be to oblige a man to produce evidence againſt himſelf; the anſwer is, that *they have not produced one caſe to ſhew any difference at all as to the rule of evidence in criminal and in civil caſes*; therefore the rule of evidence in both caſes is the ſame, that is, to have the beſt evidence that is in the power of the party to produce, which means, that if the original can poſſibly be had, it ſhall be required; but if that original be deſtroyed, or if it be in the hands of the oppoſite party, who will not produce it, then in caſe of a deed, a counter one, or ſometimes a copy of the deed, or copy of the paper, is evidence

The Att. Gen. *v.* Le Merchant, in the Exch. 4 Dec. 1772, 2 *Ter. Rep.* 201. (n. *a*)

dence to be admitted. But it is ſaid that this does not hold in criminal caſes, becauſe the conſequence of it would be to compel a man to produce evidence againſt himſelf; and it is a rule of law, that a man in criminal caſes is not compellable to produce evidence againſt himſelf. But the defendant, *Le Merchant*, is not compellable to produce thoſe letters againſt himſelf; for he is liable to no puniſhment at all if he do not, but is left at his entire liberty either to do it or not; the only conſequence muſt be, that theſe copies (which muſt be ſworn to be true copies) are read againſt him. If they be not true copies, he has it in his power to prove that by producing the originals. The rule is not founded upon any miſbehaviour of the party, or conſidering him in fault: but the rule is this; *the copies are admitted when the originals are in the adverſary's hands, for the ſame reaſon as when the originals are loſt by accident*; the reaſon is, becauſe the party has not the originals to produce. Another objection has been made, that this notice is not ſufficient: the anſwer is, I know no difference between the rule of evidence in civil and criminal caſes. Then if there be no ſuch difference, the rule which has always been followed and allowed in civil caſes is, that notice be given to the attorney or agent of the adverſe party. Now in this caſe there was unqueſtionable notice proved to the agent and ſolicitor of *Le Merchant*, into whoſe hands it appears that theſe letters had actually been delivered; and then there is a notice likewiſe to the attorney for the defendant, and no attempt was made on the part of the defendant to prove what was become of theſe letters, or that it was not in his power to produce them.—Rule diſcharged.

The King *v.* Archer, Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 203.

The defendant, who reſided at Plymouth, had been indicted by Dr. *Rennet* of that place for an aſſault, and had ſuffered judgment to go by default. He was this day brought up to receive judgment. Affidavits were offered to be read by the proſecutor, of expreſſions made uſe of by the defendant, confirming and aggravating his guilt, which had been uttered by him in the hearing of two perſons, and by them afterwards related to the perſons making the affidavits. The proſecutor laid a ground for entitling himſelf to read theſe affidavits, by ſwearing to an application to both thoſe perſons to come forward with their teſtimony, which they had refuſed, and ſtrongly inſinuating that they were under the influence of the defendant. The reading of theſe affidavits was ſtrongly objected to by the defendant's counſel; but the Court, conſidering theſe witneſſes as being in a great degree under the control and influence of the defendant himſelf, permitted the affidavits to be read, as the perſons themſelves had been applied to for their teſtimony, and had refuſed it; at the ſame time allowing the defendant and thoſe perſons an opportunity of anſwering that fact.

A copy

A copy of an entry of an inſtitution, in the biſhop's inſtitution book, is not evidence admiſſible and ſufficient to prove a preſentation by the patron to the living. For the preſentation under the hand and ſeal of the patron ought to be produced, or upon evidence that a proper ſearch had been made for the preſentation itſelf, and that it could not be found; then the biſhop's inſtitution book itſelf (which is the next beſt evidence) may be produced. Tillard *v.* Shebbeare, Mic. Ter. 8 Geo. 3. C.B. 2 *Wilſ.* 366.

*Entries.*] An entry in the court rolls of a manor, ſtating the mode of deſcent of lands in the manor, is admiſſible evidence of the mode of deſcent, though no inſtances of any perſon's having taken according to it be proved.—In this ejectment, the leſſor of the plaintiff claimed under *a cuſtom of the manor for the youngeſt kinſwoman to inherit* in default of iſſue, and of brothers, ſiſters, nephews, and nieces, of the perſon laſt ſeiſed. *The plaintiff offered in evidence an entry in the court rolls of the manor, ſtating what the cuſtom was:* but the defendant's counſel objected that ſuch evidence of the cuſtom ought not to be received, until inſtances had been proved of ſuch a mode of deſcent having taken place. On the other ſide it was alleged, that the contrary had been held in a caſe in this court (1), wherein ſuch evidence had been determined to be admiſſible; and under this impreſſion it appeared, by an entry on the court rolls, that the homage, on the 17th of September, 1661 *(inter alia)*, had preſented the cuſtom, upon the abovementioned default, to be for *the youngeſt kinſman or kinſwoman*, to inherit, and never the eldeſt. It appeared that ſome of the ancient court rolls were loſt; but no inſtance in the court rolls was produced of any admiſſion beyond ſiſters, nor was any inſtance of the youngeſt kinſwoman taking, proved by living witneſſes. *It appeared, however, that, if the leſſor of the plaintiff were not entitled, another branch of that family, who did not diſpute the leſſor's right, had a better title than the defendant.* The jury found a verdict for the plaintiff. And a rule having been afterwards obtained, to ſhew cauſe why the verdict ſhould not be ſet aſide, *on the ground that the evidence of the preſentment of ſuch a cuſtom on the court rolls, by the homage, was not of itſelf ſufficient to eſtabliſh the cuſtom, inaſmuch as no inſtance was produced of its having been put in ure*; cauſe was ſhewn. —Lord KENYON, Ch. J. The cuſtom of one manor cannot be extended, by analogy, to another: but the mode of deſcent, under which a party claims, muſt be eſtabliſhed by proof; and the queſtion here is, whether or not there were any evidence of the cuſtom, upon which the plaintiff's claim was founded. The cuſtom is clearly defined in the paper Roe *ex dim.* Beebee *v.* Parker, Mic. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 26.

(1) *Denn dim. Goodwin* v. *Spray*, *ante*, vol. II. p. 619.

writing

writing produced from the court-rolls; and, without referring to the ſtrict rules of law, let us conſider the authenticity of this document on principles of plain common ſenſe. Near a century and a half ago, the homage (the tenants holding under the lord of the manor) being convened together *eo nomine* as the homage (not for the purpoſe of extending their claims either againſt the lord or ſtrangers, but) in order to aſcertain thoſe rights which were their own in common with the reſt of the tenants, and being poſſeſſed of all that information which either tradition or their own perſonal obſervations could furniſh, proceeded to deſcribe the ſeveral cuſtoms, which regulated the deſcent of the different ſpecies of tenure within this manor. Now can it be ſuppoſed that theſe perſons, acting under the ſanction of an oath, could for no purpoſe whatever give a falſe repreſentation of theſe cuſtoms; or is it not more probable that their account was the true one? Common ſenſe and common obſervation would induce us to believe the latter. The argument againſt the verdict ſeems to admit, that this document was a degree of evidence when it was produced to the jury; and if it were admiſſible in evidence, it not being oppoſed by any other ſpecies of evidence, and the jury having given credit to it, it puts an end to the queſtion. And that this was admiſſible, cannot be doubted; for tradition and the received opinion, are the evidence of the *lex loci*. A diſtinction, indeed, prevails between a preſcription as applied to a particular tenement, and a cuſtom affecting the whole diſtrict. And the latter has gone ſo far, that the cuſtom of one manor has been given in evidence to ſhew the cuſtom of another, where they are both governed by the border-law. Now here was full proof of a tradition reſpecting the cuſtom of deſcent in this manor; it was the ſolemn opinion of twenty-four homagers, who are the conſtitutional judges of that court, delivered on an occaſion when they were diſcuſſing the intereſts of all the tenants of the manor. I cannot diſtinguiſh this from the inſtance of a terrier, which is certainly evidence. The caſe of *Goodwin* v. *Spray*, is diſtinguiſhable from the preſent. Every thing that was ſaid by the Court in giving judgment, muſt be underſtood *ſecundum ſubjectam materiam*. That caſe firſt decided, that ſuch an inſtrument as the preſent is admiſſible; and then that that part of it, which ſaid that lands were not partible, either beween males or females, in general terms, was to be explained by the cuſtom as it had exiſted in point of fact, which did not extend to nieces. And if that deciſion go farther, and determine that ſuch a document is not admiſſible in evidence, unleſs inſtances in fact be previouſly proved to warrant the introduction of it, I muſt beg leave to diſſent from it. In this caſe, ſuppoſing the defendant had demurred to this evidence,

dence, the Court must have drawn the same conclusion from it which the jury have drawn; and therefore on the law of the case, the rule for a new trial must be discharged.—Grose, J. Where a party at *nisi prius* attempts to give reputation in evidence, the judge constantly tells the jury that it does not deserve any credit, unless it be supported by facts. But it never has been determined that a court-roll or a terrier is not *per se* admissible evidence, without proving some fact in support of it. The consequences of not receiving evidence of this kind, would be inconvenient to all the tenants of manors; for some of the instances of descent, according to this custom, very rarely happen; and if no instance were to happen in the memory of man, and the court-rolls were to be lost, as they were in this case, the custom itself would be entirely destroyed.—Rule discharged.

Where the right to the soil is in issue, entries written by the steward of a former owner, from whom title is derived, are admissible evidence, if the steward be dead.—On the trial of an action of trespass, wherein the issue was on the soil and freehold of the defendant, the plaintiff, who derived title under Lord *Barrymore*, offered in evidence several items, contained in a book in the hand-writing of one *Ashley*, who had many years ago been steward to Lord *Barrymore*, and was now dead. The manuscript was a common day-book, not particularly appropriated to *Ashley*'s concerns with Lord *Barrymore*, but containing a variety of other matters relating to his different employers; and the items in question, three in number, were *memoranda* of receipts of sums of money by *Ashley*, from different persons by name, for trespasses committed on the common in question, paid on account of Lord *Barrymore*: the first item was dated in 1739, the last in 1785. This evidence was rejected; and a verdict having been given for the defendant, a rule was obtained to shew cause why there should not be a new trial.—Per Curiam: The single question is, Whether these entries be not admissible evidence? It is clear that where a steward charges himself with the receipt of money, it shall be received in evidence before a jury to shew that such sum was received by him. But it has been objected that the steward's accounts should have been signed by him: if the entry be not in the hand-writing of the steward, undoubtedly it must be signed by him: but here all these entries were written by the steward himself, and, therefore, they were evidence to charge him with the receipt of the money; and if so, they should have been received in evidence on the trial of this cause, though probably they may not have much weight before the jury.—The rule absolute.

*Barry v. Rebbington*, Hil. Ter. 32 Geo. 3. B.R. 4. *Ter. Rep.* 514.

But entries made by a third person, deceased, in his books of receipts of rent from his tenant, for a particular estate, are

*Outram v. Morewood*, Hil. Ter. 33 Geo. 3 B.R. 5 *Ter. Rep.* 121.

are not evidence to prove the identity of the land, in a cauſe between two others.—This was treſpaſs for breaking and entering the plaintiff's cloſe, called The Cow Cloſe, in the pariſh of Alfreton. Plea, not-guilty, and ſeveral ſpecial pleas juſtifying under a right to dig coals in the *locus in quo*, as parcel of the lands of which Sir *John Zouch* was formerly ſeiſed. Sir *John Zouch* being ſeiſed of certain lands lying in this pariſh, in the 18 *Eliz.* conveyed them away, reſerving the coals under the ſame, and certain rents. *John Zouch*, to whom theſe rents and coals came by deſcent in the 15. *Jac.* conveyed them to one *Turner*, who afterwards ſold the rents, but not the coals, to *John Morewood*, who deviſed them to *M. Morewood*, who in the year 1708 conveyed them to *Rowland Morewood*, from whom the defendant claimed thoſe rents. And about three years ago, *G. Morewood*, the defendant's late huſband, who was then in the poſſeſſion of theſe rents, bought the coals alſo from *Thorton*, the legal repreſentative of the *Turner* family. At the trial, it became material to indentify the cloſe in queſtion, to be a part of thoſe lands which had been the eſtate of Sir *J. Zouch*, and out of which the rents and coals had been reſerved. This was attempted to be done, by tracing the lands through the poſſeſſion of ſeveral perſons claiming under the *Zouch* family; by ſhewing that this cloſe had been in their poſſeſſion; and that the ſame rent was paid now, as had been paid for it by the owners of the land to the perſons claiming under *Zouch*, during all that time; from whence it would follow, as was contended, that this was part of the lands of *Zouch*, out of which the coals alſo were reſerved, which was the only thing now in queſtion. To ſubſtantiate this, the deed of 1708 was produced (which referred to the former conveyance from the *Zouch* family), in order to ſhew that a rent of 39s. (the ſame which was now paid for this cloſe) had been payable out of lands, part of the *Zouch* eſtate, in the poſſeſſion of one *Adyn*, who was tenant to one *Machell*, the then owner of the inheritance; and that *Adyn* was in poſſeſſion of the cloſe alone, within eight years after the deed of *Anne*. *Then was produced, in order to fill up a chaſm of time, the evidence upon which the principal queſtion aroſe, which were entries in certain books made by Rowland Morewood*, in which he acknowledged the receipt of the ſame rent for ſeveral years from *Machell*, the owner of the Cow Cloſe, under whom the plaintiff derived title. It was proved by living witneſſes, that this rent of 39s. was continued to be paid by perſons claiming under *Machell*. *But the queſtion was, Whether theſe entries, made by a perſon from whom the defendant claimed the rent, though not the coals, ought to be received in evidence for the purpoſe of proving the identity of the land, in order to eſtabliſh his right*

to

*to the coals alſo.* The Chief Baron admitted the evidence. And there being a verdict for the defendant, a new trial was afterwards moved for, on the ground that this evidence had been improperly admitted.—PER CURIAM: This book ſtands in the ſame ſituation, and is entitled to the ſame degree of credit, as a declaration of *Rowland Morewood.* Now all evidence (except in certain particular caſes) muſt be given on oath: but this is merely the declaration of a perſon not on oath. And although a general right may be proved by traditionary evidence, yet a particular fact cannot. The entries in this book by *Rowland Morewood,* are mere private memorandums, to remind him, that he had received this rent, and it cannot be admitted to decide the right between the parties. Evidence of this kind can only be admitted to reſtrain, not to advance, the right of the party who makes it. What a man does in his cloſet ought not to affect the rights of third perſons: there is only one inſtance in which this is allowed, namely, the books of an incumbent reſpecting his tithes, which may be evidence for his ſucceſſors (1). But that has always been conſidered as an excepted caſe.—Evidence not on oath is not admiſſible, except in the caſe of pedigrees, and certain other excepted caſes, or where the declaration is evidence againſt the party making it.—The caſe of *Barry* v. *Bebbington* is diſtinguiſhable from the preſent, becauſe there the entry was made by a ſteward, who charged himſelf with the receipt of the money. But, as the evidence of a declaration by *Rowland Morewood,* would not have been admiſſible, his book is not: it being nothing more than a declaration. Nor can this be received in evidence, on the ground of tradition; becauſe the tradition of a particular fact is not evidence.

An allegation in an action for a falſe return to a *mandamus* of a cuſtom of payment, by the chapel-wardens of A. to the churchwardens of B. may be ſupported *by evidence of a cuſtom of payment to officers acting only for the townſhip* of B. not co-extenſive with the pariſh of B. but who have always been deſcribed as the churchwardens of B. Alſo an entry of the receipt of money by officers of a townſhip, from the officers of another townſhip, of a proportion of church rates, made in a pariſh book, is evidence to charge the latter officers with the ſame proportion in future. And another entry, explaining the proportions, made on the ſame page, is alſo admiſſible evidence.—In an action for a falſe return to a writ of *mandamus,* that there was no cuſtom within the pariſh of Bradford, that the inhabitants of the chapelry of Haworth ought to contribute one-fifth part of the money raiſed for the reparation and ſupport of the pariſh church of

Stead *et al.* v. Heaton *et al.* Eaſt. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 669.

(1) *Vid.* 2. *Vez.* 43.

Bradford;

Bradford; nor any cuſtom for the chapel-wardens of Haworth, to make any rate upon the inhabitants of the townſhip for church rates; ſeveral queſtions aroſe, amongſt others, 1ſt. The cuſtom alleged in the declaration was, that *the chapel-wardens of Haworth ſhould pay to the churchwardens of Bradford* ſo much. And by the evidence it appeared, that the pariſh of Bradford conſiſted of ſix townſhips or vills, of which the town of Bradford, and the chapelry of Haworth, were two; and that each of theſe diſtricts nominated their own two wardens at a veſtry, held for the whole pariſh. But the wardens of the town of Bradford were proved to have been always called churchwardens, and did in fact ſuperintend the pariſh church: and the wardens of the other townſhips were always called chapelwardens. It was objected, that this cuſtom was bad; for it appeared that the churchwardens alluded to were only officers for a particular townſhip, and by law there could be no churchwardens of any other diviſion than a pariſh; and taking them to mean the church-wardens of the whole pariſh as upon the face of the cuſtom they muſt be ſuppoſed to mean, then the evidence did not ſupport the allegation. 2dly, The cuſtom in queſtion being in diſpute, between the town of Bradford on the one hand, and the chapelry of Haworth on the other, evidence was admitted on the part of Bradford, of certain accounts of their own wardens, in 1679; in which were the following entries; "Received of Haworth, who this year diſputed "this our ancient cuſtom; but after we had ſued them, "paid it accordingly, 8l. and 1l. for coſts." And at the head of the ſame page was written, "It is an ancient cuſtom thus "to proportion church-lay; 1ſt, The chapelry of Haworth "pay one-fifth; Bradford a third of the remainder; and the "reſt to be equally divided, according to the churchwardens "of the ſeveral other townſhips in the pariſh." It was objected that theſe accounts, coming out of the hands of the Bradford officers, could not be made evidence by them of a right to call upon Haworth to contribute towards their rates. And that, at all events, if the receipt were evidence of the actual payment, the other part, ſtating the cuſtom, ought not to be ſo conſidered. Both theſe objections were overruled by the judge, and a verdict taken for the plaintiffs.—Lord KENYON, Ch. J. Theſe officers may have obtained the name of churchwardens of the town of Bradford, by preſcription; for church-rates depend upon preſcription alone. But if that be not their legal name, it is ſufficient here, for they have made their return to the writ of *mandamus*, as churchwardens of the town of Bradford; and it is merely a name of deſcription. And with regard to the admiſſibility of the evidence, it is clear that one entry was properly admitted, becauſe it charged the pariſh officers with the receipt of the money: and then the entry immediately preceding it muſt alſo

alſo be admitted, becauſe the other refers to it; in fact, they are both parts of one and the ſame tranſaction, each explaining the other. Even without this reference, I do not ſee any objection to admitting the ſecond entry, as evidence *proprio vigore*, becauſe uſages, relating to pariſhes, muſt be got out of the pariſh books. It is like the inſtance of court rolls, which are frequently admitted in evidence, though they affect the rights of third perſons. However, it is admiſſible for the reaſon firſt given.

*Gazette.*]—A Gazette is evidence of all acts of ſtate.—The defendant was convicted upon two informations: the firſt was an information for a libel, entitled, "A Letter addreſſed to the Addreſſers on the late Proclamation;" the ſecond for a libel, entitled, "An Addreſs to the Tradeſmen, "Mechanics, Labourers, and other Inhabitants of the Town "of Newark, on a parliamentary Reform." The firſt information ſtated, that before the publiſhing of the libel thereinafter mentioned, to wit, &c. "our lord the king, by "the advice of his privy council, had iſſued his royal proclamation, whereby, &c. [*reciting the proclamation*]; that after "the ſaid proclamation had been iſſued, and before the publiſhing of the ſeditious libel thereinafter mentioned, divers "addreſſes had, on occaſion of ſuch proclamation, been "preſented to his ſaid majeſty by divers of his loving "ſubjects, expreſſing their loyalty and attachment to his "ſaid majeſty, and the government and conſtitution of this "kingdom, &c." It then proceeded to ſtate, that the defendant, well knowing the premiſes, &c. but maliciouſly and ſeditiouſly intending to bring the ſaid proclamation into contempt, &c. and to ſtir up ſedition, &c. publiſhed the libel in queſtion, entitled, "A Letter addreſſed to the Addreſſers on "the late Proclamation," which was averred to mean his ſaid majeſty's proclamation: after which followed the libel itſelf. —On a motion for a new trial, it was objected againſt the verdicts, that with reſpect to the libel, entitled, "A Letter, addreſſed, &c." the allegation that divers addreſſes had been preſented to the king, &c. was not proved at the trial; the only proof of it being *the production of the Gazette, in which it was ſtated, that ſuch addreſſes* [ſtating them] *had been preſented to the king.* Lord KENYON, Ch. J.—That the Gazette is evidence of many acts of ſtate is not doubted; that it is evidence of the king's proclamation ſeems not to be diſputed in this caſe, and that it is evidence of a proclamation for the performance of quarantine cannot be doubted. In order to encounter this general propoſition (a doctrine adopted at all times), caſes have been put at the bar, which have no reference to the ſtate, grants by the king to a ſubject

The King *v.* Daniel Holt, Mic. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 436.

of a tract of land, or of preſentations: but theſe are the evidence of private titles, and become parts of the private muniments of the families to whom they are granted. But they have no reſemblance whatever to the acts which have been the ſubject of diſcuſſion in this caſe, acts done by and to the king in his regal character; they are the addreſſes of different bodies of ſubjects going to offer their loyalty at the foot of the throne, and received by the king in his public capacity. They then become acts of ſtate; and of ſuch acts, announced to the public in the Gazette, it is admitted, that the Gazette is evidence in courts of juſtice: therefore, there is no foundation for this objection. ASHHURST, J. agreed. BULLER, J.—The Gazette is evidence, upon this principle, that every thing which relates to the king, as king of this country, is, in its nature, public; and that a Gazette, which contains any thing done by his majeſty, in his character of king, or which has paſſed through his majeſty's hands, is admiſſible evidence in a court of law, to prove ſuch thing. The caſe of *R.* v. *Franklin*, 9 *St. Tr.* 259. though not directly on the point, eſtabliſhes this to be evidence; for there the Court admitted the journals of the Houſe of Lords, not only to prove the addreſs to the king, but the king's anſwer to the Houſe. Now, if the journals were evidence to prove both thoſe things in that caſe, it ſeems to me that the Gazette, which is publiſhed by royal authority, is good evidence to prove, that theſe addreſſes had been preſented to the king. In *The King* v. *Withers*, the priſoner, who was a common ſoldier, was indicted for the murder of a ſerjeant in the ſame regiment. It became a material queſtion, to conſider how far the priſoner was to be obedient to his ſerjeant; that depended on the articles of war; and, the proſecution being ſtrangely neglected, the articles of war were not produced at the trial. It occurred to me, that there was great reaſon to doubt on the propriety of the conviction, founded on this defective evidence; and I reſerved the caſe for the opinion of the judges, who thought that *the articles of war ought to have been produced, and if they had been produced, as printed by the king's printer, it would have been ſufficient evidence.* However, on this information, I do not think the proſecutor need have given any evidence at all of theſe addreſſes: the averment, reſpecting theſe addreſſes, ſeems unneceſſary; for the information, after ſtating the proclamation and the addreſſes, charges the defendant with *a ſeditious intent to bring the ſaid proclamation into contempt*, without noticing the addreſſes again. The diſtinction between material and immaterial averments is perfectly well ſettled: if the averment be material, that is, if it be connected with the charge, it muſt be proved; but if it be totally immaterial, and if the libel be not connected with

with the averment, it need not be proved.—GROSE, J. agreed.

*Proceedings in the Courts.*]—On the trial of an action of trover, it appeared in evidence, that the plaintiff, who was a wine-merchant, had purchased several pipes of wine of one *Hicks*, which the defendant seized, for want of a permit; and it appearing to be a malicious seizure, the jury gave a verdict for the plaintiff, with 150l. damages. *The defendant had prosecuted this seizure in the court of Exchequer, and the record of acquittal was read in evidence.* The defendant, at the trial, insisted that the permit given with the wines was out of time, the seizure being made between three and four o'clock in the afternoon, on the 20th of July. And the judge was of that opinion; but it being suggested that a different determination had been made in the court of Exchequer, he saved the point for the opinion of this Court, with liberty to enter a verdict for the defendant, if it should be adjudged with him. The question, therefore, between the parties was, Whether the two days expired at ten on the morning of the 20th, or whether the permit continued in force the whole of that day? It was dated nine o'clock in the morning of one day, and gave the party one hour for removing it out of the stock of *A.* and two days more for delivering it into the stock of *B.*—THE COURT said, that *the judgment of acquittal in the Exchequer, which was given in evidence, being a judgment* in rem, *was conclusive, as to the question of the illegality of the seizure; and precluded all reasoning upon the construction of the permit*, although they might doubt whether that Court had put a true construction upon the effect of the instrument, in respect to the time of its operation; therefore the rule was discharged. BUT, on a subsequent day, THE COURT being moved to open the rule again, on the ground that the case had been saved upon a different point which was stated in the report, namely, the construction of the permit. THE COURT said, that they could not go out of the report, which confined the question to the only point made at the trial, concerning the true construction of the permit; upon which they thought no doubt could be entertained, but that the time was out when the seizure was made.—Verdict entered for the defendant.

Cooke *v.* Sholl, Ea. Ter. 33 Geo. 3. B.R. 5 *T. Rep.* 255.

A bill in Chancery is no evidence of the facts contained therein, not even of those on which the prayer of relief is founded.—The lessor of the plaintiff was the heir at law of a mortgagor, and, in 1778, filed a bill in Chancery against *G. Pym* for an account, and in order to redeem; to which the latter appeared, but died before any answer was put in, having, by his will, devised the premises as freehold in trust to *W. Roman, H. Holt*, and *F. Hilton, to the use of his*

Doe, *ex dim.* Bowerman, *v.* Sybourn, Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 2.

*natural ſon, J. Pym*, and to convey the ſame to the ſaid *J. Pym* in fee, on his attaining his age of twenty-one years. The ſuit in Chancery was revived in 1790, againſt the legal repreſentatives of *G. Pym*, and a decree of redemption was obtained in 1794. in favour of *Bowerman*; and, amongſt other things, the Court directed the defendant *Sybourn*, who was the tenant in poſſeſſion, to attorn to *Bowerman*, which he accordingly did.—On the trial of this ejectment, the defendant ſet up a leaſe from *J. Pym*, dated the 16th of October, 1789, executed after he came of age, whereby he demiſed the premiſes to the defendant for eighty-one years, to commence from the 16th of February, 1791, when his former leaſe expired. Againſt this it was objected, on the part of the leſſor of the plaintiff, that it did not appear that *J. Pym* had the legal eſtate in him at the time, *but that it was then outſtanding in his truſtee, without whoſe concurrence no legal title could be conveyed:* and his counſel offered in evidence a bill in Chancery, filed in 1790, by the preſent defendant, in conjunction with *J. Pym*, againſt *Bowerman* and *H. Holt*, the ſurviving deviſee in *G. Pym*'s will, ſtating, among other things, a leaſe to *Sybourn*, of the premiſes from *W. Holt* and *G. Pym*, for twenty-one years, from the 16th of February, 1770, *which bill prayed a conveyance of the legal eſtate to* John Pym, *and that* H. Holt *might be reſtrained from compelling* Sybourn *to pay his rent to him:* this bill was afterwards diſmiſſed, at the time of the decree for redemption. This evidence was rejected by Lord KENYON at the trial, upon the ground that a bill in Chancery was not evidence of any fact therein contained, but was to be taken merely as the ſuggeſtion of counſel; and he thought that the jury might preſume a legal conveyance from the truſtees to *J. Pym*, upon his coming of age, purſuant to the terms of the truſt. Upon which there was a nonſuit: and afterwards, on a motion to ſet the ſame aſide—PER LD KENYON: A bill in Chancery is never admitted in evidence (1), further than to ſhew that ſuch a bill did exiſt, and that certain facts were in iſſue between the parties, in order to let in the anſwer or depoſitions of the witneſſes. And as to the preſumption which the jury were directed to make, his lordſhip ſaid, he had grounded himſelf upon the doctrine laid down by Lord *Manſfield*, in *Lade* v. *Holford*, *ante*, p. 228, which was not, as had been ſuppoſed, that an ejectment might be maintained upon a mere equitable title, which would remove ancient land-

(1) In *Taylor* v. *Cole*, Weſtm. Sittings after Hil. Ter. 1789, his lordſhip held the ſame doctrine, with the exception that a bill in Chancery, by an anceſtor, was evidence to prove a family pedigree ſtated therein, in the ſame manner as an inſcription on a tomb-ſtone, or in a bible.

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marks in the law, and create great confuſion (1); but that, in all caſes where truſtees ought to convey to the beneficial owner, he would leave it to the jury to preſume, where ſuch a preſumption might reaſonably be made, that they had conveyed accordingly, in order to prevent a juſt title from being defeated by a matter of form.—Rule refuſed.

A recovery in ejectment againſt the wife cannot be given in evidence, in an action againſt the huſband and wife for meſne profits.—This was an action of treſpaſs for meſne profits, brought in the name of the nominal plaintiff in ejectment. The notice of declaration in ejectment was ſerved on the wife only, and in her own name only. It was proved that her huſband allowed her a ſeparate maintenance, and that he had not been near her for many years. The judge refuſed to receive the judgment in ejectment, in evidence againſt the huſband, and the plaintiff was nonſuited. And afterwards, on a motion to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and cauſe ſhewn, *The Court* ſaid, that the judgment in ejectment could not be admitted as evidence againſt the huſband, becauſe he was no party to that ſuit; that, in this caſe, there was no evidence of the treſpaſs, but the judgment in ejectment; and that the wife's confeſſion, of a treſpaſs committed by her, could not be given in evidence to affect the huſband, in an action in which he is liable for the damages and coſts.—Rule diſcharged.

Denn *v.* Joſhua White and Wife, Hil. Ter 37 Geo. 3. B.R. 7 *Ter. Rep.* 112.

*Proof of hand-writing.*]—An inſtrument executed abroad, and witneſſed by a foreigner reſiding there, may be proved by evidence of the hand-writing of the witneſs, and of the contracting party, but not by the latter alone.—In debt, on a charter-party of affreightment, not under ſeal, the charter-party, being produced, appeared to be dated the 26th of September, 1795, and ſigned by the name of *M. Trompowſky, and atteſted by one* Knieriem, *whoſe ſeal, as a ſworn broker, was affixed to the inſtrument.* A witneſs was called, who was a merchant, reſiding at Hull, long converſant in the Ruſſia trade, and in habits of correſpondence with the defendant, and who proved the ſignature to the charter-party to be his hand-writing; he alſo proved, that eight years ago a ſworn broker, named *Knieriem*, was living, and reſident at Riga, and he had not heard of his death; another witneſs proved, that he knew *Knieriem*, acting there as a broker, in 1790: but neither of theſe witneſſes knew his hand-writing. After the plaintiff had gone through his whole caſe, *it was objected, amongſt other things, that the charter-party was not duly proved*;

Barnes *v.* Trompowſky, Ea. Ter. 37 Geo 3. B.R. 7 *Ter. Rep.* 265.

(1) Vid. *Goodtitle* d. *Jones* v. *Jones*, *ante*, p. 293.

*but the judge thought there was ſufficient evidence to go to the jury, and the plaintiff recovered a verdict.* A rule was afterwards obtained, calling on the plaintiff to ſhew cauſe, why the verdict ſhould not be ſet aſide, and a new trial had. BUT, PER CURIAM (after cauſe ſhewn), Generally ſpeaking, every inſtrument, whether under ſeal or not, the execution of which is witneſſed, muſt be proved in the ſame manner, regularly, by the witneſs himſelf, if living; if dead, by proving his hand-writing; if reſiding abroad, by ſending out a commiſſion to examine him, or, at leaſt, by proving his hand-writing; which laſt, indeed, is a relaxation of the old rule, and admitted only of late years. There was a caſe tried at Guildhall, where the ſubſcribing witneſs, being domiciled in a foreign country, Lord *Mansfield* permitted evidence to be given of his hand-writing. That opinion was received with approbation at the time, on account of the neceſſity and convenience of the caſe (1). The ſame medium of proof has alſo been admitted, where the ſubſcribing witneſs has been ſought for, and could not be found, ſo as to furniſh a preſumption that he was dead. But the rule has never been relaxed further than theſe inſtances, and there is neither neceſſity nor convenience in doing ſo. *Swire* v. *Bell*, *ante*, vol. I. 362, went on the ground, that the ſubſcribing witneſs was intereſted at the time of the execution, and alſo at the time of trial. Rule abſolute.

Adam *et ux.* v. Keir, Mic. Ter. 30 Geo. 3. C.B. 1 *Pul.* & *Boſ.* 360.

In debt on bond, if one of the atteſting witneſſes be dead,

(1) *Wallis* v. *Delancey*, ſittings at Weſtminſter, 13th Feb. 1790, cor Lord *Kenyon*.—Debt on bond, dated in 1774, which had been executed by the defendant at New-York, in America, to the plaintiff, who was averred to be truſtee of ſir *Frederick Haldiman*. There were two witneſſes to the bond, and it was proved thus; evidence was given of the hand-writing of *Rivington*, one of the ſubſcribing witneſſes, who was in America. Objection was taken that this was not ſufficient, without proving alſo the hand-writing of the obligor; and Lord *Kenyon* being of that opinion, it was proved accordingly. 2d Objection, that the hand-writing of *W. Moreton*, the other ſubſcribing witneſs, ſhould alſo be proved, and that he alſo was abroad or dead; otherwiſe *non conſtat*, but he might have been ſubpœnaed here. Lord *Kenyon* thought that ſome evidence of that ſort was neceſſary. Whereupon the plaintiff proved, that there had been a man of the name of *Moreton*, who had lived as a clerk with *Rivington*, the other ſubſcribing witneſs; but it could not be proved that his name was *William*, or that it was the hand-writing of that *Moreton*, or that that *Moreton* might not now be in England; all which was urged by *Erſkine* againſt the admiſſion of the proof. But Lord *Kenyon* held it ſufficient; for this being the caſe of a foreign tranſaction, though, perhaps, the evidence was capable of being more perfect, yet it was ſufficient and reaſonable evidence to go to the jury at leaſt, unleſs it were rebutted by ſome evidence on the other ſide. The expence of ſending out a commiſſion, would (he ſaid), in many caſes, be more than the value of the ſum in diſpute.

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and the other beyond the proceſs of the court, it is ſufficient to prove the hand-writing of the witneſs that is dead.—The inſtrument in queſtion was made in Jamaica, and atteſted by two witneſſes; but, being produced at the trial, it appeared to have no ſeal, though a mark of a particular kind had been made with a pen, in the place where bonds are uſually ſealed. Evidence was admitted to ſhew a cuſtom in Jamaica, to execute bonds in this manner. *One of the atteſting witneſſes having been proved to be dead, and the other to be reſident in Jamaica*, the hand-writing of the former only was eſtabliſhed, and no evidence was given of the hand-writing of the obligor.—There was a verdict for the plaintiff, ſubject to the opinion of the Court. On a motion for a rule to ſhew cauſe, why the verdict ſhould not be ſet aſide, it was inſiſted, 1ſt, that the hand-writing, either of the witneſs living in Jamaica, or of the obligor, ſhould have been proved; 2dly, that the evidence of the cuſtom in Jamaica ought not to have been received. PER CURIAM: There is nothing in the firſt point; for, where a witneſs is dead, the courſe is, to prove his hand-writing. In this caſe, one of the atteſting witneſſes was dead, and the other was beyond the reach of the proceſs of the court; the beſt evidence, therefore, which could be obtained, was given. The hand-writing of the obligor need not be proved; that of the atteſting witneſs, when proved, is evidence of every thing on the face of the paper (1), which imports to be ſealed by the party.—On the laſt ground, however, there is no objection to the rule, to ſhew cauſe, being granted.—Rule to ſhew cauſe granted (2).

*In general.*]—Evidence of the day, when a writ was actually ſued out, may be admitted, to obviate the fictitious relation of a declaration to the firſt day of the term, and thereby ſhew, that the cauſe of action aroſe ſubſequent to the bringing of the action. — It was an action of trover: no actual converſion was proved; but the evidence of converſion was a demand and refuſal, on the *2d of May*.—It was objected at the trial, "that this demand and refuſal appeared "to be *ſubſequent* to the bringing of the action:" for it appeared on the *niſi prius* roll, that the *bill was filed of Eaſter term*, and, conſequently, as there was *no ſpecial memorandum*, it muſt refer to the *firſt day* of that term, which was in the beginning of April (long before the time of the demand and refuſal upon the ſecond of May). And there was no other

Morris *v.* Pugh and Harwood, Mic. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1241. 1 *Black. Rep.* 312. 320.

(1) See vol. I. p. 361.

(2) But the Court recommended the defendant to accede to the terms offered by the plaintiff, viz. of taking judgment without coſts, which the defendant afterwards aſſented to.

evidence but this to ſupport the declaration.—In anſwer to this objection, the counſel for the plaintiff produced the *writ*, which appeared to be ſued out AFTER the ſecond of May.—The counſel for the defendants objecting to this evidence, as *not admiſſible*, the judge, Ld MANSFIELD, reſerved the point for the opinion of the Court; and, if the Court ſhould be of opinion, "that it *was admiſſible*," then the verdict (which was found for the plaintiff) was to ſtand, otherwiſe the plaintiff to be nonſuited. Lord MANSFIELD:—Refuſal upon demand is not an actual converſion, but *evidence* of it. If the refuſal on the ſecond of May had really been after the action brought, I ought to have left it to the jury, as evidence of a converſion, before the bringing of the action. But I had no doubt of admitting the writ, to ſhew "that the refuſal was "before the commencement of the ſuit." It is true, if there be no ſpecial memorandum, the bill, by fiction of law, relates to the firſt day of the term. But fictions of law hold only in reſpect of the *ends and purpoſes for which they were invented*; when they are urged to an intent and purpoſe *not* within the reaſon and policy of the fiction, the other party may ſhew the truth.—The BILL is *not* the commencement of the ſuit; the writ is: and being after the time to which the bill relates, ſhews that there ſhould have been a ſpecial memorandum.—Judges ought to lean againſt every attempt to nonſuit a plaintiff upon objections which have no relation to the real merits; much more, when the plaintiff is clearly entitled to recover upon the merits, and muſt recover in another action.—It is unconſcionable in a defendant to take advantage of the *apices litigandi*, to turn a plaintiff round, and make him pay coſts where his demand is juſt. Againſt *ſuch* objections every poſſible preſumption ought to be made, which ingenuity can ſuggeſt. How diſgraceful, then, would it be to the adminiſtration of juſtice, to allow *chicane* to obſtruct *right*, by the help of a legal fiction, contrary to the truth of the fact! I am clearly of opinion, "that the writ "was *rightly* admitted to be given in evidence."—It has been determined, in actions upon *penal* ſtatutes, which muſt be brought within a limited time, "that the plaintiff may "ſhew the true commencement of the proſecution, *contrary* "to the fiction:" and this being done in ſupport of a *penal* action, is much ſtronger than the preſent caſe, where truth is admitted, to prevent manifeſt injury and wrong.

Mary Leader *v.* Moxton, *et al.* Mic. Ter. 14 Geo. 3. C.B. 3 *Wils.* 461. 2 *Black.* 924.

So in this caſe it was held, that the *capias ad reſpondendum* was very properly read in evidence, to prove the time of the commencement of the ſuit.

The King *v.* Lord George Gordon,

On the trial of the defendant for high-treaſon, ſome of the witneſſes for the crown had given in evidence, that Lord *George*, in addreſſing the crowd, either at coachmakers'-hall,

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or in the lobby of the House of Commons, had alluded to what had passed in Scotland, at the time when it was in agitation to extend the benefit of the provisions of the statute of 18 *Geo.* 3. c. 60. to the Roman catholics in that country, and had said, "the *Scotch* carried their point, by firmness and "steadiness;" "the *Scotch* had no redress, till they pulled "down mass-houses;" or, "when the *Scotch* pulled down "mass-houses, they had redress." The attorney-general then offered to call witnesses, to prove that mass-houses had actually been destroyed in Scotland. THIS EVIDENCE WAS OBJECTED TO, as not having any relation to the present enquiry, or the conduct of Lord *George*, and, therefore, irrelevant and inadmissible. BUT THE COURT over-ruled the objection, on the ground that the evidence offered would shew what it was that Lord *George* had referred to, and held out as an example, and that it was matter of fact which had an actual existence. A witness being asked, on the cross-examination, if he was a Roman catholic, the question was objected to; AND THE COURT RULED, that he was not obliged to answer it, because, if he were to say he was, his declaration would be evidence against him, and might subject him to penalties.—Sworn copies of certain entries in the journals of the House of Commons were produced, and read as evidence, on the part of the crown, without being objected to (1). Hil. Ter. 21 Geo. 3. B.R. 2 *Doug.* 592.

*General declarations, or the answer of a parent in Chancery,* are good evidence, after the death of such parent, *to prove that a child was born before marriage*; but not to prove that *a child, born in wedlock, is a bastard.*—On the trial of an ejectment, the only question was, Whether the lessor of the plaintiff was the legitimate son of *Francis* and *Mary Stevens*, or was born of *Mary* before their marriage? For the plaintiff, Goodright, *ex dem* Stevens, *v.* Moss, *et al.* Ea. Ter. 17 Geo. 3. B.R. *Cowp.* 591.

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(1) A motion was made in M. 12 *Geo.* 3. (27 Nov. 1771), for a rule on the East-India company, to shew cause why they should not permit their original transfer books to be produced, on the ground that copies from them could not be read. And it was urged, that the general rule was, that *copies of nothing* but records are admissible. BUT THE COURT denied the rule to be as stated, and mentioned several instances, where copies of matters, not of record, are admissible; as copies of court-rolls, of parish registers, &c. And Lord MANSFIELD expressly said, that copies of the journals of the House of Commons are evidence. THE COURT added, that the reason, *ab inconvenienti*, for holding it not necessary to produce records, applied, with still greater force, to such public books as the transfer books of the East-India company; for the utmost confusion would arise, if *they* could be transported to any the most distant part of the kingdom, whenever their contents should be thought material on the trial of a cause. The rule granted was, to shew cause *why copies of those entries in the transfer books, which the party meant to make use of*, as relative to the matter in dispute, should not be taken and read in evidence at the trial; the rule to be served both on the solicitor for the company, and the opposite party.—*Douglas* adds, that the correct principle, therefore, seems to be as laid down by Lord *Holt*, in a case of *Lynche* v. *Clerke*, viz. "That, wherever an "original *is of a public nature*, and would be evidence if produced, an immediate "sworn copy thereof will be evidence." 3 *Salk.* 154.

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the regiſter of the marriage of *Francis Stevens* and *Mary Packer*, dated November 2, 1703, and the regiſter of the birth of the leſſor of the plaintiff, in the following words, "Chriſtenings, 1704, *Samuel*, ſon of *Francis* and *Mary* "*Stevens*, baptized July 3," were produced.—It was inſiſted on the part of the defendant, "that the leſſor of the plaintiff "was born, and privately baptized, before the marriage, "and that there was a public baptiſm after the marriage," which accounted for the regiſter. They firſt offered witneſſes to *general* declarations, by the father and mother, that *Samuel*, the leſſor of the plaintiff, was born before marriage; *which evidence the judge rejected.*—They alſo offered evidence, that there was a general reputation in the place where the father and mother reſided, that he was born before marriage, *which evidence was likewiſe rejected.* And, laſtly, they offered an anſwer of the mother of the leſſor of the plaintiff, to a bill in the court of Chancery, by the committee of *Ann*, a lunatic, the perſon laſt ſeiſed, againſt the leſſor of the plaintiff and his mother. In which anſwer, *the mother declared him to be illegitimate*; that he was born *before marriage*, and privately baptized; and again publicly baptized after the marriage: *which evidence was alſo rejected.* A verdict, therefore, paſſed for the leſſor of the plaintiff, ſubject to the opinion of the Court upon theſe points of evidence. Lord MANSFIELD, Ch. J.—The law of England is clear, that the declarations of a father or mother cannot be admitted to baſtardize the iſſue born after marriage; but here the evidence offered is only to prove the time when the iſſue was born, and to ſhew whether it was before the marriage or after: and two queſtions have been made, 1ſt, Whether the father and mother could have been examined, if alive? 2dly, If they could, whether their declarations, if ever ſo ſolemn, can be admitted as evidence after their death? In this caſe there is evidence of the fact of the marriage, but there is no evidence of the time of the birth; the regiſter only proves the chriſtening; but *non conſtat* from thence, when the child was born.—As to the firſt queſtion, I ſhould have as ſoon expected to hear it diſputed, whether the atteſting witneſſes to a bond could be admitted to prove the bond: I have known it done over and over again, and it is much too clear to admit of a doubt. In this court, at *niſi prius*, a mother was allowed to prove a clandeſtine marriage at the Fleet; and no other evidence was given, to ſhew the legitimacy of the child.—In Lord *Valentia*'s caſe in the Houſe of Lords, April 22, 1771, where the queſtion was, Whether the Earl of Angleſea was married to the Counteſs Dowager of Angleſea on the 15th of September, 1741, prior to the birth of Lord *Valentia*, their ſon, who was born in the year 1744? The Counteſs Dowager, having no intereſt,

intereſt, was admitted as a witneſs, to prove the fact of the marriage. In *Stapylton* v. *Stapylton*, about the year 1739, 1 *Atk.* 4. upon an iſſue to try whether the plaintiff was legitimate or not, the mother attended at Guildhall, to prove he was illegitimate: but it happened that ſhe had made an affidavit, in which ſhe had ſworn, that ſhe and her huſband had been married long before the plaintiff was born, and this affidavit was intended to be made uſe of againſt her: but there was not an idea, on either ſide, that ſhe was not a proper witneſs to the fact of the marriage.—*As to the time of the birth*, the father and mother are the moſt proper witneſſes to prove it; but it is a rule, founded in decency, morality, and policy, that they ſhall not be permitted to ſay, *after marriage*, that they have had no connection, and, therefore, that the offſpring is ſpurious; more eſpecially the mother, who is the offending party: but *the queſtion of acceſs or non-acceſs is totally different from giving evidence of the time of the birth.*—The next queſtion is, Whether the declarations of the father and mother, in their life-time, can be admitted in evidence after their death? Tradition is ſufficient, in point of pedigree. Circumſtances may be proved; for inſtance, ſuppoſe, from the hour of one child's birth to the death of its parent, it had always been treated as illegitimate, and another introduced and conſidered as the heir of the family; that would be good evidence.—An entry in a father's family bible, an inſcription on a tomb-ſtone, a pedigree hung up in the family manſion, are all good evidence; ſo the declarations of parents in their life-time. If the credit of ſuch declaration is impeached, it muſt be left to the jury to judge of.—As to the declaration made by the mother, in her anſwer to the bill filed againſt her in the court of Chancery, it is not like offering a depoſition, or an anſwer in evidence, againſt a perſon, not a party to the original ſuit; that cannot be done; for this reaſon, becauſe ſuch perſon has it not in his power to croſs-examine: but here the anſwer is offered only as evidence under her hand, of her having made ſuch declaration.—Therefore, as part of the evidence, which was material in this caſe, and which ought to have been admitted, was rejected: there muſt be a new trial.

Bauerman, *et al.* *v.* Radenius, Tr. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 663.

The defendant may give in evidence, the declarations or admiſſions of the plaintiff on the record to defeat the action, although ſuch plaintiff appear to be only a truſtee for a third perſon.—This was an action on the caſe, againſt the defendant, who was maſter of a veſſel for certain goods to be carried from thence to London: there to be delivered in good condition and dry (except in caſe of inevitable damage or leakage) to Meſſrs. *Van Dyck* and Co. for a certain reaſonable freight to be paid to the defendant, the defendant promiſed to carry

carry and deliver the ſame accordingly; the ſhip with the goods arrived ſafely from Embden at London; and although Meſſrs. *Van Dyck* and Co. paid the freight for the ſame, yet the defendant did not deliver the goods in good condition and dry, although not prevented from ſo doing by inevitable damage or leakage, but on the contrary, delivered the ſame wet and ill-conditioned, and the ſaid goods were through the neglect and default of the defendant much damaged and ſpoiled, &c. To this the general iſſue was pleaded.—At the trial before Lord *Kenyon* at Guildhall, much evidence was at firſt gone into, in order to ſhew that the injury aroſe from the unſkilful ſtowing of the goods on board the veſſel, and not from the inevitable danger of the ſea as the defendant endeavoured to eſtabliſh. *But the principal queſtion aroſe on the production in evidence by the defendant of a letter from the plaintiffs, who were the ſhippers of the goods to* Van Dyck *and Co. entirely exculpating the defendant from all blame or imputation of negligence or miſconduct, and ſtating, that he acted in every reſpect according to their* (the plaintiffs') *orders, by ſtowing the goods under their direction.* But it alſo appeared in the ſame letter, that *Van Dyck* and Co. were the perſons on whoſe riſk the goods were ſhipped, that they were the perſons really intereſted in the ſuit, and had indemnified the plaintiffs, their agents, in whoſe name they had brought this action. Whereupon it was contended at the trial in ſupport of the action, that as it was diſcloſed that *Van Dyck* and Co. were the real plaintiffs, and the nominal plaintiffs only their agents, the former ought not to be concluded by the admiſſions of their agents proved too by letter, without the ſanction of an oath, and that therefore this evidence ought to be rejected: but Lord *Kenyon* being of a different opinion, the plaintiff was nonſuited.—Afterwards it was moved to ſet aſide the nonſuit. Againſt which rule, cauſe was ſhewn.—Lord KENYON, Ch. J. This was an action brought by *Bauerman* and Co. againſt the defendant, *Radenius*; and in the courſe of the trial, an admiſſion by the plaintiffs themſelves was proved, that there was no colour for the action: which admiſſion was not fraudulently obtained from them, but was the opinion that the plaintiffs really entertained on the merits of the caſe. And the only queſtion now is, Whether or not that ought to conclude the caſe againſt the plaintiffs who made the admiſſion? If the queſtion that has been made in this caſe had ariſen before Sir *M. Hale*, or Lords *Holt* or *Hardwicke*, I believe it never would have occurred to them, ſitting in a court of law, that they could have gone out of the record, and conſidered third perſons as parties in the cauſe. Here it has been contended that *Bauerman* and Co. are to be laid out of the caſe entirely, and we are deſired to ſubſtitute *Van Dyck* and Co. as plaintiffs in their room:

room: but if they may be taken to be off the record, then they may be witneſſes, and yet it is not pretended that they could have been examined; the argument therefore, that aſſerts that they may be taken from off the record, not holding good to all purpoſes, fails entirely. I cannot conceive on what ground it can be ſaid, that *Bauerman* and Co. may be conſidered not as the parties in the cauſe for the purpoſe of rejecting their admiſſions, and yet as the parties in the cauſe for the purpoſe of preventing their being examined as witneſſes. *I take it to be an incontrovertible rule, that the admiſſion made by a plaintiff on the record is admiſſible evidence; and on the trial of this cauſe, there was proof of an admiſſion by the plaintiffs, that they had no ground upon which to ſupport the action.*—I am, therefore, clearly of opinion, on principles of law, that the plaintiffs cannot recover in this action, and that we cannot in this caſe aſſume the juriſdiction of a court of equity, in order to over-rule the rigid rules of law.—ASHHURST, J. It was competent to *Van Dyck* and Co. to have made themſelves parties to the record, inſtead of which they have choſen to ſue in the names of *Bauerman* and Co. by which they have made the latter the real plaintiffs in a court of law, and are bound by their acts, and by the acts of other perſons done by the orders of *Bauerman* and Co. Here it is admitted, that if the letter in queſtion were to be read as againſt *Bauerman* and Co. conſidering them as the plaintiffs, it afforded ſufficient ground to convince a jury that the plaintiffs ought not to recover: but it is argued that, though the letter be admiſſible in evidence, as it appears by the latter part of it that *Bauerman* and Co. were acting only as agents for *Van Dyck* and Co. the admiſſion made by the former, ought not to prejudice the latter. But that argument cannot be ſupported. When *A.* appoints *B.* his agent, he is bound by every act and order of his, done within the ſcope of his authority. Here it appears by the letter, that *Bauerman* and Co. were preſent when the ſhip was loading, and approved of the mode in which it was effected: then if the loſs happened in conſequence of the directions given by *Bauerman* and Co. *Van Dyck* and Co. muſt be bound by it as much as if the orders had been given by themſelves.—GROSE, J. As long as *Bauerman* and Co. are plaintiffs on the record, they muſt be taken to be ſo in all the conſequences. Here it appeared by their own acknowledgment, that there was no foundation for the action, and that acknowledgment muſt in this action conclude *Van Dyck* and Co.—LAWRENCE, J. The ground, on which it muſt be contended that the admiſſion made by a mere truſtee is not evidence, is that he has no intereſt in the ſubject, and may therefore be induced to admit what is not true. But in this caſe, *Van Dyck* and Co. are in this difficulty; the

the preſent plaintiffs either have or have not an intereſt; but it muſt be conſidered that they have an intereſt in order to ſupport the action, and if they have, an admiſſion made by them that they have no cauſe of action is admiſſible evidence. I have looked into the books to ſee if I could find any caſe in which it was holden that the admiſſion of a plaintiff on the record was not evidence, but have found none. There is a caſe in *Salkeld* (1), where Lord *Holt* ſaid, that if the plaintiff in ejectment, who is conſidered only as a truſtee for the leſſor, releaſed the action, he might be committed for a contempt of the court, but he did not ſay that the releaſe would not defeat the action; this, therefore, appears to be the moſt that a court of law can do in caſes of this kind (2).—Rule diſcharged (3).

Rowe v. Haſland, Ea. Ter. 3 Geo. 3. B.R. 1 *Black.* 405.

In eſtabliſhing a title upon a pedigree, where it may be neceſſary to lay a branch of the family out of the caſe, it is ſufficient to ſhew, that the perſon has not been heard of for many years, to put the oppoſite party upon proof that he ſtill exiſts. Many perſons go to the Eaſt and Weſt Indies, and are never heard of again. What is done on ſuch a trial is no injury to the man, or to his iſſue, if he ſhould afterwards appear and claim the eſtate.

J. Dodd *v.* Kyffin, Tr. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 354.

On the trial of an action of treſpaſs, the defendant may give evidence of title under the general iſſue.—On the trial of an action of treſpaſs, where the *plea was the general iſſue.* The plaintiff gave evidence of his being in poſſeſſion of the cloſe at the time of the treſpaſs alleged, by proof of different acts of huſbandry exerciſed by him therein down to that period and afterwards. It appeared, that the cloſe belonged to a chapel, of which Mr. *Evans* had been miniſter for ſome years, till his death in December, 1792, during which time it was held under him, by one *G. Dodd.* Before the day of the alleged treſpaſs, Mr. *Price* had ſucceeded as miniſter of the chapel; and the defendant offered to call a witneſs to prove, that previous to that day, *Price* had verbally demiſed the cloſe to

(1) *Vide* Anonymous, *Salk.* 260.

(2) See *Payne* v. *Rogers*, *Dougl.* 407, under title LANDLORD and TENANT, where the tenant, a nominal plaintiff, having given a releaſe to the defendant, the Court ordered it to be given up on an application by the landlord.

(3) *Craib* and Wife v. *d'Aeth*, Bart. Tr. 30 *Geo.* 3. 7 Ter. Rep. 670. n. *b.*—In debt on a bond from the defendant to *M. Bartlett*, ſpinſter, now the wife of the plaintiff, *W. Craib.*—The defendant at the trial, gave in evidence before Lord *Loughborough*, at Guildhall, an affidavit of *W. Craib*, the plaintiff on the record, ſworn by him, in which were ſtated certain facts relied on by the defendant; on which the plaintiff's counſel tendered a bill of exceptions to the admiſſibility of the evidence, which came on, and was to have been argued: BUT THE COURT ſaid it was too clear to be argued; and that *there could be no queſtion, but that any thing ſaid or ſworn by the plaintiffs on the record*, muſt be evidence for the defendant.

him,

him, the defendant. *The Judge ſaid he would receive any evidence to ſhew the actual poſſeſſion out of the plaintiff at the time of the ſuppoſed treſpaſs, but he thought that under the plea of not guilty, he could not receive any evidence of title, or of the right of poſſeſſion being in the defendant: nothing being in iſſue but the fact of the treſpaſs on the actual poſſeſſion of the plaintiff.* And there was a verdict for the plaintiff. Afterwards, on a rule to ſhew cauſe, why the verdict ſhould not be ſet aſide. The Court were clearly of opinion, that the defendant ought to have been permitted to give evidence of title, and of right to poſſeſſion under the general iſſue; and they made the Rule abſolute.

In an action by an innocent indorſee, for a valuable conſideration againſt the acceptor of a bill, in order to draw an inference, either that, at the time of his acceptance, he knew the name of the payee to be fictitious, or that he had given an authority to the drawer, to draw the bill in queſtion, by having given a general authority to him, to draw Bills on him, payable to fictitious perſons, *evidence is admiſſible of irregular and ſuſpicious tranſactions and circumſtances, relating to other bills drawn*, payable to fictitious payees, though none of thoſe tranſactions or circumſtances have any apparent relation to the bill in queſtion, and though none of them prove that any of thoſe other bills were accepted with a knowledge that the payees mentioned in them were fictitious.—A *venire de novo* having been awarded in this cauſe (*ante*, p. 2, 8, 9.), it came on to be tried a ſecond time before Lord *Kenyon*, at Guildhall, at the ſittings after Trinity term, 1793, when the plaintiffs in error tendered a bill of exceptions to his Lordſhip's directions to the jury, the record of which ſtated the evidence [in ſubſtance as above mentioned] in a very full and circumſtantial manner.—In Michaelmas term, 1793, the court of King's Bench gave judgment for the defendant in error; upon which judgment the plaintiffs brought a writ of error in parliament, and having aſſigned the common errors, hoped that the judgment of the court of King's Bench would be reverſed, for the following, among other,

Gibſon v. Hunter in error. *In Dom. Proc.* Ea. Ter 34 Geo. 3. 2 *Hen. Blank.* 288.

REASONS:

1ſt. Becauſe the evidence excepted to, has no relation to the particular bill now in queſtion, and does not purport or affect to apply itſelf to ſuch bill, and it is impoſſible that the facts of any one particular tranſaction can legally be inferred from circumſtances applying wholly to others.

2d. Becauſe it follows as a conſequence from the firſt reaſon, that even if it had been proved that the plaintiffs in error had accepted other bills, knowing that the ſuppoſed payees in them were fictitious, it could not legally be inferred from thence, that they had actual knowledge of the ſuppoſed payee being fictitious in the bill in queſtion.

3d.

3d. Becauſe, if the evidence excepted to was not legally admiſſible, and to be left to the jury as evidence, from which they might properly infer actual knowledge in the plaintiffs in error, of the bill in queſtion being made payable to a fictitious payee, it cannot be admiſſible to prove general authority to have been given, by the plaintiffs in error, to *Liveſey, Hargreave*, and Co. to draw bills upon them, payable to fictitious payees, inaſmuch as a general authority to do certain acts, where an actual authority is not proved, can only be inferred, by ſhewing an acquieſcence of the perſon ſuppoſed to have given ſuch authority, in other acts of a ſimilar nature, done with his privity or conſent; and if the evidence excepted to, did not prove any one act of a ſimilar deſcription with that in queſtion, to have been done with the privity, and by the conſent, of the plaintiffs in error, no given number of inſtances of the ſame kind, can be proper evidence, upon which to preſume a general authority to have been given by them to do ſuch acts. Any number of inſtances, each of which, taken ſingly, proves nothing, can never prove any thing when taken collectively: and if the evidence excepted to would not be admiſſible to prove that the plaintiffs in error had accepted any ſingle bill with knowledge that the payee therein was fictitious, the permitting it to be offered to the jury as evidence, from which they might infer the fact of the plaintiffs in error, having given *general authority* to *Liveſey, Hargreave*, and Co. to draw bills upon them, payable to fictitious payees, would be attended with this abſurdity, that the fact of ſuch general authority would be inferred from the aſſumption of a number of antecedent facts, when the evidence was not admiſſible to prove the exiſtence of any ſingle antecedent fact, from a number of which the fact of general authority was to be inferred.

## REASONS for the defendant in error.

It is preſumed that the plaintiffs in error mean to argue, that the evidence given at the trial, to prove their knowledge that the payee named in the bill in queſtion was a non-exiſting perſon, or that the houſe of *Liveſey, Hargreave*, and company, with their privity, or under their authority, drew bills upon them payable to fictitious payees, ought not to have been received, as neither directly proving the facts to which ſuch evidence was applied, nor raiſing any probability or preſumption of the exiſtence of ſuch facts, or at moſt a probability or preſumption ſo light and uncertain, as not to be entitled to any attention in a court of law.

The defendant in error humbly ſubmits, that it is competent to a jury to find matters of fact, without direct or poſitive teſtimony of thoſe facts, and upon circumſtantial evidence only, although the inference or concluſion to be drawn

drawn from the circumſtances proved, be not abſolutely certain or neceſſary.

That it is ſufficient if the circumſtantial evidence be ſuch as may afford a fair and reaſonable preſumption of the facts to be tried; and if the evidence has that tendency, it ought to be received, and left to the conſideration of the jury, to whom alone it belongs to determine upon the preciſe force and effect of the circumſtances proved, and whether they are ſufficiently ſatisfactory and convincing to warrant them in finding the fact in iſſue.

The defendant in error humbly contends, that the privity or authority attempted to be proved, has, if neceſſary to ſupport the verdict, been found upon circumſtances affording a degree of probability of the fact, ſufficiently ſtrong to entitle the defendant in error to prove thoſe circumſtances, and ſubmit them to the conſideration of the jury, as a ground of preſumption.

The whole of the bill tranſaction in evidence, appears as between *Liveſey*, *Hargreave*, and company, and the plaintiffs in error, to have been a joint concern of thoſe two houſes, merely for the purpoſe of raiſing money. Though the extent of the negotiation was ſo large, there is no evidence to ſhew that it aroſe out of any real mercantile tranſaction between them, but the contrary is to be inferred from the whole of the evidence given. The irregularities and improprieties in the manner of making the bills, are ſuch as would, for preſerving the credit of the drawers, have been carefully concealed by them from the perſons required to accept ſuch bills, unleſs thoſe perſons had been privy to the whole plan of the negotiation, and the mode of conducting it; but the evidence which is objected to, proves the moſt open and undiſguiſed expoſure of all thoſe circumſtances to the view and knowledge of the plaintiffs in error.

Theſe are all circumſtances hardly reconcileable with any other ſuppoſition than that of an entire privity betwixt *Liveſey*, *Hargreave*, and Co. and the plaintiffs in error; and it would be greatly injurious to the fair purchaſers of bills of exchange, and a great encouragement to fraud, if ſuch circumſtances could not be proved againſt an acceptor, and that the acceptor might always reſiſt the performance of his engagements, when there ſhould be a defect of poſitive or demonſtrative evidence of a fact, of which none but the drawer and acceptor, the parties intereſted, might have a full knowledge.

After argument, the following queſtion was propoſed to the judges, viz. "Whether the circumſtances, mentioned in the bill of exceptions, be ſufficiently relative to the propoſitions therein alſo mentioned, viz. that the defendants, in the action, knew the name *Fletcher* was fictitious, or that the defendants had given authority to *Liveſey* and Co. to draw

bills upon them, the ſaid defendants, payable to fictitious payees, ſo that they ought to have been received, and left to the jury as evidence thereof?" On this queſtion there was a diviſion among the judges, who delivered their reſpective opinions *ſeriatim*; but the majority of them, together with the Lord Chancellor and Lord *Kenyon*, having declared that they thought the evidence ought to have been received, and left to the jury, the judgment was affirmed (1).

Burbige v. Jakes, Ea. Ter. 38 Geo. 3. C.B. 1 *Pul. & Boſ.* 225.

Evidence of a houſe ſituate in the pariſh of M. will ſupport an averment, in a declaration, of a houſe "at S." S. being extraparochial, and both places uſually going by the name of S. —The declaration ſtated, that the plaintiff was poſſeſſed of a meſſuage "at Sheerneſs, in the county of Kent." At the trial it was proved, that the houſe was ſituate in the pariſh of Minſter, which is contiguous to Sheerneſs; that Sheerneſs is extraparochial; but that both places uſually go by the name of Sheerneſs. A verdict having been found for the plaintiff, it was moved to ſet it aſide, and enter a nonſuit on the ground of the variance between the declaration and the evidence. But the Court were of opinion, that as the houſe was not ſtated to be in the *pariſh* of Sheerneſs, it was well enough, ſince it appeared to be within the *diſtrict* of Sheerneſs.

Doe *ex dim.* Church and Phillips v. Perkins and twenty-three other defendants, Tr. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 749.

A witneſs may refreſh his memory by *any* book or paper, if he can afterwards ſwear to the fact from his own recollection. But if he cannot ſwear to the fact from recollection any farther than as finding it entered in a book or paper, the *original* book or paper muſt be produced.—On a motion for a new trial, in ejectment, it appeared from the report, that the title of the leſſors of the plaintiff to the ſeveral premiſes, for which the ejectment was brought, was not in diſpute; but that the only queſtion was, at what time of the year the annual holdings of the ſeveral tenants expired. That *Aldridge*, the witneſs, whoſe teſtimony was objected to, went round with the receiver of the rents to the different tenants, whoſe declarations, reſpecting the times when they ſeverally became tenants, were minuted down in a book at the time; ſome of the entries therein being made by *Aldridge*, and ſome by the receiver. When *Aldridge* was examined, the original book was not in court; but he *ſpoke concerning the dates of the ſeveral tenancies from extracts made by himſelf out of that book, confeſſing, upon croſs-examination, that he had no memory of his own of thoſe ſpecific facts; but that the evidence he was giving as to thoſe facts was founded altogether upon the extracts which he had made from the above-mentioned book.* This evidence was objected to at the time on the part of the defendants, upon

(1) The various queſtions reſpecting bills of exchange, which aroſe from the bankruptcy of *Liveſey* and Co. and *Gibſon* and Co were at length finally ſettled. The ſeveral ſtages through which they paſſed, may be ſeen by referring to vol. II. p. 356, 357, 360, 362; and *Gibſon* v. *Hunter*, in this volume, p. 2.

the

the ground that, as the witneſs did not pretend to ſpeak to thoſe facts from his own recollection, he ought not to be permitted to give evidence from any extracts, but that the original book from whence they were taken ought to be produced. The Judge, however, being of a different opinion, the evidence was admitted, and the plaintiff had a verdict. The Court did not appear to entertain much doubt as to the inadmiſſibility of the evidence, but they ſaid that as it was a matter of ſuch general practice, they would conſider of it, that the rule might be finally ſettled for the future. On the following day, *Buller*, J. read a MS. note of *Tanner* v. *Taylor*, Hereford ſpring aſſizes, 1756. "In an action for goods ſold, *the witneſs, who* "*proved the delivery, took it from an account which he had in* "*his hand, being a copy, as he ſaid, of the day-book, which he* "*had left at home*: and it being objected that the original "ought to have been produced, *Legge*, Baron, ſaid, that if "he would ſwear poſitively to the delivery from recollection, "and the paper was only to refreſh his memory, he might "make uſe of it. But if he could not from recollection ſwear "to the delivery any further than as finding them entered in "his book, then the original ſhould have been produced: and "the witneſs ſaying he could not ſwear from recollection, the "plaintiff was non-ſuited." And Lord Kenyon, Ch. J. ſaid, that the rule appeared to have been clearly ſettled, and that every day's practice agreed with it. And that comparing this caſe with the general rule, the Court were clearly of opinion, that *Aldridge*, the witneſs, ought not to have been permitted to ſpeak to facts from the extracts which he made uſe of at the trial. *Per Curiam.*

Parol evidence ſhall not be admitted to contradict an agreement in writing.—*Per Curiam:* No *parol* evidence is admiſſible to diſannul, and ſubſtantially to vary, a written agreement. Indeed, in ſome caſes of *wills* and *deeds*, where there are two *Johns* named, or two Blackacres mentioned, *parol* evidence may be admitted to explain which *John*, or which Blackacre, was meant and intended by the *will* or *deed*. The rules of evidence are univerſally the ſame in courts of law and courts of equity. Suppoſe a bill in equity was to be brought by the defendant to have a ſpecific performance of an agreement, the Court would not admit *parol* evidence. You cannot depart from the writing, but may argue touching the operation thereof. If a man agrees in writing to ſell Blackacre for 1000l. ſhall *parol* evidence be admitted that he intended Whiteacre ſhould alſo paſs? Certainly it ſhall not.

Meres *et al. v.* Anſell *et al.* Mic. Ter. 12 Geo. 3. C.B. 3 *Wils.* 275.

In debt upon an award, and *nil debet* pleaded, the defendant cannot give in evidence *partiality* in the arbitrators in making the award; for the plea of *nil debet*, *prima facie*, admits the award, and there never was an inſtance where this kind of evidence was permitted to be given; it would be to ſuffer evidence that affects third perſons, the arbitrators themſelves;

Wills *v.* Maccarmick, Mic. Ter. 3 Geo. 3. C.B. 2 *Wils.* 148.

an award is a judgment by judges choſen by the parties themſelves, and a jury in a ſpecial verdict cannot find any matter or fact *dehors* the award; by parity of reaſon nothing *dehors* the award (as partiality is) can be given to them in evidence; if this evidence was permitted, the plaintiff would be wholly unprepared at the trial, for all that he has to do is, to prove the ſubmiſſion and the award; the corruption or partiality of the arbitrators may be wholly unknown to the plaintiff, it concerns the arbitrators themſelves; in a trial at law, this matter of partiality and corruption can never be got at, there is no precedent at law of any *writ* to ſet aſide an award, and we muſt go by precedent; there is no caſe wherever this matter hath been pleaded; the Stat. *Wil.* 3. ſhews that an award at law muſt ſtand, for that ſtatute ſays, that with reſpect to awards made according to that ſtatute they ſhall ſtand, unleſs controverted and ſet aſide in two terms. The remedy in this caſe is in equity, or at law by action againſt the arbitrators if they have been corrupt.

Sullivan *v.* Montague, Hil. Ter. 19 Geo. 3. B.R. 1 *Doug.* 106.

Matter of defence, ariſing after the action brought, may be given in evidence, if it happen before plea pleaded, in caſes where the ſpecial matter may be given in evidence under the general iſſue.

Ilderton *v.* Atkinſon, Hil. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 480.

If a man has money in his hands, for which he will be equally anſwerable whichever way the queſtion goes, he ſtands indifferent between the parties, and may be called as a witneſs.—In this caſe one *Barber* had been the agent of the plaintiff, and, as aſſerted by the defendant, continued to be ſo at the time when he received a ſum of 200l. the money in diſpute, from the defendant, and received the money in that character. The plaintiff admitted the receipt of the money by *Barber*, but denied the agency at the time of the receipt. AND THE COURT held, that this witneſs ſtood indifferent, in point of intereſt, between the parties; being liable, either to pay the money received, to the plaintiff; or to refund it to the defendant. And the caſe of *Evans* v. *Williams* is mentioned by the Reporter: where the captain of a veſſel was admitted, as a witneſs, to prove whether money, which he had borrowed of the plaintiff, was borrowed for the uſe of the ſhip, or for his own uſe.

## Exchange.

The provoſt of Eton college, and the ſame college, *v.* the Biſhop of Winchester, and Fountain, clerk, Hil. Ter. 14 Geo. 3. C.B. 3 *Wils.* 468, 483. 2 *Black.* 936.

AN exchange can only be between two parties; and if three mutually grant reciprocal eſtates to each other, viz. *A.* to *C.* *B.* to *A.* and *C.* to *A.*; and *A.* be evicted of the tenements granted by him to *B.* *A.* cannot recover of *C.* the tenements granted to him by *A.*—The plaintiffs brought a *quare impedit* for hindering them to *preſent* to the church of Worpleſdon, in the county of Surrey, and declared that they

they were seised in gross, in fee, in right of the college, of the advowson of *that* church; and being so seised, the church became void on the 8th of October, 1765, by the death of one *Stephen Sleech*, whereupon the plaintiffs in right of the college presented *John Burton*, D.D. who was admitted, instituted, and inducted; that on the 13th of February, 1771, the church became void by the death of Doctor *J. Burton*, and it belonged to the plaintiffs, in right of the college, to present a fit person to the church being so void, and the defendants disturbed them, to their damage of 200l. —The bishop pleads his common plea, that he claims no right but as ordinary.—The defendant, *Thomas Fountain*, pleads, that he is, and on the day of suing out the original writ was, *parson imparsonee* of the said church, upon the presentation of his present majesty, King *George* the Third, whose title to the advowson thereof he deduces from King *Charles* the Second, by alleging that King *Charles* the Second was seised in fee, and presented one *Charles Moore*, who was admitted, instituted, and inducted; that *Charles* the Second died seised, and the advowson descended to King *James* the Second, who, being seised in fee thereof, abdicated the government and crown of England, and thereupon King *William* and Queen *Mary* became lawfully seised in fee thereof; that Queen *Mary* died, and thereupon King *William* was seised; that King *William* died seised, and Queen *Ann* became lawfully seised in fee; that she died, and King *George* the First became lawfully seised in fee, and being so seised the church became void by the death of *Charles Moore*, and one *Henry Godolphin*, provost of the college of Eton, by usurpation upon the crown, presented *Thomas Carter*, who was admitted, instituted, and inducted; that King *George* the First died seised, and the advowson descended to King *George* the Second, who being seised thereof in fee, the church became void by the death of *Thomas Carter*, and one *Henry Bland*, provost of the college of Eton, by usurpation upon the crown, presented *George Harris*, who was admitted, instituted, and inducted; and King *George* the Second being so seised, the church became void by the death of *George Harris*; and *Benjamin*, bishop of Winchester, by usurpation upon the crown, collated *Stephen Sleech*, who was thereupon inducted; that King *George* the Second died seised, and the advowson descended to King *George* the Third, who thereupon became and is seised in fee thereof; and being so seised, the church became void by the death of *Stephen Sleech*, whereby it belonged to his present majesty to present; and the plaintiffs, usurping upon the now king, presented *John Burton*, who was admitted, instituted, and inducted; and his present majesty being so seised, the church became void by the death of *John Burton*, whereby it belonged to our lord, the now king,

to preſent a fit perſon to the church, who preſented the defendant, *Thomas Fountain*, who was admitted, inſtituted, and inducted, and before and at the time of ſuing out the original writ was, and yet is, *parſon imparſonee* of the ſaid church upon that preſentation: without this, that the plaintiffs were ſeiſed of the ſaid advowſon of the church of Worpleſdon, in manner and form as they have above alleged; and this, &c. wherefore he prays judgment, &c.—The plaintiffs reply in the common form to the biſhop's plea, and take iſſue upon the traverſe in the incumbent's plea, and thereupon iſſue is joined.—This cauſe came on to be tried at the Lent aſſizes for Surrey, 13 *Geo.* 3. when the jury found a ſpecial verdict, which may be thus briefly ſtated, viz. that on the 7th day of May, 1683, King *Charles* the Second was ſeiſed in fee of the advowſon of the church (of Worpleſdon) in queſtion, to which (being vacant) he preſented one *Charles Moor*, who was admitted, inſtituted, and inducted; that the kings and queens of England were ſeiſed of the ſaid advowſon in fee until the making of the act of parliament following; and that before the ſame act, viz. on the 30th of January, 1687, by indenture of that date, made between *Charles*, Duke of Somerſet, and *Elizabeth*, his ducheſs, of the firſt part; *Thomas Beach* and *Henry Champion* of the ſecond part; *James*, Earl of Suffolk, *Elizabeth*, Counteſs Dowager of Eſſex, Sir *John Erule*, knt. chancellor of the exchequer, and *Elizabeth*, Lady *Seymour*, his wife, and mother of the ſaid lord duke, and Sir *Orlando Gee*, of the third part. The rectory of Kirby Overblowes, in Yorkſhire, and the inheritance of the Honour of Petworth, in Suſſex, were conveyed to the uſe of the Ducheſs of Somerſet for life; remainder to the Duke of Somerſet for life; remainder to truſtees, to preſerve contingent remainders; remainder to *Algernon*, Earl of Hertford, the firſt ſon of the duke and ducheſs in tail-male; remainder to the ſecond, third, and every other ſon and ſons of the duke and ducheſs in tail-male; remainder to the iſſues females of the lady ducheſs in tail-general; and for default of ſuch iſſue, remainder to ſuch uſes as the lady ducheſs (whether ſole or under coverture) ſhould direct, limit, and appoint; remainder in fee to the ducheſs.—That the duke and ducheſs died, leaving iſſue *Algernon*, Earl of Hertford, afterwards Duke of Somerſet, their ſon, and *Catharine* their daughter; and no other iſſue.—That the ſaid Duke *Algernon* died, leaving *Elizabeth*, now Ducheſs of Northumberland, his only child.—That *Catharine*, the daughter of Duke *Charles* and his ſaid ducheſs, intermarried with Sir *William Wyndham*, baronet, and died, leaving *Charles*, afterwards Earl of Egremont, her eldeſt ſon, who died, leaving *George*, now Earl of Egremont.—That the provoſt and college of Eton, before and at the time of making the act of parliament hereafter-

mentioned,

mentioned, were ſeiſed in fee of the advowſon of the church of Petworth, and the chapelries of North-Chapel and Dungton, within the pariſh of Petworth, in Suſſex.—That in the fourth and fifth years of *William* and *Mary*, an act of parliament was made, for dividing the ſaid chapelries from the pariſh of Petworth, and erecting them into new pariſhes, and for ſettling the advowſons of Worpleſdon, Kirby Overblowes, and Petworth, &c. according to the agreement in that behalf made between *their majeſties, patrons of the churches of* Clewer in Berks, Farnham-Royal in Bucks, and Worpleſdon in Surrey; and *the Duke of Somerſet, patron of the churches of* Kirby Overblowes and Catton in Yorkſhire, and Longhorſley in Northumberland; and *the provoſt of Eton college, and the college, patrons of the church of* Petworth in Suſſex.—Whereby it was enacted, that the advowſons of Kirby Overblowes, Catton, and Longhorſley, ſhall be, and are thereby, ſettled and *veſted in their majeſties*, and their ſucceſſors, in right of their crown, for ever; and that the advowſons of Clewer, Farnham-Royal, and Worpleſdon, ſhall be, and are thereby, ſettled and *veſted in the provoſt and college of Eton*, and their ſucceſſors, for ever; and that the advowſons of Petworth, North-Chapel, and Dungton, ſhall be, and are thereby, ſettled and *veſted in the Duke of Somerſet, and the lady ducheſs his wife*, and their heirs, *ſaving* the rights of all other perſons (others than their majeſties, the duke and ducheſs and their heirs, and Eton college and their ſucceſſors) to the ſaid advowſons of the ſaid churches, or any of them.—That the act of parliament hath been carried into execution ever ſince the making it, until the year 1760; and that the church of Kirby Overblowes hath ſeveral times been vacant ſince the making of the act; and from that time, until the year 1760, the crown hath preſented to *that* church.—That, in the year 1760, the church of Kirby Overblowes became vacant, and *Charles*, Lord Egremont, thereupon claiming a right of preſentation thereto, by virtue of the ſaid indenture, as having his right to the ſaid preſentation, ſaved by and under the ſaid *proviſo* in the ſaid act, preſented one *John Metcalf* thereto, who was admitted, inſtituted, and inducted, to the ſaid church.—That, on the 13th of February, 1771, the church of Worpleſdon became vacant by the death of Doctor *John Burton*, and thereupon his preſent majeſty preſented the defendant, *Thomas Fountain*, to the ſaid church.—That, within ſix months from the death of Doctor *John Burton*, the plaintiffs preſented one Doctor *Stephen Abthorp* to the ſaid church of Worpleſdon; and that the ſaid *John*, biſhop of Wincheſter, before the commencement of this ſuit, refuſed to admit, inſtitute, and induct, either the ſaid *Thomas Fountain* or *Stephen Abthorp*; and that the ſaid church of Worpleſdon, on the 13th day of Febru-

ary, 1771, became vacant, and ever ſince hath been, and ſtill continues vacant; and the ſame is of the true value of 170l. by the year; and that ſix months did not elapſe, from the time of the death of the ſaid Doctor *John Burton*, before the iſſuing out the original writ of *quare impedit* in this cauſe, by the plaintiffs; but whether his majeſty had a right to preſent the defendant, *Thomas Fountain*, to the church of Worpleſdon, or not, the jurors are ignorant, and pray the advice of the Court thereupon, &c.—*In the argument for the plaintiffs* it was obſerved, that, from the time of making the act until the year 1760, the act had, in all reſpects, been carried into execution; and, until the year 1771, Eton college had not, ſince the making the act, been hindered or diſturbed by the crown, in preſenting to Worpleſdon; but *that* church becoming void on the 13th of February, 1771, *the crown, by their ancient title to the advowſon thereof, preſented the defendant, Fountain*, and thereupon the provoſt and college of Eton have brought the preſent writ of *quare impedit*.—THAT THE QUESTION was, therefore, Whether the advowſon of the church of Worpleſdon is to be reſtored to the crown? which depended upon the conſtruction of this act of parliament, which ſaves Lord Egremont's right of preſentation to Kirby Overblowes, and as to that matter, it is the ſame to him as if the act had never been made.—BUT IT WAS OBJECTED *on the part of the defendant, the preſentee of the crown*, that the crown has been deceived by *Charles*, Duke of Somerſet, who had only an eſtate for life in the rectory of Kirby Overblowes, which, if the crown, or the legiſlature, had known at the time of making the act of parliament, *that* act would not have paſſed; that private acts of parliament are to be conſtrued according to the rules and principles of the common law, and, therefore, this act is to be conſidered as a legal conveyance, by way of *exchange*; and that the crown, having been deceived in the *exchange*, may, after near ſeventy years poſſeſſion under the act of parliament, diveſt the college of Eton of the church of Worpleſdon, now in queſtion.—CURIA: The Court has no doubt: and they have very little to ſay upon this matter. The Duke of Somerſet, having a ſeat at Petworth, was deſirous of having the advowſon of that church in his own family, which was in poſſeſſion of Eton college: the duke, not having any living to tempt the college to give him Petworth in *exchange*, prevailed upon the crown to give the living in queſtion to the college, and the duke gave to the crown the church of Kirby Overblowes (ſuppoſed then to be an equivalent for Worpleſdon). This being agreed, and the duke wanting to make three advowſons out of one, an act of parliament is made to carry this into execution, which does not make uſe of words of conveyance, but *veſts* the ſeveral advowſons in the

the reſpective parties for ever, viz. Worpleſdon in the college, Petworth in the duke, and Kirby Overblowes in the crown; at the time of making the act, the duke was only tenant for life of Kirby Overblowes, which was then a ſecret (and ſo continued till the year 1760), and there is a ſaving clauſe in the act, which ſaves to all perſons (other than the crown, the duke and ducheſs, and their heirs, and Eton college), all their rights of preſentation to the ſeveral churches, as fully as if the act had never been made; by which ſaving clauſe, and under a limitation in the ſettlement of 1687, *Charles*, late Earl of Egremont, in the year 1760, preſented *John Metcalf* to the church of Kirby Overblowes, who was not diſturbed by this agreement, or by the crown, Lord Egremont having a clear title under the ſettlement, which was ſaved by the act.—In 1771, the church of Worpleſdon (in queſtion) became vacant, and the crown, under their ancient title, preſented the defendant, *Fountain*, thereto, ſuppoſing the whole agreement void, whereupon the plaintiffs have brought this *quare impedit*; and the queſtion is, Whether the preſentation of Lord Egremont to Kirby Overblowes ſet the whole agreement aſide, and the title to preſent to the church in queſtion be reſtored to the crown, which depends upon the conſtruction of the act of parliament? which, in reſpect to Lord Egremont, is the ſame as if it had never been made.—*Private acts of parliament muſt be conſtrued according to the principles of the common law, and therefore it is ſaid, that, from the nature of this agreement, or contract, it muſt be conſtrued to be an exchange at common law, which is a mode of conveyance that has particular properties of its own, and conveys a fee-ſimple without livery*; *and, before the ſtatute of frauds, might have been made by parol, without deed or writing*; the word *excambium*, or *exchange*, is ſaid, by the beſt writers upon this ſubject, to be abſolutely neceſſary to this mode of conveyance; *the eſſence of an exchange is when one eſtate in land is given in conſideration of another*; hence, if one part fails, the other will fail alſo: in ſome caſes it may be ſaid to be the beſt mode of conveyance, as in dealing with a defeaſable title. *The effect of an exchange ariſes from the remedies*; 1ſt, An implied *condition of re-entry*; 2d, A *ſpecial warranty: theſe are incidental to an exchange:* a *condition* of re entry is entire and indiviſible; he cannot enter into a part of what he gave in *exchange*, for he cannot judge how much he has loſt: it is given againſt a ſtranger; but if the ſtranger be impleaded and vouches, no more is to be recovered than the value of *what* was loſt; beſides the *warranty* ariſing from an *exchange* is only *lineal warranty*, ariſing from operation of law, for the law will not raiſe a *collateral warranty*, becauſe of hard conſequences attending it. An alienee can neither enter nor vouch, but he may make uſe of the *warranty* in law, by way of *rebutter:*

*rebutter: if tenant in tail, by exchange, conveys a baſe fee, each iſſue may determine the exchange during his time, therefore it ſeems to be the very eſſence of an exchange, that the nature of the eſtates exchanged be equal*; that the land given by *A.* to *B.* may be a recompence for the land given by *B.* to *A.*—*There is no caſe to be found of an exchange, in the legal ſenſe and meaning of that conveyance, between more than two parties*; for if *A.* gives land to *B.* and *B.* gives lands to *C.* and *C.* gives lands to *A.*; if *C.* be evicted of the land given to him by *B.*, *C.* cannot enter upon *A.* becauſe *A.* gave nothing in *exchange* to *C.*; ſo *A.* is not bound to *warrant* the land to *C.* which was given to him by *B.*; this accounts for the defendant's counſel not being able, with all their induſtry, to find one caſe of an *exchange* between three perſons; beſides, *the act of parliament cannot be conſtrued to operate as a deed of exchange, the word exchange not being once mentioned therein*; the act makes uſe of no words of conveyance, but *veſts* the ſeveral advowſons in the reſpective parties, under the agreement.—Hence it is clear, that this act of parliament cannot be conſtrued, by the rules and principles of a conveyance, by way of *exchange*; but although the act doth not operate as an *exchange*, yet it ſupports and executes the agreement between the parties, ſaving the Earl of Egremont's right. Let us ſuppoſe it was an agreement, touching land, between *A. B.* and *C.* by feoffment; *A.* (the college) in conſideration of land from *C.* (the crown) enfeoffs *B.* (the duke) of other land with *warranty*; and *B.* in conſideration of other land from *A.* enfeoffs *C.* of other land with *warranty*; *C.* is impleaded by a ſtranger (the Earl of Egremont), for the land whereof *B.* enfeoffed him, whereupon *C.* vouches *B.* to *warranty*; *B.* cannot vouch over *A.* to *warranty*, becauſe *A.* did not enfeoff *B.* of that ſame land whereof *B.* enfeoffed *C.* and for which land *C.* is impleaded; ſo the crown would recover in value againſt the duke, and the loſs would fall where it ought, upon him who brought a bad title.—The crown grants a good title to the college, the college grants a good title to the duke, the duke grants a bad title to the crown; the college have broken no contract with the crown, or the duke, but the duke was the only wrong doer; the advowſons, lying in *grant*, doth not differ from the caſe put, of a feoffment of lands: the nature of the agreement in both is the ſame, and the crown, being a party, doth not alter the caſe; nor is it material, at preſent, in what manner Lord Egremont aſſerted his title to the church of Kirby Overblowes.—By the whole Court, reſolved, *there cannot be an exchange at common law, between more than two parties*; the things given and taken in exchange run in parallel lines, and cannot paſs into three lines, or a triangle.—Judgment for the plaintiffs, *per totam Curiam.*

Exrom-

# Excommunication.

A writ *de excommunicato capiendo* ſtated, that the defendant was excommunicated in a cauſe of "defamation and ſlander, merely ſpiritual;" and held ſufficient.

The King v. Payton, Hil. Ter. 37 Geo 3. B.R. 7 *Ter. Rep.* 153.

If the ſentence of the greater, inſtead of the leſſer, excommunication be pronounced, it is only a ground of appeal: but this Court will not quaſh a writ *de excommunicato capiendo* for that objection.

It is not neceſſary that the defendant ſhould be reſident in the dioceſe at the time of the excommunication; it is ſufficient if he were there at the time of the citation.

The above points were determined on a motion to diſcharge the defendant out of cuſtody, and to quaſh a writ of *excommunicato capiendo*, which ſtated, that the biſhop of Worceſter had ſignified that the official of the conſiſtorial court of Worceſter, in a certain cauſe of defamation or ſlander, merely ſpiritual, between *Elizabeth*, the wife of *William Hopkins*, of the pariſh of Grimby, in the county and dioceſe of Worceſter, complainant, and *Nathaniel Payton*, of the pariſh of Grimby aforeſaid, the party accuſed, did, for the contumacy of the ſaid *Nathaniel Payton*, in not appearing, decree him to be excommunicated.—To this writ three objections were made: 1ſt, That the cauſes of excommunication are not ſufficiently ſtated;—2dly, That the ſentence is erroneous, in pronouncing the greater excommunication, inſtead of the leſſer;—3dly, Becauſe it does not appear that, at the time of the ſentence, the defendant was inhabiting within the dioceſe. PER CURIAM: As to the firſt, the caſes cited were 1 *Rol. Rep.* 136. where an excommunication, *for not anſwering articles*, without ſhewing what, was held bad; and in that caſe *Arſcot's* caſe is mentioned, where the excommunication was held bad, it only alleging, that he was an inveterate ſchiſmatic. Another caſe was in *Salk.* 293. *The King* v. *Fowler*, where the writ was held bad, as the excommunication was recited to be *pro quibuſdam cauſis ſubtractionis decimarum ſive aliorum jurium eccleſiaſticorum:* which was held uncertain, as the *alia juria* might be matters not within their juriſdiction. But, according to the report of this caſe in Lord *Raym.* 619. the reaſon aſſigned by *Holt*, Ch. J. was, the not ſpecially aſſigning the reaſon of the excommunication but in the diſjunctive; and *Gould*, J. thought it good, as the *ſive* ſeemed to him accumulative; and *Holt*, Ch. J. ſaid, that if the writ had been in *cauſâ ſubtractionis quorundum jurium eccleſiaſticorum*, it had been well. But in *The King* v. *Smith*, *Strange*, 946, an *excommunicato capiendo* was quaſhed, being in *cauſâ defamationis ſive contumacii*, for the uncertainty of the laſt word; but

but there was no objection, on account of the firſt word not being ſufficiently certain and explicit. And in *The King* v. *Keat*, *Strange*, 950, the Court held an excommunication for ſlander, or defamation, not bad for uncertainty.—*The preſent caſe is more certain than that, for it is alleged to be for defamation, or ſlander, merely ſpiritual.* Thoſe words remove all doubt, ſhewing that this was within the cognizance of the ſpiritual court.—As to the ſecond objection, that the party was only liable to the leſſer excommunication; that, if objectionable, is only the ground of appeal; it is merely that the judge has not proceeded according to the proper forms of the eccleſiaſtical court.—As to the third objection, the 23 *Hen.* 8. c. 9; *Moor*, 467; *Latch.* 174; *Godbolt*, 191; *Godolphin's Repertorium Canonicum*, 635; and *Shower*, 17. were cited. As to the ſtat. of *Hen.* 8. after reciting, "that perſons had been cited in courts out of the "dioceſes where they lived, and on certificate thereof had "been excommunicated, it provides that no perſon from "thenceforth ſhould be cited out of the dioceſe in which he "ſhould inhabit," but it does not prevent the ſentence of excommunication being paſſed againſt thoſe who, having been cited in their dioceſe, may afterwards remove out of it. The caſe in *Latch.* 174. is *Brown's* caſe. There the objection was, that the defendant was ſued out of his dioceſe. This caſe proves nothing, as the defendant muſt be underſtood to have been cited out of the dioceſe. *Godbolt*, 191, is *Fraunces* and *Powell's* caſe. It was a motion for a prohibition for citing the plaintiff out of his dioceſe, contrary to the 23 *Hen.* 8. and there Lord *Coke* ſaid, *obiter*, that the 23 *H.* 8. was in affirmance of the common law; for if a man be excommunicated in a foreign dioceſe, the ſame is void, and *coram non judice*, as appeared by the 8 *H.* 6. and 2 *H.* 4. But this doctrine muſt be underſtood from the reference to the 23 *H.* 8. as applying to the caſe of a citation out of the dioceſe. *Godolphin's Repert. Canon.* 635. only refers to *Moor*, 467, which is *Beaumont's* caſe, and is in theſe words: "*Beaumont* was taken on an *excommunicato* "*capiendo*; and the ſignificavit did not mention that he "was commorant within the dioceſe of the biſhop at the "time of the excommunication, and it was adjudged un-"certain, and the party diſcharged." *Shower*, 17. is *Johnſon's* caſe; and that, as far as reſpects this caſe, is merely a reference to *Moor*, 467; for the objection in that caſe was the want of an addition. With reſpect to the caſe in *Moor*; *as the neceſſity of being commorant at the time of the excommunication is not found to be ſo determined in any other book, and as ſuch a doctrine would enable defendants, by ſhifting their dioceſe pending the ſuit, to avoid being amenable to the eccleſiaſtical court, that caſe muſt be underſtood as proceeding*

on

*on the ground of the defendant's not being within the dioceſe at any time during the ſuit.* But the authority of that caſe may well be doubted (1): for in the caſe of *The Queen* v. *Digg*, 11 *Mod.* 172. *Page* moved to quaſh a writ of *excommunicato capiendo*; his firſt exception being to the ſignificavit upon the *excommunicato capiendo*, that it did not appear he was commorant in the dioceſe: and he cited *Moor*, 466, 467: he took two other exceptions to the writ; and the report concludes with ſaving, "which exception (namely, the "third) the Court ſeemed to allow;" but no notice is taken of the firſt being allowed by the Court. And in Sir *T. Jones*, 89, in the caſe of the Inhabitants of Bermondſey, *Darnel* prayed that the defendants might be diſcharged, becauſe it did not appear by the certificate that they were commorant in the dioceſe of the biſhop, at the time of the excommunication; and he relied on *Moor*, 467. and *Latch.* 174. But the priſoners were remanded.—We are, therefore, of opinion, that none of the objections are well founded.—Rule diſcharged.

## Execution.

Coyſgarne v. Fly. Ea. Ter. 15 Geo. 3. C.B. 2 *Black.* 995.

On a judgment of above twenty years old, the Court gave leave to the adminiſtrator, *cum teſtamento annexo*, of the plaintiff, to ſue out a *ſcire facias* to revive the ſame. *But they ordered that no execution ſhould be taken out thereon, until either the ſheriff made an actual return of* ſcire feci, *or an affidavit was made and filed, of perſonal notice being ſerved on the defendant of the iſſuing ſuch* ſcire facias.

Vigers v. Aldrich. Mic. Ter. 10 Geo. 3. B.R. 4 *Burr.* 2482.

In an action of debt upon a judgment, it appeared upon the plea, and was admitted by the replication, that *the defendant's perſon had been taken in execution, by virtue of a capias ad ſatisfaciendum*, upon this judgment, *and afterwards diſcharged out of cuſtody by conſent of the plaintiff, upon his entering into an agreement*, "to pay certain ſums of money at "ſtipulated times;" *part* whereof he had accordingly *paid* to the plaintiff, purſuant to the ſaid agreement, but had *failed* in payment of the *remaining part*. The plaintiff, in his replication, acknowledged all this, and yet concluded it with demanding the *whole* ſum due upon the judgment. The defendant demurred to the plaintiff's replication.—PER CURIAM: The defendant having been *once taken in execution* upon this judgment, and afterwards diſcharged of the execution againſt his perſon, by the conſent of the plaintiff, he

(1) It ſeems to have been overruled in *R.* v. *Burrard*, 1 *P. Wms.* 435.

could

could not be liable to any further execution upon it; nor could the plaintiff bring an action of debt upon that same judgment, which has been already ſo carried into execution, and the defendant ſo diſcharged from it: he ought to have brought a new action upon the caſe, founded on this new agreement:—they alſo held the replication to be repugnant, in demanding the whole ſum, when it acknowledged it to be ſatisfied in part.—Judgment for the defendant.

Clark *v.* Clement and Engliſh, Hil. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 525.

If the plaintiff conſent to diſcharge one of ſeveral defendants taken on a joint *ca. ſa.* he cannot afterwards retake him, or take any of the others.—And a ſeparate *ca. ſa.* againſt one defendant, on a judgment againſt two, cannot be ſupported.—*The defendant*, Engliſh, *having been taken on a* ca. ſa. *iſſued againſt both of the defendants, was ſet at liberty by the plaintiff, on an undertaking by him to render himſelf on a given day, if he did not, in the mean time, pay the debt.* On which the defendant, *Clement*, moved that the *ca. ſa.* ſhould be quaſhed, and ſatisfaction entered on the roll. Lord KENYON, Ch. J. —This being a joint execution, as the plaintiff ſuffered the other defendant to be diſcharged out of cuſtody, he cannot now take *Clement*, vid. *Hob.* 2. And formerly, in Lord Ch. J. *Hobart*'s time, it was held, that if the defendant died, when charged in execution, the creditor could not revive the judgment againſt his repreſentatives (1). But there is no reaſon why we ſhould make this rule abſolute in its full extent; it will ſatisfy the juſtice of this caſe, as far as reſpects *Clement*, merely to order that he ſhall not be taken on this writ, but that the writ ſhall not be quaſhed.—Afterwards the plaintiff ſued out a ſeparate execution againſt *Engliſh*, and took him; on which it was moved, that he might be diſcharged out of cuſtody, and the *ca. ſa.* ſet aſide, and ſatisfaction entered on the roll. And in ſupport of the rule, the caſe of *Vigers* v. *Aldrich* was cited.—2dly, It was inſiſted that, at all events, the ſeparate execution againſt *Engliſh*, on a joint judgment againſt *Engliſh* and *Clement*, could not be ſupported.—AND THE COURT were of opinion, that the plaintiff was wrong on both points, and made the—Rule abſolute.

Tanner *v.* Hague, Mic. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 420.

So where the defendant, having been charged in execution at the ſuit of the plaintiff, was diſcharged, on his undertaking to pay the debt at a future day; and on nonpayment at the day, the plaintiff ſued out a *fieri facias* againſt him. *It was moved* that the latter writ might be ſet aſide, and the caſes of *Vigers* v. *Aldrich*, and *Clark* v. *Clement*, were cited.—On the behalf of the plaintiff it was argued, that the releaſe of

(1) *Foſter* v. *Jackſon*, *Hob*, 52, &c. But that was remedied by ſtat. 21 *Jac.* 1. c. 24.

the

the defendant was conditional; and as the condition had not been performed, the plaintiff had a right to ſue out another writ of execution. BUT THE COURT ſaid, that the caſes cited proceeded on this ground, that it was conſidered that the plaintiff received a ſatisfaction in law, by having his deb or once in cuſtody, and made the rule abſolute.

It was moved to ſet aſide a *teſtatum fieri facias* for irregularity, on the ground that the plaintiff had not ſued out a *fi. fa.* to warrant the *teſtatum*. AND THE COURT, after conſulting with the maſter, ſaid that, according to the eſtabliſhed practice, the want of an original *fi. fa.* was a deciſive objection, though the irregularity might be cured by a ſubſequent production of that writ.—Rule abſolute (1). Brand *v.* Mears, Tr. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 388.

A *ca. ſa.* in a different county muſt be grounded on a *teſtatum*.—It was moved, to quaſh a writ of *ca. ſa.* directed to the ſheriff of London, and to diſcharge the defendant, becauſe the judgment is upon a record in Wilts, and no *teſtatum* or ſuggeſtion that the defendant had been commorant in London. And the Court was of opinion, that the writ muſt be quaſhed, with coſts, no rule being yet made up, to amend it by: and the defendant diſcharged, he undertaking to bring no action for the falſe impriſonment. Allen *v.* Allen, Ea. Ter. 10 Geo. 3. B.R. 2 *Black.* 694.

But the Court will not ſet aſide a *teſtatum capias ad ſatisfaciendum*, ſued out without an original *capias* to warrant it, though a writ of error has been brought, if a *capias ad ſatisfaciendum* have been afterwards ſued out, returned, and entered on the roll. Milſtead *v.* Coppard, Ea. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 272.

A *capias ad ſatisfaciendum*, made returnable at a day which falls out of term, is not void, but only liable to be ſet aſide upon motion for irregularity.—A *ſcire facias* being brought againſt bail, the defendant pleaded thereto, "that the principal "died before the return of the *capias ad ſatisfaciendum*." The return of the *ca. ſa.* being thereupon ſet forth in the replication, it appeared to be returnable "on Thurſday next, after eight days *from* the purification of the Virgin *Mary*." The defendant demurred, generally, to the replication, and on behalf of the defendant, it was inſiſted that the proceedings were irregular: for the word "*from*" is excluſive; and conſequently the writ is not returnable till in *vacation*-time (even a week in the vacation).—On the other hand, it was inſiſted for the plaintiff, that it was *right and regular*, in true and even (2) *ſtrict* computation. And, were it otherwiſe, yet, as it was an *execution*, and not upon meſne proceſs, the writ of *ca. ſa.* would *not be void*, but only liable to be ſet aſide upon Campbell, Eſq. *v.* Cumming, *et al.* Tr. Ter. 1 Geo. 3 B.R. 2 *Burr.* 1187.

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(1) See *Cowperthwaite* v. *Owen*, *ante*, p. 333.

(2) It was ſo. For the purification fell on Monday; ſo that, either way, the Thurſday next after eight days from it, or the Thurſday next after the octave of it, was the 12th of February.

*motion*,

*motion*, for irregularity. And THE WHOLE COURT were unanimouſly of the ſame opinion in *both* points.—Judgment for the plaintiff.

Laroche, *v.* Waſbrough and Mailand, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 737.

If a plaintiff recover a judgment againſt two defendants in B. R. and one of them bring a writ of error in *cam. ſcacc.* the plaintiff cannot charge the other defendant in execution till the record be remitted into the court of B. R. notwithſtanding the writ of error might have been quaſhed immediately, becauſe not brought by both defendants.—Final judgment was ſigned againſt both the defendants in Trinity term, 1787. *Mailand* was arreſted, and committed to priſon for want of bail, *but was not charged in execution in the next term after judgment, according to the regular courſe of proceedings. Waſbrough*, in Michaelmas term, brought a writ of error in the Exchequer Chamber (to which *Mailand* was no party), where the judgment was affirmed in Hilary, 1788. Afterwards, there was a joint execution againſt both the defendants, under which both the defendants were charged in execution. —And it was argued, that the defendant, *Mailand*, might be diſcharged out of execution, *becauſe he was not charged in execution within two terms after final judgment.*—SED PER. CURIAM: The writ of error removed the record into the Exchequer Chamber, and till it was remitted here, there was no record in this Court, on which the plaintiff could have charged the defendant in execution.—Rule diſcharged.

Jordan *v.* Cole, Mic. Ter. 31 Geo. 3. C.B. 1 *Hen. Black.* 532.

Where judgment is ſigned againſt a defendant in an inferior court of record, and he ſurrenders in diſcharge of his bail, but before he is charged in execution, is removed to the Fleet by *habeas corpus*. The court of C. B. will grant a *certiorari* to remove the record, in order to charge him in execution in the Fleet, by virtue of the ſtat. 19 *Geo.* 3. *c.* 70. *ſ.* 4. (1).

Broughton, *v.* Martin, Mic. Ter. 30 Geo 3. C.B. 1 *Pul. & Beſ.* 176.

The Court will diſcharge a defendant out of cuſtody who is in execution at the ſuit of a plaintiff, ſome time ſince de-

(1) Which enacts, that in all caſes where final judgment ſhall be obtained in any ſuit, *in any inferior court of record*, it ſhall be lawful for any of his majeſty's courts of record at Weſtminſter, upon affidavits made and filed therein of ſuch judgment being obtained, and of *diligent ſearch* and inquiry having been made *after the perſon* of the defendant, or his effects; and of execution having iſſued againſt the *perſon* or effects, and that the perſon or effects are *not to be found* in the juriſdiction of ſuch inferior court, *to cauſe the record of the ſaid judgment to be removed* into ſuch ſuperior court, to *iſſue writs of execution thereupon to the ſheriff* of any county, city, liberty or place, *againſt the perſon or effects of the defendant in the ſame manner, as upon judgments obtained in the ſaid court at Weſtminſter*: *and the Sheriff upon every ſuch execution, ſhall detain the defendant* until the ſum of twenty ſhillings be paid to him, or levy the ſame out of the effects, according to the nature of the execution, for the extraordinary coſts of the plaintiff in the inferior court, ſubſequent to the judgment and execution in the ſuperior court, over and above the money for which ſuch execution ſhall be iſſued.

ceaſed,

ceaſed, on whoſe part no will has been proved, nor any adminiſtration granted, and whoſe family, on notice of a motion for the above purpoſe, decline interfering.—The defendant had been three years in execution at the ſuit of *Delves Broughton*, Eſq. who died at Gibraltar, ſixteen months previous to this application, and no will had been proved, nor any adminiſtration granted. *At firſt the Court* doubted; but afterwards granted a rule *niſi*, directing, that notice ſhould be ſerved on the attorney of the *Broughton* family.—On ſhewing cauſe, the attorney for the *Broughton* family attended, and informed the Court, that the relations of the deceaſed declined interfering, and had not taken out, and did not mean to take out, letters of adminiſtration.—THE COURT ſaid, they wanted nothing but precedent to warrant them in doing what was deſired, as it was a reaſonable thing to be done; and that as the *Broughton* family had received notice, and there was no probable ground to ſuppoſe that adminiſtration would be taken out, they thought they might make the—Rule abſolute.

If a plaintiff cannot find ſufficient effects of the defendant to ſatisfy his judgment, the Court will order the ſheriff to retain, for the uſe of the plaintiff, money which he has levied in another action, at the ſuit of the defendant.—It was agreed, that this motion was of the firſt impreſſion, and Lord MANSFIELD ſaid, he believed there were old caſes where it had been held, that the ſheriff could not take *money* in execution, even though found in the defendant's ſcrutoire, and that a quaint reaſon was given for it, viz. that money could not be *ſold*. However the rule was granted, and it was afterwards made abſolute by conſent, with a qualification that the attorney's bill, in the cauſe in which the money had been levied, ſhould be paid in the firſt place.

Armiſtead, *v.* Philpot, Tr. Ter. 19 Geo. 3. B.R. 1 *Doug.* 230.

The ſpecific goods of a teſtator in the hands of his executor, cannot be ſeiſed in execution, under a judgment againſt the executor in his own right; if the ſheriff have notice that the goods are not the proper goods of the executor.—At the trial of this action, which was caſe againſt the defendants, as ſheriffs of Middleſex, for making a falſe return to a writ of *fi. fa.*—The jury found a ſpecial verdict (in ſubſtance) as follows: "That in Eaſter term, 30 *Geo.* 3. the plaintiffs recovered againſt *Watts* and *Reid* and his wife, executors of "*W. Lewer*, 236l. 10s. and on the 17th of May, 30 *Geo.* 3. "ſued out a *fi. fa. to levy that ſum of the goods and chattels, "which were of* Lewer, *in the hands of the executors to be "adminiſtered.* That on the 28th of May, 1790, the writ "was delivered to the defendants, then ſheriff. And that in "Eaſter term, 1790, *Wilſon* recovered againſt *Reid*, 1047l. "debt, and 63s. damages and coſts; which judgment was "ſigned the 27th of May, 1790. That on the 28th of May, "1790, *Wilſon* ſued out a *fi. fa.* on that judgment, teſted "on the 17th of May; which writ on the 28th of May, 1790,

Farr *et al v.* Newman, *et al.* Ea Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 621.

" and a few hours before the delivery of the plaintiffs' writ, " was delivered to the ſheriff, who under that writ, a few " hours before the delivery of the plaintiffs' writ to him, " ſeized goods in a houſe wherein *Reid* and his wife reſided, " and in which houſe *Lewer*, at his death, did reſide; and " which goods were the goods of *Lewer*. That on the ſame " 28th of May, 1790, after the ſheriff had ſeized the ſaid " goods, the attorney for the plaintiff gave notice to the " attorney for *Wilſon*, and alſo to the ſheriff, that the goods " ſo ſeized were the goods of *Lewer*, in the poſſeſſion of *Reid* " and his wife, as executors, liable to the payment of the debt " recovered by the plaintiffs, and alſo liable to the payment " of 116l. recovered by one *Stedman*, and not liable to the " payment of any debt of *Reid*; the ſame not being ſufficient " to ſatisfy the ſaid judgment and other debts of *Lewer*; and " that the ſaid attorney meant to take out executions on the " ſaid judgments; and unleſs they quitted poſſeſſion, actions " would be brought againſt them. That afterwards, on the " ſaid 28th of May, the attorney for the plaintiffs procured a " warrant from the defendants, then ſheriff, on the writ of " *fi. fa.* mentioned in the declaration, which warrant was " on the ſame day delivered to the officer to be executed. " That the officer went with the warrant to the houſe where " the goods were before they were ſold, but did not levy " thereon; and the ſheriffs afterwards returned *that there* " *were not any goods in their bailiwick, which were of* W. " Lewer, *at the time of his death, in the hands of* A. Reid, " *and* Ann *his wife, to be adminiſtered, whereof they could be* " *cauſed to be levied*, &c. and then the jury find that, by " means of the premiſes, the plaintiffs are hindered from re- " covering their damages, and have loſt the ſame."—This ſpecial verdict was twice argued; and for the plaintiffs, two points were made: 1ſt, That the teſtator's goods could not be taken under an execution for a debt of the executor's: to prove which were cited *Crane* v. *Drake*, 2 *Vern.* 616. 1 *Eq. Caſ. Abr.* 240; *Ellis's* caſe, 1 *Atk.* 101; *Howard* v. *Jennett*, 3 *Burr.* 1369; and *ante*, vol. II. p. 102, 287. and 1 *Com. Dig.* 259.—2dly, That they could not be taken for the debt of the huſband of the executrix: *Bro. Abr.* title " *Baron and Feme*," pl. 84.; ib. title " *Adminiſtrator*," pl. 38.; *Norton* v. *Sprigg*, 1 *Vern.* 309.; *Bachelor* v. *Bean*, 2 *Vern.* 61.; 1 *Com. Dig.* 269.; *Wentw. Off. Exec.* 298.; and 1 *Com. Dig.* 570.—In anſwer to the firſt, the following caſes were relied on by the defendants' counſel: *Hoyl* v. *Lundon*, 3 *Keb.* 839.; *Elliot* v. *Merryman*, 3 *Barnard.* 81.; *Nugent* v. *Gifford*, 1 *Atk.* 463.; *Ruſſell's* caſe, 5 *Rep.* 27, 2 *Vez.* 268.; and *Whale* v. *Booth* (1).—And in

(1) *Whale* v. Sir *Charles Booth Knight*, *M.* 25 *Geo.* 3. B. R. Action againſt the ſheriff for a falſe return. Verdict for the plaintiff, damages 3cl.

anſwer

anſwer to the ſecond, theſe two: *Arnold* v. *Bidgood*, *Cro. Jac.* 318.; *Thruſtout* v. *Coppin*, 3 *Wilſ.* 277.; 2 *Bl. Rep.* 801.; and *ante*, vol. II. 289. *The Court* took time to conſider of their judgment; and now there being a difference of opinion on the bench—GROSE, J. delivered his firſt:—*The queſtion upon all theſe facts is, Whether the defendants as ſheriffs have made a falſe return to the plaintiff's writ; that is, whether there were any goods of the teſtator in the hands of* Reid, *and his wife, to be adminiſtered at the time the ſheriffs received the plaintiff's writ of fieri facias?* Before I conſider the law, I will ſay a word upon the juſtice of the caſe.—Goods are delivered by the law into the hands of a man for the purpoſe of dividing them amongſt the creditors, legatees, and next of kin, of another,

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35l. at all events, and a farther verdict for 368l. ſubject to the opinion of the Court on a caſe reſerved.—*William Woodham* was indebted to the plaintiff by bond, conditioned for the payment of 400l. He died, leaving his two ſons, *William* and *John*, his executors, who poſſeſſed themſelves of effects to a much greater amount than the money due on the bond. The plaintiff obtained judgment for the ſaid ſum, and 35l. for coſts. On a *fieri facias* ſued out, the ſheriff returned *nulla bona*. "It appeared in evidence that the executors were indebted to their uncle to the amount of 800l. and confeſſed judgment; upon which a *fi. fa.* iſſued; and goods were levied *both of the teſtator and of the executors for ſatisfaction of that judgment*. The caſe ſtated that the uncle knew the goods levied were the goods of the teſtator. *The queſtion was, Whether under the circumſtances of this caſe the executors had ſo far conveyed away the goods of the teſtator as to deprive the plaintiff of levying her debt upon the ſaid goods?* After argument, Lord *Mansfield*, Ch. J. ſaid, The general rule, both of law and equity, is clear, that *an executor may diſpoſe of the aſſets of the teſtator; that over them he has an abſolute power; and that they cannot be followed by the teſtator's creditors*. He muſt ſell in order to effect the will; but who would buy if liable to be called to an account? It is alſo clear, that if at the time of alienation the purchaſer knows they are aſſets, this is no evidence of fraud; for all the teſtator's debts may have been already ſatisfied; or if he knows that the debts are not all ſatisfied, muſt he look to the application of the money? No one would buy on ſuch terms. There is one exception indeed, where a contrivance appears between the purchaſer and executor to make a *devaſtavit*. But nothing of that ſort appears here; for the alienation is by execution and a bill of ſale. The teſtator died three years before this tranſaction; and if the executors paid all demands, the aſſets belong to them. No demand was made by the plaintiff during all that time; and long before any demand was made, a fair creditor of their own ſued out execution. As to fraud, there is none. It is ſtated, indeed, they knew the goods were the goods of the teſtator; but that will not make a fraud, as it is not ſtated that they knew the debts were unpaid. *It is true that the executors might have diſputed the ſeizing of the goods which he had as executor*; but they did not object. On the contrary, by being a party to the bill of ſale, they aſſented to it; and this bill of ſale ſo aſſented to, is equal to a purchaſe, and is the ſame as an alienation by the executors.—WILLES and ASHHURST, Juſtices, concurred.---BULLER, J. What is it that conſtitutes a *devaſtavit*? Not merely that they knew the goods ſo diſpoſed of were aſſets, but that they alſo knew that there were debts unpaid.——Judgment for the defendant.

whoſe goods they were. Their value we will ſuppoſe 1000l. The debts and legacies we will ſuppoſe 500l. On the day thoſe goods are delivered to the executor, before the teſtator's creditors can recover their debts, a *fieri facias* for 2000l. againſt his goods is delivered to the ſheriff. It is urged that theſe goods, the moment the writ is delivered, are bound to pay the debt of the executor, and that neither the creditors, nor legatees, nor next of kin, ſhall receive one farthing. The injuſtice is obvious. It is to make the goods of *A.* pay the debts of *B.* and poſſibly leaves the creditors of *A.* without any redreſs but againſt the perſon of *B.* One caſe of intolerable hardſhip may be put: ſuppoſe the executor indebted to the crown in more than the value of his own and the teſtator's perſonal eſtate; the moment the executor is inveſted with his authority, an extent iſſues and ſweeps away every ſhilling of the teſtator, in fraud of his creditors, legatees, and next of kin: a more ſhameful act of injuſtice can hardly exiſt under the name of law. I hope I can ſhew it to be no more law than it is juſtice. The ground on which it was, and muſt be, argued is, that the *fieri facias* againſt the goods of the executor muſt be executed on the goods of the teſtator in the hands of the executor. And here I premiſe that (for argument ſake) I ſhall conſider *Reid*, the huſband of the executrix, as if he were the executor. And it is argued, that the moment a man becomes executor, the goods of the teſtator are ſo veſted in him that they are liable to his debts as much, and in the ſame way, as his own proper goods are; in ſhort, that in the hands of the executor, they are to be conſidered in all reſpects as his goods, at leaſt as far as concerns executions againſt him. In order to ſee whether that poſition be well founded, I will conſider what in law an executor is, and what intereſt he has in the teſtator's goods. One definition (and I think a good definition it is) that I find of an executor is, that he is one to whom a teſtator has given his goods, chattels, and perſonal eſtate, for the purpoſe of paying all his debts. And in *Wentworth*'s Office of Executors, p. 4. it is ſaid, that "the naming of *A.* and *B.* executors is, by implication, a gift or donation unto them of all the goods and chattels, credits, and perſonal eſtate, of the teſtator; and the laying upon them an obligation to pay all his debts, and making them ſubject to every man's action for the ſame." And this, that is, the payment of his debts, being the purpoſe for which the goods are given, his intereſt in the goods is not the ſame as in his own goods: the reaſon given is, that he hath them not in his own right but in the right of another; and that "by law he is but the miniſter and diſpenſer, and diſtributor of theſe goods." 9 *Rep.* 88. *b. Wentw.* 88. That of this there can be no doubt we need but look into the entries of judgments againſt executors, and the writs of execution upon thoſe judgments,

judgments, which are to levy ſo much of the goods of the teſtator in his hands to be adminiſtered. This ſhews that the law conſiders thoſe goods differently from his own goods; it is not to levy ſo much of *his goods*, which it would have been if upon their coming into his hands the law had conſidered them as his: but it is to levy *of the goods of the teſtator*, conſidering them, in his hands, ſtill as the teſtator's. If they are not ſo to be conſidered, but as the goods of the executor, it ſeems that the writ of *fieri facias*, &c. *de bonis teſtatoris*, cannot be executed: but inaſmuch as they are in law the teſtator's, he (the executor) cannot deviſe them. If he die inteſtate, the goods of the teſtator veſt, not in his adminiſtrator, but in the adminiſtrator *de bonis non* of the teſtator: if he commit felony, or treaſon, although he forfeit his own goods, yet thoſe which he has as executor are not forfeited. For the law, and for the principle upon which the law is founded, I cannot do better than refer to *Wentworth*'s Office of Executors, p. 85, 86, 87, 88; and there we find (p. 86) a paſſage directly applicable to the point now before us: "Whereas a man's goods ſtand liable to the payment of his debts, both in his life-time and after, the goods which a man hath as executor are not to be taken in execution for his own debts, either upon a recognizance, ſtatute, or judgment, had againſt him. And if ſuch an one die indebted, leaving to his executors much goods which he had as executor, theſe are not aſſets in his hands, liable to the payment of his debts, but only for the payment of the firſt teſtator's debts or legacies. Therefore, a *quo minus* brought by an executor, ſhewing that he was not able to pay the king's debt, becauſe the defendant detained from him 100l. which he owed him as executor to *F. S.* was overthrown; for that it could not be intended, ſaith the book, that the king's debt could be ſatisfied with that which the plaintiff ſhould recover and receive as executor." And the reaſon of this difference is ſtated in page 88. The paſſage in page 86 is direct, and what the author ſtates to be law appears to be founded on paſſages in the year books, in *Plowden*, and in Lord *Coke*; and appears to have been adopted by Lord Chief Baron *Comyns* in his Digeſt, 1 vol. 259. (B. 10). tit. "Adminiſtrator." His words are: "Nor ſhall they be taken in execution for the proper debt of the executor or adminiſtrator." Upon the ſame principle, we find in 3 *Burr.* 1369. *ante*, vol. II. p. 102. that the commiſſioners of a bankrupt cannot ſeize the teſtator's goods in the hands of an executor bankrupt: but a commiſſion of bankrupt is conſidered as a ſtatutable execution; and if in law the goods are his goods, they veſt in the commiſſioners, and they are bound to take them. Such being the undoubted law as to ſome of the points I have taken notice of, one may fairly be permitted to aſk, why may not the executor deviſe the teſtator's

goods? Why may not his adminiſtrator take them? Why are they not forfeited to the crown on the attainder? Why are they not liable to be ſeized under a commiſſion of bankrupt againſt the executor? The anſwer and reaſon is, I think, obvious. It is becauſe they are not *his goods*; he is only the diſtributor and diſpenſer of them for the benefit of the creditors, the legatees, and the next of kin, of the teſtator. To permit him to deviſe them, to permit his adminiſtrator to take them, to permit the aſſignees under a commiſſion againſt the executor to ſeize them, and to permit the ſheriff under an execution iſſued againſt his goods, to take them, would be to diſpoſe of them for purpoſes for which he had them not; in a way in which it cannot by law be intended that thoſe purpoſes will be anſwered. And it ſeems very difficult to aſſign any reaſon why the goods of a teſtator, in the hands of an executor, ſhould be privileged from a ſeizure by the crown, in the caſe of an attainder of felony, and from a ſeizure by aſſignees under a commiſſion, and yet not be privileged from being taken by the ſheriff, under a *fieri facias* againſt the executor's goods. On the part of the defendants, it has been contended, that if in this caſe the goods are not conſidered as the goods of *Reid*, the huſband of the executrix, the doctrine laid down in former caſes, in which the executor has been conſidered as impowered to diſpoſe of the goods of the teſtator, will be impeached; and it has been argued that this caſe is analogous to thoſe caſes. There I conceive is the fallacy; and that in the two caſes there exiſts a manifeſt and material difference; and that the determination in this caſe for the plaintiffs will not at all impeach the law upon which that line of caſes is founded. The power of ſelling or diſpoſing of the goods of the teſtator the executor muſt have; it is neceſſarily incident to his office: without that power his truſt cannot be executed; nor can the purpoſes for which it is given be anſwered. Therefore when he ſells, the law intends that he ſells the goods of the teſtator to anſwer the purpoſes for which the power of ſelling was given; and in ſo doing, he does that which is neceſſary to his authority, and therefore lawful, juſt, and right. But in the caſe before us it is the reverſe; it is not neceſſary for the purpoſe of diſcharging the teſtator's debts, and executing the executor's authority, that the goods of the teſtator in the hands of the executor ſhould be conſidered as the goods of the executor, and taken in execution under a judgment to recover a debt due from him. On the contrary, the moment they are taken under this judgment, the power of diſtributing them for the purpoſes for which they were given is taken away; and ſo far is it untrue, that it can be intended that thereby the teſtator's debts may be paid, that it is moſt evidently clear that, if ſuffered, it prevents the poſſibility of their being paid by the produce of thoſe goods; and the power of diſtributing them in

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the way intended by the teſtator is taken away (and as it is ſaid by law), and ſo, if it be true, a man is by law compelled to be unjuſt. For when they are taken in execution for the executor's debt, they are put into another channel; they are applied to a purpoſe for which they were not given; and the power of doing juſtice in this reſpect is taken from the executor, even if he intend to do it. Surely it cannot be the operation of law, to work ſuch abſurdity and injuſtice under the plea of neceſſity, which clearly does not exiſt. But caſes have been cited; and it was argued for the defendants, that to this purpoſe is the caſe in 3 *Keb.* 839, *Hoyl* v. *Lundon*. That was a "motion to ſtay execution of goods in the ſheriff's hands, being the wife's, as executrix to her former huſband, and taken for the preſent huſband's debt; which *Rainsford*, Ch. J. and *Jones*, J. denied, becauſe by payment of the debts of the former huſband theſe goods *may* be the wife's own; and this Court will not try this *on affidavit*. And by *Rainsford*, Ch. J. in *Norden*'s caſe, *ſupra*, laſt term, it was held that execution againſt the goods of the executor for debt in *jure proprio* is a *devaſtavit nolens volens*." The obſervations upon this caſe are: firſt, that whatever was determined was on a ſummary motion, and by the opinion of two judges only; and 2dly, that the ground was, that the goods *might* be the wife's own, by having paid debts of the former huſband. Therefore it may be fairly inferred that, unleſs by ſomething done by the executrix they become her's, they are to be conſidered as the goods of the teſtator. Here nothing appears to have been done; and no fact is ſtated to ſhew that by the payment of a debt, or any thing elſe, they had become the wife's or her ſecond huſband's. But whether the wife's own, or not, the Court would not in that caſe determine on affidavit. This, therefore, they conſidered as a matter of fact. And here they are not ſtated to be her's; nor any thing done by her to give her a claim to them. And then the Chief Juſtice alluded to a caſe which, in the report, is ſaid to be "*ſupra* laſt term," but is not to be found; and by which a man is guilty of a *devaſtavit nolens volens*. That the law will conſider a man guilty of doing that which is unjuſt and unlawful as to third perſons, and which the law ſays muſt be done, and that it is not in his power to prevent, ſeems moſt extraordinary, and appears to be the ſtrongeſt of all reaſons, for ſaying that that caſe, if even there were ſuch an one, cannot be law. I have looked in the preceding term for ſuch a caſe: there is none there; nor is there in *Levinz*; but in Sir *T. Jones*, 88. there is reported, as of that term, a determination of a caſe of *Norden* v. *Levet* (1): but in *Levinz* and

(1) See in this caſe alſo in 3 *Keble* 778, reported as of *Tr.* 29 *Car.* 2. the term but one before *Hoyl* v. *Lundon*.

*Keble*, the determination is ſtated as of Trinity term, 29 *Car.* 2. That caſe was in error on a *ſcire facias* againſt an adminiſtrator, ſuggeſting a *devaſtavit*. In that caſe, the adminiſtrator, having brought an action of trover in right of the inteſtate, compounded it by an agreement, that the adminiſtrator ſhould diſcharge the defendant in the action of trover, and that the defendant ſhould pay the adminiſtrator 650l. at a future day. The queſtion was, Whether this was a *devaſtavit*; and whether he ſhould be liable upon this *de bonis propriis?* It came on ſeveral times, and at laſt it was determined that this was a diſpoſal and converſion to the uſe of the adminiſtrator; and judgment was given for the plaintiff. From the name, the ſubject, and the time of the determination, I rather think this was the caſe alluded to by the Chief Juſtice, and certainly miſapplied by him. The motion in the caſe cited, was the firſt day of Hilary term, 1677; and only *Raynsford*, Ch. J. and *Jones*, J. were in court. The caſe of *Nugent* v. *Gifford*, 1 *Atk.* 463. proves only that an executor may aſſign over a mortgage term of his teſtator, and if he do ſo, although in payment of his own debt, ſuch aſſignment is good: and that is founded on the doctrine that an executor may alien the aſſets of the teſtator, and when aliened no creditor can follow them; which I admit and ſay it does not apply to this caſe; for although he may alien, as the diſtributor of the goods, yet to every other purpoſe they are the goods of the teſtator, and ſo to be conſidered, and not his goods. The ſame obſervation and anſwer apply to *Jacomb* v. *Harwood*, 2 *Ves.* 265: and that caſe, as far as concerns this cauſe, proves only that where there are two executors, each may releaſe, pay, transfer, or ſell, without the other, any part of the teſtator's property, which I do not deny. In *Whale* v. *Booth*, Lord *Mansfield* ſaid, "The general rule, both of law and equity, is now clear, that an executor may diſpoſe of the aſſets; and they cannot be followed by the creditors of the teſtator. *Mead* v. *Ld Orrery*, 2 *Vern.* 75. 2 *Eq. Caſ. Abr.* 488. And it would be very inconvenient if the creditors could; for then no one would deal with an executor, without examining the whole account of aſſets. Where the buyer is any way acceſſary to the contrivance of a *devaſtavit*, that is a different caſe: but here it is not ſuggeſted; there is no appearance of fraud. The executor might have diſputed the firſt execution, but he conſented to it: and I do not ſee how it then differs from any other alienation. An execution acquieſced under, is equivalent to a conveyance. Then the ground of that determination was, that under all the circumſtances of that caſe the execution was to be conſidered as a ſale by the executor. If that were the ground, I have given it my anſwer, as not applicable to the preſent caſe; if it were upon the ground contended for in the preſent caſe, I ſay that this ſpecial verdict was made for the purpoſe of reconſidering

ſidering that caſe; and reaſonably too, when it is recollected that that ground is totally deſtructive of the purpoſe for which the power of the executor is given. But it is ſaid, if this be not the law, no man can ſafely deal with an executor. That I deny; for a determination in this caſe for the plaintiffs will not decide that a man may not buy the teſtator's goods, if the executor chooſe to ſell them. It will only decide that a judgment againſt the executor's goods does not neceſſarily bind the goods of another perſon, who gave them to the executor to diſcharge his (the teſtator's) debts, and not the debts of the executor. And if it be ſaid that the executor may with this money pay his own debts, and ſo elude the teſtator's intention, my anſwer is, I admit it: it is ſo, becauſe (as I ſaid before) the power of ſale is neceſſarily incident to his office, and the law intends that he will do what is right: but in conſidering the goods of the teſtator as neceſſarily liable to the execution of a judgment againſt the executor, the law would compel injuſtice to be done, and conſider the act as unjuſt, as it conſiders the execution which it compels, and which the executor cannot prevent, as a *devaſtavit* by him. A queſtion may be put, How the ſheriff is to diſtinguiſh between the goods of the executor and the goods of the teſtator? Here that queſtion cannot be put; becauſe the ſheriffs were informed, and had notice that theſe goods were the goods of the teſtator, and not the goods of the executor. But I will meet the objection in its full force. The ſheriff in this, as in many other caſes, muſt act at his peril: ſo ſay *Dalton*, 146; and *Gilbert* in his Treatiſe on Execution, p. 21. *Dalton*, 146, in inquiring into the duty of a ſheriff, where there is a doubt reſpecting the property of the goods, ſays, "but the ſafeſt and wiſeſt courſe for the ſheriff or officer, is to inquire by a jury in whom the property of the goods is; or elſe not to take in execution, or not to meddle at all with any ſuch goods as ſhall not plainly appear to them to be the proper goods of the defendant; for it ſeemeth that the officer is bound at his peril to take knowledge whoſe the goods be, or at leaſt that they be the proper goods of the defendant; but being found by the jury, that excuſeth the ſheriff." *Gilbert*, 21. ſays, "the ſheriff is bound at his peril to take only the goods of the defendant; and if he doubt whether the goods ſhewn him be the defendant's, he may ſummon a jury *de bene eſſe*, to ſatisfy himſelf whether the goods belong to the defendant or not. This will juſtify him in returning, that the defendant has no goods within his bailiwick, and mitigate damages in an action of treſpaſs, if the goods ſeized ſhould not happen to be the defendant's." If this would be a ſufficient anſwer in the mouth of the ſheriff, what are we to ſay to caſes of a much ſeverer line of juſtice; caſes, where a ſheriff is conſidered as a *tort-feaſor* by relation; caſes of bankruptcy? In the preſent caſe, upon information given

given to the ſheriff, that the goods were the goods of the teſtator, unappropriated by the executor, and on which he had no demand, he might have ſummoned a jury; and had the jury found them to be the goods of the teſtator, not of the executor, he would have been juſtified in returning *nulla bona*. Upon theſe grounds it ſeems to me that the goods of the teſtator, upon the facts ſtated in this ſpecial verdict, were not in law the goods of the executor liable to an execution againſt him, but at the time when the *fieri facias* againſt the goods of the teſtator was delivered to the ſheriffs, continued and were the goods of the teſtator, liable to the execution againſt his goods; conſequently, that the execution delivered to the ſheriffs againſt the goods of the executor, did not bind the goods in his hands that remained unadminiſtered; but when they received the writ to levy the debt of the goods of the teſtator, there were goods which they might have taken in execution of that writ.—In this way of conſidering the queſtion there is no occaſion for me to enter into a head of argument much diſcuſſed at the bar, how far theſe goods, being veſted in the executrix, are in conſequence of the marriage liable to be taken in execution for the debt of her huſband; as, in my opinion, this action would have been maintainable, had the huſband been the executor, and not merely the huſband of an executrix. Nor do I conſider the difference in point of law, whatever it may be in point of juſtice, that is made by the notice given to the ſheriffs, that the goods were the teſtator's; becauſe, if my opinion be right, the ſheriffs muſt at their peril execute the writ, and make a true return. *In this caſe, they have not ſo done, as they have returned* nulla bona *to the* fieri facias *againſt the goods of the teſtator, when there were goods of the teſtator which they might have taken in execution of the writ.—Therefore, I am of opinion that, ſuch return being falſe, the action is well ſupported, and that the plaintiffs ought to have judgment.*—[BULLER, J. was of a different opinion, and aſſigned his reaſons at large.] BUT ASHHURST, J. agreed with GROSE, J. and ſaid, I do not mean to controvert the general doctrine, that by the appointment of a perſon, as executor, the legal property in the perſonal eſtate of the teſtator does on his death veſt in ſuch perſon, as executor. Nor do I mean to controvert that he has, as neceſſarily incident to the nature of his office, a diſpoſing power over ſuch property; for it being a part of his office to pay debts, &c. he muſt be able to convert the ſpecific property into money by the ſale of it. If it were otherwiſe, no man would deal with an executor; for the buyer cannot be ſuppoſed to have a knowledge of the ſtate of the teſtator's property and debts; and, therefore, the bare act of ſale is a ſufficient indemnity to the purchaſer, if there be no colluſion. I will add, that I do not diſagree with the doctrine laid down in

in the caſe of *Whale* v. *Booth*: but, in my opinion, that caſe does not at all govern the preſent; for *in that the execution (for the proper debt of the executors) was completely executed, and a bill of ſale made before the coming in of the plaintiff's execution for a debt of the teſtator's*, and though it is ſtated that the creditor knew the goods ſeized were part of the teſtator's property, it is not ſtated that he knew there were unſatisfied debts, nor did any creditor intervene till the excution was completely executed (which is not the caſe here). *If the creditors will lie by, and not aſſert their rights, it is reaſonable for a third perſon to ſuppoſe that all the debts are ſatisfied*; and if ſo, the executors have the property; or they may have paid the debts with their own money, and *it would be very inconvenient that an execution, completely executed, ſhould be overhauled, when it was owing to the laches and neglect of the party that the prior execution was ſuffered to be completed.* There are caſes where even the crown may loſe its priority by not aſſerting its claim in due time; as in *The King* v. *Cotton* (1); where it ſeems taken for granted that in caſe of diſtreſs *and ſale* a crown proceſs teſted *after the ſale* ſhall not overhaul it, though for a prior debt. I ſhall next conſider what the nature of the property is, which an executor has in the aſſets of the teſtator. And I apprehend it clearly not to be an *abſolute*, but a *qualified*, property; he has it only under a truſt to apply it for payment of the teſtator's debts, and ſuch other purpoſes as he ought to fulfil in the courſe of his office, as executor. This appears plainly from the form of the judgment in an action brought by a creditor of the teſtator; for it is "to be "levied of the goods of the teſtator in the hands of the ex- "ecutors to be adminiſtered, if they have ſo much in their "hands, and if they have not, then the coſts to be levied "of the goods of the executors:" this ſhews plainly that *the law makes a diſtinction between the goods he has as executor, and thoſe he has in his own right.* But it may be ſaid that, as the executor has the legal property in theſe goods and the ſheriff has an execution again *his* goods, the ſheriff is bound to take them if he can find no other. In anſwer to this, I ſay that, *as between the ſheriff and the party, the ſheriff will certainly not be a treſpaſſer by the taking; but, as between the ſheriff and an unſatisfied creditor of the teſtator, he is guilty of a wrong, if he proceed to ſell, after notice from ſuch creditor, that the goods ſeized were the property of the teſtator, and that he has a judgment againſt the executor, to be levied of the teſtator's goods: and he would be juſtified, as againſt the creditor of the executor, if he were to return* nulla bona; *for though the executor has the legal property, they are not his ſimpliciter, but merely as truſtee*

(1) *Park.* 112.

*for*

*for certain purpoſes till all debts are paid.* But the caſe in 3 *Keb.* 839. has been cited at the bar, and relied on. In the firſt place, this book does not ſtand in the higheſt degree of authority in general; and I do not think the intrinſic merit of the report itſelf of this caſe will add much to its authority. That caſe has been already mentioned, and, therefore, it is not neceſſary to ſtate it again. But I muſt obſerve that *Norden's* caſe, which is there referred to as of the preceding term, is not to be found. But to give the principal caſe more credit than it ſeems to deſerve, let us conſider what it is. The Court denied the motion, "becauſe by payment of the debts of the former huſband, theſe goods may be the wife's own; and this Court will not try this upon affidavit." The Court then refuſed to enter into this in a ſummary way. But that objection does not hold in the preſent caſe, where the Court are proceeding upon a ſpecial verdict, and where all the facts appear before them on record. There, too, the Court ſaid, "the goods may be the executor's own by payment of the debts of the teſtator. But there is nothing before us, upon which we can ground ſuch a preſemption. In the firſt place, the executor has not pretended upon the record that he has fully adminiſtered; and we are not then to preſume it. Nor has the ſheriff given any evidence upon this trial that the executor has paid debts to the amount. And I have always taken it as a rule, that *nothing is to be intended upon a ſpecial verdict.* Let us next conſider what is the juſtice of the caſe. The creditor who has brought his action, and recovered judgment againſt the huſband of the executrix in his own right, has given credit to the party himſelf. The teſtator's creditor never gave any credit but to the teſtator, and his aſſets. If then one of the two is to ſuffer, it muſt be agreed that he ought to ſuffer who has given credit to the executor. But it has been ſaid this will be a *devaſtavit* in the executor, and the plaintiff may have a remedy againſt him on the *devaſtavit, de bonis propriis*; but unfortunately it appears on the record that the executor has no goods and chattels of his own; therefore the plaintiffs' right to bring ſuch action will be but a poor remedy. They never truſted to the executor's ſolvency, but truſted to the teſtator and his aſſets. *I cannot agree that, becauſe the ſheriff has ſeized, he is bound to ſell.* Suppoſe he had ſeized goods as the goods of the debtor, when it afterwards appeared before ſale that they were manifeſtly the goods of another; it could not be contended that he was bound to ſell. Or ſuppoſe the party had the goods *as a truſtee* for certain purpoſes, which was made known to the ſheriff before ſale, if the ſheriff perſiſted in ſelling, it would, in my opinion, be a tortious act in him. Therefore I am of opinion, that judgment muſt be given for the plaintiffs. Lord KENYON, Ch. J. alſo agreed with *Groſe*, J. and *Aſhhurſt*, J. and

and ſaid, about the juſtice of this caſe no man living can doubt. *A.* died indebted to a conſiderable amount, leaving aſſets, and appointing executors to adminiſter them; and part of theſe aſſets remained in the hands of the huſband of the executrix down to the time when an execution was iſſued for the proper debt of the executrix's huſband. When that writ came to the ſheriff, if no claim had been made by any other perſon, if there had been no evidence to induce the ſheriff to believe that the goods ſeized were the property of the teſtator unadminiſtered, if there had been no competition between the reſpective creditors who had the ſuperior claim, the goods taken muſt have been conſidered as the property of him in whoſe hands they were found. They would have been treated as his own originally, or as having become ſo by payment of all the debts of the teſtator. But it is now too late to ſay that, in every caſe, and under all circumſtances, the poſſeſſion of goods is concluſive evidence of property, and will warrant a ſheriff in ſeizing *all* goods in the hands of the executor. In deciding that, we ſhould forget a ſeries of decided caſes upon marriage ſettlements, *Cadogan* v. *Kennet* (1); and many others. They eſtabliſh this point, that as ſoon as it becomes neceſſary to juſtice to enquire to whom the goods belong, the ſheriff is bound to make that enquiry. But it was ſaid, in the argument, that it was difficult for the ſheriff to decide in this caſe to whom theſe goods belonged: it was not leſs difficult in all thoſe caſes alluded to; becauſe poſſeſſion is *primâ facie* evidence of property. But the ſheriff is bound to execute the duties of his office; and if any queſtion ariſe about the property, the paſſage cited by my brother *Groſe*, from *Dalton*, ſhews that he has an opportunity of deciding that, by ſummoning a jury; and that will at all events juſtify him. That, in general, there is a diſtinction between thoſe goods which an executor has in his own right, and thoſe which he has as executor, the very form of proceedings abundantly evinces. For in an action againſt an executor, the judgment is, that the debt ſhall be levied *de bonis teſtatoris*, if there be ſufficient goods of the teſtator in the hands of the executor to be adminiſtered, and the damages and coſts in certain events to be levied *de bonis propriis*. In executing ſuch a writ, the ſheriff muſt abide by the terms of the writ, and make a diſtinction between the two ſorts of goods. And if, in the execution of ſuch a writ, he cannot find goods ſufficient to anſwer the debt of the teſtator's creditor, he cannot have recourſe to the other fund; but the creditor muſt inſtitute a new action, alleging a *devaſtavit*, before he can reſort to that other fund, and have execution

(1) *Comp.* 432. *inf a.*

againſt

againſt the executor's goods. This ſhews the diſtinction between the two funds beyond all doubt, and is of greater authority than even adjudged caſes, becauſe the writs and records form the law of the land. I will not go through all the caſes upon the ſubject, becauſe my brother *Groſe* has already ſtated them: but they all prove that wherever it is neceſſary to enquire whether goods in the hands of the executor belong to him, or to the teſtator, the ſheriff is bound to inſtitute the enquiry. In 3 *Burr.* 1369, Lord *Manſfield* expreſsly ſaid, "If an executor become a bankrupt, the commiſſioners cannot ſeize the ſpecific effects of his teſtator; not even in money, which ſpecifically can be diſtinguiſhed and aſcertained to belong to ſuch teſtator, and not to the bankrupt himſelf." This, indeed, did not want the authority of Lord *Manſfield*; for it ſtands upon the firſt principle of law and juſtice, *jus ſuum cuique tribuere.* One of the caſes cited was from 1 *Rol. Abr.* 889 (1). where it is ſaid, "if the huſband of an executrix ſue with her for a debt due to her as executrix to *J. S.* and the wife die after judgment and before execution, the huſband cannot have execution on the judgment; for though he was privy to the judgment, yet he ſhall not recover the debt, becauſe that would belong to the ſucceeding executor or adminiſtrator of *J. S.*" Now if all the property which an executor had, whether belonging to the teſtator or to himſelf, were to be mixed in one undiſtinguiſhed maſs, ſuch caſes never could have ariſen. In that caſe, if the huſband and wife had ſued for a debt due to the wife in her own right, the huſband might have had execution. As to the caſe cited from 3 *Keble*; my brother *Aſhhurſt* has already obſerved that that reporter is not always accurate; and, if any inſtance were wanting to warrant the obſervation, the caſe referred to would prove it; becauſe he there referred to another caſe of his own reporting, as of the preceding term, which is not there to be found. And, indeed, I cannot reconcile to my mind the principle ſaid to have been eſtabliſhed in *Norden*'s caſe, that an executor ſhall be compelled to commit a *devaſtavit nolens volens.* But the principal caſe might, I think, have been cited by the plaintiffs here; there the Court "refuſed, on motion, to ſtay execution of goods in the ſheriff's hand, being the wife's, as executrix to her former huſband, and taken for the preſent huſband's debt, *becauſe, by payment of the debts of the former huſband, the goods might be the wife*'s own; and the Court would not try this on affidavit." There the material queſtion was, whether or not the wife had paid debts to the amount of thoſe goods; becauſe, if ſhe had, they would have belonged to

(1) 889. tit. "Execution;" there being two pages of the ſame number.

her:

her: but that the Court refuſed to try on a ſummary application. But it is not ſaid in that caſe that a creditor of the teſtator came in before the execution was executed: but the goods being found in the poſſeſſion of the huſband of the executrix, and no competitor appearing to make any croſs demand, they were (for any thing that appeared to the contrary) his own, and were, therefore, taken in execution for his debt. But that caſe does not prove that if there had been any competition between the creditor of the executor and of the teſtator, and if the fair ſtate of the caſe had been diſcloſed to the ſheriff, he muſt have taken the goods as belonging to the former. As little to the defendants' purpoſe alſo is the caſe of *Whale* v. *Booth*. Lord *Mansfield*, in deciding that caſe, attended to the juſtice of it, and ſeemed rejoiced to find that the law and the juſtice of the caſe were not at variance. His lordſhip began with ſaying "that the general rule of law and equity was clearly ſettled, that an executor *may* alien the aſſets of the teſtator for a debt of his own, and that a creditor cannot follow them; and that it is no objection to the validity of the ſale that the purchaſer knew that they were aſſets." It is abſolutely neceſſary that he ſhould have that power, in order to convert the goods into money for the payment of debts. His lordſhip ſtated one exception, "where there was a contrivance between the executor and his creditor to enable the former to commit a *devaſtavit*." Here, indeed, was no contrivance between thoſe perſons: but the effect was the ſame; for the attempt on the part of the creditor was to compel the executor to commit a *devaſtavit*, which is an exception to the general rule. Lord *Mansfield* then proceeded to ſay, that "when the executor had paid all the demands upon the teſtator, the aſſets belonged to him." But that cannot apply to this caſe; where, ſo far from the teſtator's debts being all paid, it appears that before the execution againſt the executor was executed, this competition between the reſpective creditors aroſe, which ſhews that the teſtator's effects were not become the property of the executor, becauſe the debts were not paid. His lordſhip then ſaid, "when the effects were ſeized, the executor might have diſputed their being applied to ſatisfy his own debt. It is true that the executor may diſpute it; and when the objection is made, it controls the *primâ facie* evidence that the goods in the hands of the executor are his own. His lordſhip alſo added, that "the ſale under the execution, in that caſe, could not be diſtinguiſhed from an alienation by an executor." In general it cannot; but it may be diſtinguiſhed when the ſeizure is made to anſwer the purpoſes of injuſtice. I agree, therefore, with the reaſoning of that caſe throughout; and think that that caſe, and the one in *Keble*, afford a ſtrong argument in favour of the plaintiffs here. I am not prepared

pared to exclude from our conſideration the deciſions in courts of equity. *Equitas ſequitur legem.* Where the law is ineffectual, equity ſteps in to give redreſs, following, however, the rules of law. And in *Cowper* v. *Lord Cowper* (1), Sir *Joſeph Jekyl*, in commenting on the juriſdiction of the Lord Chancellor, ſaid that the diſcretion which was to be exerciſed in that Court was to be governed by the rules of law and equity; that in ſome caſes it followed and aſſiſted the law, by advancing the remedy; and that though in others it relieved againſt the abuſe, or allayed the rigors, of it, it in no caſe contradicted or overturned the grounds or principles of law. With regard to the caſe cited from 3 *Lev.* 204. where the ſilver cup was taken in the hands of the executor; the ground upon which the Court proceeded was that they would intend the property altered after ſo long a poſſeſſion by the executor. But there is no ground here upon which we can intend an alteration in this property: but, on the contrary, that intendment is negatived, for it appears that the executor has not paid all the debts of the teſtator. The facts found by this verdict, inſtead of opening a door to let in the preſumption that the teſtator's debts were paid, and that the goods were, conſequently, become the property of the executor, abſolutely exclude it. As to the expreſſion cited from *Shower* to ſhew that goods once ſeized cannot be ſeized again, it muſt mean, when they are *legally ſeized*; for if any thing happen to diſaffirm the firſt ſeizure, and to ſhew that it was not legal, it is conſidered as no ſeizure in law; and the word "ſeizure" is, in ſuch a caſe, miſapplied. *Per Curiam*, judgment for the plaintiffs.

Quick & Ux. v. Sir W. Staines, Kt. Sheriff, Tr. Ter. 31 Geo. 3. C B. 1 *Pul & Boſ.* 293.

But if an executrix uſe the goods of her teſtator as her own, and afterwards marry, and then treat them as the goods of her huſband, ſhe ſhall not be allowed to object to their being taken in execution for her huſband's debt.—This was an action of trover for houſehold goods brought by the huſband and wife in right of the wife as executrix of her former huſband *M'Pherſon*, under the following circumſtances: *M'Pherſon* died about nine months previous to the action being brought, having made his widow his executrix, who continued in poſſeſſion of his goods, and about three months after his death married the plaintiff *Quick*. During thoſe three months ſhe uſed the goods as her own, and after her marriage with *Quick* the goods were treated by them both as his. The defendant having taken theſe goods in execution at the ſuit of a perſon who was a creditor both of *M'Pherſon* and of *Quick*, but who claimed them upon the preſent occaſion to ſatisfy the debt of the latter, received notice from the

(1) 1 *P. Wms.* 753.

plaintiffs

plaintiffs that the effects which he had taken were the unadministered goods of *M^c Pherson*. On the trial of the cause, EYRE, CH. J. being of opinion that a *devastavit* had been committed on the part of the executrix, by putting the effects of *M^c Pherson* into the hands of her second husband, *directed a nonsuit* against the plaintiffs, with liberty to move to set it aside, and enter a verdict in their favour. Such motion having been made, on the authority of the foregoing case of *Farr* v. *Newman*, cause was shewn against it. EYRE, Ch. J. said, that he was not aware at *nisi prius* that the case of *Farr* v. *Newman* had been decided in so solemn a manner, though if he had, it would have made no other difference than to make him wish that this case should be put upon the record. The first objection to the authority of that case, as applying to this, arises from the form of the action, which was not the same as here; and the second, from the difference of the parties. It is one thing whether a creditor shall insist that an executor has been guilty of a *devastavit*, and another, whether the executor shall take advantage of his own wrong, and justify his own misconduct by saying that the goods are not his but his testator's. The case of *Whale* v. *Booth* and others is directly in the teeth of *Farr* v. *Newman*. I think, however, that this question may be decided on a principle which will leave the latter case altogether untouched, viz. that the executrix had taken the goods to her own use. On that ground I shall have no difficulty in deciding: but we will look further into this question. CUR. ADV. VULT. On the next day PER CURIAM: We have looked into the case of *Farr* v. *Newman*, and the authorities there cited, and the Court adheres to the opinion, that this nonsuit ought not to be set aside. *We proceed on a ground which does not at all interfere with the case* of *Farr* v. *Newman*. The ground of our decision is that originally taken: viz. that a *devastavit* has been committed by the executrix, who before her marriage had converted the goods. It would be hard (as it was argued) if the mere act of marriage had worked a *devastavit*; and we do not hold that. But when in consequence of the marriage the effects were permitted to come into the hands of the husband, and to be used by him, then at least, if not before, a clear *devastavit* was committed, since that conduct amounted to a conversion of the goods. We think that *where the executrix herself, or her husband, have converted the goods, it does not lie in the mouth of either of them to say that they are not the property of the husband, in a case between the executrix and one of his creditors.* We do not say any thing with respect to the question, as between creditors of the original testator pursuing the assets with legal diligence, or the executrix in respect of those assets, and creditors of the ex-

ecutrix or the huſband of the executrix, whether they ſhall or ſhall not have a preference againſt a creditor of the executrix. That queſtion will be fit to be conſidered when it ariſes, and then we ſhall decide it, with a proper reſpect for the caſe of *Farr* v. *Newman* contraſted with the caſe of *Whale* v. *Booth*, before Lord *Mansfield*, with the other caſes to be found in the books upon the ſubject, and with the general principles of law relating to the goods of teſtators and inteſtates, and the nature of a claim made on their repreſentatives in reſpect of thoſe goods. It may be a difficult queſtion, but it is not now to be touched. *Per Curiam*—Rule diſcharged.

Hutchinſon *v.* Johnſton, Ea. Ter. 27 Geo 3. B.R. 1 *Ter. Rep.* 729.

Where two writs of *fieri facias* againſt the ſame defendant are delivered to a ſheriff on different days, *and no ſale is actually made* of the defendant's goods, the firſt execution muſt have the priority, even though the ſeizure were firſt made under the ſubſequent execution. And if the perſon, claiming under the ſecond execution, pay the ſheriff the amount of the debt under the firſt execution for his ſecurity, the Court will not compel the ſheriff to refund that money on motion. —This was a rule to ſhew cauſe why the ſum of 70l. 13s. 10d. paid by the plaintiff to the ſheriff of Middleſex under a writ of *fieri facias*, iſſued at the ſuit of *J. Gover* againſt the goods, &c. of the defendant, ſhould not be repaid by the ſheriff to the plaintiff. The circumſtances which gave riſe to this application were theſe: On the 25th of November, 1786, the plaintiff entered up judgment againſt the defendant for 600l. and on the ſame day ſued out a *fieri facias* directed to the ſheriff of Middleſex; on which a warrant was granted on the ſame day to *Simpſon*, a ſheriffs' officer, who entered and took the defendant's goods on the evening of that day. On the 27th of November, another ſheriffs' officer entered the defendant's houſe by virtue of a warrant on a *fieri facias*, dated the 23d of November, for 63l. 10s. and intereſt, beſides fees, &c. at the ſuit of *Gover*. On the return of the writ, the plaintiff applied to the ſheriff for a bill of ſale, who informed him that *Gover*'s execution, being brought into the office prior to the plaintiff's, muſt be firſt ſatisfied; upon which the plaintiff paid into the ſheriff's hands 70l. 13s. 10d. the amount of *Gover*'s execution, which was the ſum now claimed. Ashhurst, J. The general principle of law is, that the perſon whoſe writ is firſt delivered to the ſheriff is entitled to a priority; and that the goods of the party are bound by the delivery of the writ. But the legiſlature ſaw the inconvenience and hardſhip which would fall upon innocent purchaſers, if the vendee under the ſecond writ were liable to be diſpoſſeſſed of the goods which he had *bonâ fide* bought; and, therefore, they guarded againſt it by the ſtatute of frauds, 29 *Car.* 2. c. 3. ſ. 16. This I underſtand

derſtand was the ſole object of that part of the act. *Here* Gover's *execution was delivered on the 23d of November, and the plaintiff's not till the 25th. It is true, indeed, that the entry under the firſt execution was not made till the 27th, which was after the ſecond; but though the ſheriff ſuffered the ſeizure to be made under the ſecond writ firſt, yet he knew at that time of* Gover's *execution, and, therefore, made the bill of ſale to the plaintiff expreſsly under the condition of ſecuring him againſt* Gover. This, then, is not a bill of ſale under an execution to an innocent purchaſer, but to a perſon who purchaſed with notice of a prior claim. This agreement takes it out of all the caſes with reſpect to innocent vendees; for though the poſſeſſion of an innocent vendee ſhall not be diſturbed, yet as to all the reſt of the world the goods are bound from the delivery of the writ. Here the plaintiff is not a vendee *without notice*, and ſo is not protected by the ſtatute. It is clear, therefore, that he is not entitled to recover this money out of the hands of the ſheriff. BULLER, J. This is not a caſe in which the Court ought to interfere on motion: for if the plaintiff be right, he may bring his action againſt the ſheriff. In the caſe of *Rybot* and *Peckham*, Mic. Ter. 19 *Geo.* 3. B. R. the ſheriff, having two writs of execution, levied and *ſold* under the ſecond. There the Court held him anſwerable to both parties. But here *Gover*'s writ was firſt delivered to the ſheriff, and he has actually *ſold* under *that execution*, as appears by the plaintiff's own rule. Therefore the ſheriff having levied at the ſuit of *Gover* is liable to him. GROSE, J. of the ſame opinion; obſerving that the money which was the object of the preſent application was levied under *Gover*'s execution.—Rule diſcharged.

If a warrant of attorney to confeſs judgment is given to a *bonâ fide* creditor, and judgment is immediately entered up, and execution levied, to defeat another creditor, entitled to execution: this preference is not fraudulent.—At the trial of this action, which was for a falſe return to a writ of *fi. fa.* againſt *Charter*, the facts were theſe: In Eaſter term, 1791, *Shepherd* obtained a judgment againſt *Charter*, who brought a writ of error, and delayed execution until Eaſter term, 1792, when the judgment was affirmed. On the 7th of May the coſts on that ſuit were taxed, and on the ſame day *Charter* wrote a letter to *Shepherd*, requeſting further time, which was refuſed. *On the 8th of May*, Charter, *knowing* Shepherd's *intention to take out execution, which he was entitled to ſue out that day, went to the plaintiff*, Holbird, *who was a creditor of his, and informed him of his ſituation, and executed a warrant of attorney to confeſs a judgment: on which judgment was immediately entered up, and execution ſued out and delivered to the ſheriff two hours before* Shepherd's *execution reached the ſheriff's office.* The ſheriff levied under

Holbird *v.* Anderſon, Ea. Ter 33 Geo. 3. B.R. 5 *Ter. Rep.* 235.

*Shepherd*'s writ, and returned *nulla bona* to the plaintiff's. On this evidence it was contended, on the part of the defendants, that the plaintiff was not entitled to recover, inaſmuch as this was an undue preference given by *Charter* to the plaintiff, for the purpoſe of defeating *Shepherd*'s execution, and that the warrant of attorney given to the plaintiff was fraudulent, and void by the ſtat. 13 *Eliz.* c. 5. BUT LD KENYON being of opinion that it was not an undue preference, the plaintiff had a verdict.—Afterwards, on a motion to ſet this verdict aſide, IT WAS CONTENDED, on the behalf of the defendants, that the warrant of attorney was void, *although it was given for a good conſideration*, it not being a *bonâ fide* tranſaction. And it was urged, that the above ſtatute was paſſed "for the avoiding of feigned, covinous, and fraudulent feoffments, gifts, *grants*, alienations, conveyances, bonds, ſuits, *judgments*, *executions*, &c. deviſed to the intent to delay, hinder, or defraud creditors, and others, of their juſt and lawful actions, &c." and enacts (1) "that all and every feoffment, gift, grant, alienation, &c. and all and every bond, ſuit, judgment, and execution, for any intent or purpoſe before declared, ſhall be utterly void;" with a proviſo (2) that the act ſhall not extend to any grants, &c. *upon good conſideration, and* bonâ fide *made*, &c. PER CURIAM: There was no fraud in this caſe. The plaintiff was preferred by his debtor, *Charter*, not with a view of any benefit to the latter, but merely to ſecure the payment of a juſt debt to the former, in which there was no illegality or injuſtice. The words of the ſtat. 13 *Eliz.* do not apply to this caſe, for this warrant of attorney was given on a good conſideration; and the other words in the act, "*bonâ fide*," only apply to thoſe caſes where poſſeſſion is not delivered, or where it is merely colourable. The caſe of an executor does not apply, therefore it is not ſufficient to ſay that theſe were not creditors in equal degree; for the rule concerning creditors of unequal degrees does not apply *inter vivos*. And in this caſe the judgment and ſimple contract creditor ſtood upon the ſame footing. The reaſon why executors are confined in their preference to thoſe of equal degree, is becauſe otherwiſe it would amount to a *devaſtavit*. But *inter vivos* all are of the ſame degree, and any one may be preferred in this manner.—Rule diſcharged.

Marſh, knt. *et al. v.* Fawcett, clerk, Mic. Ter. 36 Geo. 3. C. B. 2 *Hen. Black.* 582.

A *levari facias de bonis eccleſiaſticis* is a continuing execution, and a levy may be made under it, from time to time, *after it is returnable*, till the ſum indorſed be ſatisfied; yet if it be *actually returned*, the authority of the biſhop is at an end.—In Auguſt, 1794, a *levari facias de bonis eccleſiaſticis*

(1) Sect. 2. (2) Sect. 6.

iſſued

iſſued to the biſhop of Wincheſter, at the ſuit of the plaintiffs, againſt the defendant, returnable in fifteen days of St. *Martin*, and indorſed to levy 125l. (being the arrears of two annuities, and to ſecure which judgment had been entered on a bond), on which a ſequeſtration iſſued. On the 25th of April following, the biſhop was called upon, by rule of Court, to return the writ, which he accordingly did, ſtating only the amount of the ſum levied *up to the return*-day; but, between the 25th of November, *the return-day of the writ*, and the 25th of April, the ſequeſtrator had received a much larger ſum from the profits of the living, which, after certain deductions, remained in his hands, and which, together with the ſum before levied, amounted nearly to the ſum indorſed; and ſeveral other writs of *levari facias* had been delivered to the biſhop, at the ſuit of other plaintiffs againſt the defendant, ſome before the return-day of the ſaid writ, and ſome after.—It was therefore moved, that the biſhop and his ſequeſtrator might proceed to levy the plaintiff's debt out of the growing profits of the vicarage, and that the writ and return might be taken off the file, and the writ amended. PER CURIAM: This is certainly, in its nature, a continuing execution, unleſs the plaintiff takes away the authority under which the ſequeſtration iſſues, by calling generally for a return of the writ. The miſtake here was in calling for that return; the proper way would have been to have ruled the biſhop, from time to time, to know what he had levied: all that can be done now is to amend the return, by inſerting the amount of the whole ſum received under the ſequeſtration, up to the 25th of April.—The rule was made abſolute, not to take the writ off the file, but for the biſhop to amend the return, by ſtating the amount of the ſum levied, up to the time when the return was actually made (1).

Latkow v. Eamer and Burnett, Sheriff of Middleſex, Hil. Ter. 35 Geo. 3. C.B. 2 *Hen. Black.* 437

An inquiſition made by the ſheriff's jury to aſcertain to whom the property of goods, taken under a *fi. fa.* belongs, though found in favour of *A.* is not admiſſible evidence in an action of trover for the goods, brought by *A.* againſt the ſheriff.—The late ſheriff had levied an execution at the ſuit of one *Barlow* on the goods of one *Martin*, the value of which, *Latkow*, in order to aſſiſt *Martin*, advanced to the officer in poſſeſſion, but neither took a bill of ſale, nor removed the goods. After this, another execution was levied by the preſent ſheriff on the ſame goods, at the ſuit of one *Holbird*. After ſervice of the writ, *the ſheriff ſummoned a jury to determine in whom the property of the goods was, who declared them to be the property of* Latkow, *Holbird* being preſent at

(1) Vide *Raſt. Ent.* 37. for the form of a *levari facias de bonis eccleſiaſticis*, to levy the arrears of an annuity on a writ of annuity, and the biſhop's return.

the inquiſition. At the trial of an action of trover, brought by *Latkow* againſt the ſheriff, the inquiſition was received in evidence by Mr. J. *Buller*, who left it to the jury to decide, whether *Latkow* meant merely to redeem the goods for the uſe of *Martin*, or to become himſelf the real purchaſer; and the verdict was found for the defendants. It was moved for a new trial, on the ground that the verdict was contrary to evidence, the inquiſition on the claim of the property being concluſive in favour of the plaintiff, as againſt *Holbird*, who was preſent. PER CURIAM. Ld Ch. J. EYRE:—This proceeding of the ſheriff could not be concluſive in any caſe, for inqueſts of office are always traverſable. In the preſent caſe, I doubt whether it can be evidence at all of property in a third perſon. I much doubt, indeed, *whether a ſheriff can, ſtrictly ſpeaking, hold any inquiſition as to property, except under a writ*, de proprietate probandâ, *in replevin.* BULLER, J.—I have not been able to find any caſe in which this point has come in queſtion. In *Dalton*'s Office of Sheriffs, 146. *cap.* 30. it is ſaid, "*the* "*ſafeſt and ſureſt courſe*" for the ſheriff or officer to take, "is to enquire by a jury in whom the property of the "goods is;" and this is repeated in *Impey*'s Sheriff, 153. The only caſe in which I have ſeen it mentioned is *Cooper* v. *Chitty*, 1 *Burr.* 20. 1 *Black.* 65. where it is alluded to in the argument, but taken no notice of by the Court. *But I think I ought not to have admitted the evidence at the trial, for the inquiſition is not under the king's writ, but merely a proceeding by the ſheriff of his own authority.*—Rule refuſed.

Roberts *v.* Thomas, Mic. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 88.

But the Court will not ſet aſide the inquiſition of a jury, ſummoned by the ſheriff, to enquire in whom the property of goods ſeized by him under a *fi. fa.* is veſted.—A writ of *fieri facias* having been iſſued at the ſuit of the plaintiff againſt the defendant, under which the ſheriff ſeized ſome goods in the defendant's poſſeſſion, a Mrs. *Margetſon* came in and claimed the goods. The ſheriff, to aſcertain in whom the property was veſted, in order to enable him to make a return to the writ, ſummoned a jury (1) to make that enquiry, who found, by their verdict, that they belonged to Mrs. *Margetſon*. And it was moved to ſet aſide that inquiſition, and to have the goods ſeized ſold for the benefit of the plaintiff. Lord KENYON, Ch. J.—This application is perfectly new in practice, and I am not ſure that it is founded in principle. This is a kind of inqueſt of office; it is merely to indemnify the ſheriff in making his return to the writ, but it does not bind the right between the litigating parties. I do not know that we have any authority

(1) *Dalt. Sher.* 146. *Gilb.* on Executions, 21.

to

to interfere in this ſtage of the buſineſs, for this is not a proceeding immediately from the Court, but it is merely collateral to the cauſe which is here: and if we were to ſet aſide the inquiſition, I do not think we could order a new enquiry. —*Per Curiam:* Rule refuſed.

Leader v. Danvers, Mic. Ter. 39 Geo. 3. C.B. 1 *Pul.* & *Beſ.* 359.

The Court refuſed to grant an attachment againſt the ſheriff, becauſe he had returned to a writ of *venditioni exponas*, that part of the goods levied remained in his hands for want of purchaſers.—It was moved for an attachment againſt the ſheriff, for having made an inſufficient return to a writ of *venditioni exponas*; that he had ſold a moiety of the goods levied, and that the remainder continued in his hands for want of purchaſers. And this was urged, on the ground that, as no other writ could be ſent to the ſheriff while this *venditioni exponas* was in force, the goods under this return might remain in his hands for ever. BUT THE COURT was of opinion, that the motion could not be ſupported, and that, if the plaintiff was diſſatisfied with the return, he might ſet up a purchaſer of the goods himſelf.

Eddie v. Davidſon, Ea. Ter. 21 Geo. 3. B.R. 2 *Doug.* 650.

If, on an execution againſt one of two partners, the partnerſhip goods are taken and ſold, the ſheriff is to pay over to the other a ſhare of the produce, proportioned to his ſhare in the partnerſhip effects.—And the Court will direct it to be referred to the maſter, to take an account of the ſhare of the partnerſhip effects; and that the ſheriff ſhall pay a part of the money levied, equal to the amount of ſuch ſhare.

Merryweather v. Nixan, Ea. Ter. 29 Geo. 3 B.R. 8 *Ter. Rep.* 186.

But if *A.* recover in tort againſt two defendants, and levy the whole damages on one, that one cannot recover a moiety againſt the other for his contribution; although it is otherwiſe in aſſumpſit.—One *Starkey* brought an action on the caſe againſt the preſent plaintiff and defendant, for an injury done by them to his reverſionary eſtate in a mill, in which was included a count in trover for the machinery belonging to the mill; and having recovered 840l. he levied the whole on the preſent plaintiff, who thereupon brought this action againſt the defendant for a contribution of a moiety, as for ſo much money paid to his uſe. At the trial, the plaintiff was nonſuited, the judge being of opinion that no contribution could, by law, be claimed as between joint wrong-doers. And it being now moved to ſet aſide the nonſuit, Lord KENYON, Ch. J. ſaid, there could be no doubt but that the nonſuit was proper; that he had never before heard of ſuch an action having been brought *where the former recovery was for a tort.* That the diſtinction was clear between this caſe and that of a joint judgment againſt ſeveral defendants, in an action of aſſumpſit. And that this deciſion would not affect caſes of indemnity, where one man employed

another to do acts, not unlawful in themſelves, for the purpoſe of aſſerting a right.—Rule refuſed.

Croſley *v.* Arkwright, Tr. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 603.

Where a perſon, againſt whom a writ of *fi. fa.* is taken out, is in poſſeſſion of goods under a deed, which was given in conſideration of an antecedent debt, and a ſmall annuity payable from thenceforth, the ſheriff is warranted in returning *nulla bona*, if it appear that the memorial of ſuch annuity was not regiſtered according to the directions of the annuity-act, 17 *Geo.* 3. c. 26. ſ. 1. for in that caſe the deed is abſolutely void.—The plaintiff brought this action againſt the defendant, as ſheriff of Derbyſhire, for a falſe return on a *fieri facias*, iſſued on a judgment recovered againſt *William Clarke*, at the ſuit of the plaintiff, and indorſed to levy 790l. &c. At the trial, the plaintiff proved the judgment againſt *Clarke*, and then a copy of the execution, and the ſheriff's return of *nulla bona*. Then, in order to prove the property of the goods levied in *Clarke*, an indenture was produced, which was executed on the 4th of June, 1787, between *Edward Allanſon* of the firſt part, and *William Clarke* of the ſecond part, whereby, after reciting that 460l. was due from *Allanſon* to *Clarke*, for which judgment had been confeſſed; and that *Clarke* had agreed to advance 20l. more, and to pay an annuity of 25l. *per annum* to *Allanſon*, and provide him a decent apartment; *Allanſon aſſigned to him the poſſeſſion of a farm, and all the crops, cattle, goods, and effects*, &c. Of theſe the ſheriff's officer had taken poſſeſſion under the plaintiff's execution; but, at the ſame time, there was a diſtreſs for rent on the premiſes, by the Duke of Norfolk, made on the 8th of June. After this execution at the ſuit of the plaintiff, *Clarke* himſelf took the ſame goods in execution, on a writ ſued out by him upon a judgment againſt *Allanſon*. The judge being of opinion, upon an objection taken, that the deed in queſtion was void, for want of an enrolment under the annuity-act, 17 *Geo.* 3. c. 26. ſ. 1. and, conſequently, that no property was proved in *Clarke*, nonſuited the plaintiff. IT WAS MOVED to ſet this nonſuit aſide, and grant a new trial, on two grounds: FIRST, that the deed was only voidable, and not actually void, for want of a memorial having been enrolled; and, SECONDLY, that the ſheriff, who was no party to it, could not take advantage of that defect, whatever the parties themſelves might. PER CURIAM: THE QUESTION before the Court is between the plaintiff on the one hand, and the ſheriff on the other, in which the Court is to determine, *Whether the goods taken under the execution againſt* Clarke, *at the ſuit of the plaintiff, be the goods of* Clarke, *or not?* It has been ſaid, that *Clarke*'s being in poſſeſſion of them is *primâ facie* evidence of the property being in him: ſo it is; but if that poſſeſſion be gained by

by the deed, and that deed come before the Court, we must see whether it convey the property or not; and that brings us to the question, Whether the deed be or be not void to all intents and purposes, under the act of parliament? The objection is, that the deed is void, because the memorial was not registered according to the directions of the annuity-act. The words of this statute are as strong as possible; it makes the deed void to all intents and purposes whatsoever (1). And in none of the numberless cases which have arisen upon this act has it ever been doubted, but that annuity deeds, not registered conformable to the statute, were void. We all know the mischief that ensued the granting of annuities previous to the statute 17 *Geo.* 3. They are not granted for a number of years only, but for life, and generally by distressed men, who cannot offer any security beyond their own lives; and, unless they can be avoided by the parties themselves, they cannot be avoided at all. And if we were to determine that an annuity, granted for the life of the grantor only, cannot be avoided during his life, such a construction would repeal the act of parliament. The statutes relating to gaming and usury are very apposite; the provisions of those statutes are similar to those of the one in question; and it has been determined, that those securities are void, even in the hands of innocent purchasers (2). But there is another circumstance in this case which is decisive; it has been properly admitted in the argument, that at all events the parties themselves may avoid the deed: then let us consider, whether, under these circumstances, they have not elected to avoid it. Now the act done by *Clarke* shews his election to avoid it. *He had possession of these goods under the deed*, dated the 4th of June, 1787: *so long as that deed continued in force, the property was his; but not relying upon that, he afterwards sued out execution against these very goods, and by that he declared his election to avoid the deed.* This cannot be likened to the case of a deed, by which a small annuity is reserved to a person not privy to the other parts of the deed, because here the annuity is the very consideration of granting the goods; therefore the transaction is entire, and must stand for the whole, or be defeated for the whole. And here *Clarke* has said, that he would not abide by it. With respect to the case of a contract upon paper not stamped, that is widely different from the present case. The stamp acts are merely revenue laws: there are clauses in some of the old ones to enable the party who has made a contract on

(1) Vid. *Saunders* v. *Hardinge*, *ante*, vol. I. p. 611.
(2) Vide vol. II. p. 453, 454.

unstamped

unſtamped paper, to get it ſtamped after it is made, on paying a certain penalty: now all theſe acts, being made *in pari materia*, muſt be taken together; and though they ſay, that ſuch a paper ſhall be void, yet they make a proviſion to make it good; and, therefore, if it be ſtamped at the time it is produced, it is ſufficient. The caſe alſo of a criminal proſecution, for a forgery committed on unſtamped paper, ſtands on a different ground: the ſtatutes only ſpeak of deeds which are avoidable in law, if not ſtamped: but in the caſe of a forgery, the inſtrument is not produced as a good deed, but as a falſe one. Then it is not competent to the perſon, making ſuch falſe deed, to ſay, on a criminal enquiry, that it is not good on another account; for, if the inſtrument be falſe, and it be made with a view to deceive, that is ſufficient to conſtitute a forgery.—Here a writ was delivered to the ſheriff, to take in execution the goods of *Clarke*; this deed was then put into his hands, by which he ſaw that an annuity was granted; and he alſo knew that it was void by the ſtatute, becauſe it was not regiſtered: then, after the act has declared that ſuch a deed is void to all intents and purpoſes, it would have been imprudent in the ſheriff to have continued in poſſeſſion of the goods, of which there was no valid conveyance. As, therefore, the deed was void, in point of law, the ſheriff made a proper return, and the non-ſuit muſt ſtand.

Martyn v. Podger, *et al.* Ea. Ter. 30 Geo. 3. B.R. 5 *Burr.* 2431. 2 *Black. Rep.* 701.

In an action of treſpaſs, the defendants juſtified under a *fi. fa.*—At the trial, NO *copy of the judgment* upon which the ſaid writ was grounded was *given in evidence:* for WANT *whereof* a verdict was found for the plaintiff, ſubject to the opinion of the Court upon the following queſtion: "Whether, in this caſe, it were *neceſſary* for the defendants, "*being* SHERIFFS' OFFICERS, upon the trial of this cauſe, "*to produce and prove* a COPY *of the* JUDGMENT upon "which the ſaid writ of *fieri facias* iſſued?" PER CURIAM: When the action is brought by a ſtranger, the judgment muſt be proved; and it is neceſſary to produce a copy of the judgment. BUT THE WHOLE COURT were likewiſe of opinion, that, as the action was brought by a father upon a fraudulent bill of ſale, merely colourable, not a real fair tranſaction, but leaving the poſſeſſion in the ſon, and fraudulent even at common law, independent of the ſtatute of 13 *Eliz.* c. 5. § 2. that the verdict ought not to ſtand; and they thought, therefore, *that the defendants might be at liberty to move* for a *new trial.* A NEW TRIAL WAS ACCORDINGLY MOVED FOR, and, after cauſe ſhewn, THE COURT were unanimous, that there ſhould be a NEW TRIAL, on payment of coſts. Lord MANSFIELD:—*The copy of the judgment ought to have been produced:* but the verdict ariſes from a ſlip and inadvertence; it

it is againſt law and juſtice. The plaintiff has no merits. The bill of ſale was fraudulent: the ſon remained in poſſeſſion. The recovery is manifeſtly contrary to reaſon and juſtice.

Upon an *elegit* the ſheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making, *in value*, a moiety of the whole.—The leſſor of the plaintiff brought this ejectment, to obtain poſſeſſion under an *elegit*; and, on the trial, the inquiſition being produced, it appeared, that it mentioned by name all the different farms and tenements of which the defendant's eſtate in the county conſiſted, with their value; the number of acres in each, be the ſame more or leſs; the tenants' names; yearly value, beſides reprizes, and the clear yearly amount of the whole; and then, repeating the names of a certain number of them, their number of acres more or leſs, and yearly amount, it found that thoſe particular farms and tenements were a true and equal moiety of all the ſaid lands and premiſes of the defendant in the county, "which moiety of the ſaid lands and premiſes, I, the ſaid "ſheriff, on the day of taking this inquiſition, have cauſed "to be delivered to the leſſor of the plaintiff, by the price and "extent aforeſaid, &c." Upon the production of this inquiſition it was objected, on the behalf of the defendant, that the *elegit had not been duly executed, and that the inquiſition was void on the face of it, for that a moiety of each farm ought to have been extended and delivered to the leſſor of the plaintiff, and not a certain number of diſtinct farms, amounting, in value, to a moiety of the whole.* This objection being ſtated, and a paſſage in *Gilbert*'s Evidence, 54. taken from *Ventris*, 1 *Vent.* 259. cited in ſupport of it, *the judge, and counſel on both ſides, agreed that a caſe ſhould be ſaved*, ſetting forth the inquiſition, in order to take the opinion of the Court, ſubject to which opinion a verdict was found for the plaintiff. The queſtion was afterwards argued. *And for the leſſor of the plaintiff* it was contended, that the method in which the writ had been executed, and the inquiſition taken, was entirely conſonant to the ſtatute of 13 *Edw.* 1. ſtat. 1. c. 18. by which the proceſs by *elegit* was introduced. The words of the ſtatute are: "The ſheriff ſhall deliver to (the "plaintiff) all the chattels of the debtor (ſave only his "oxen, and beaſts of his plough), and *the one half of his "land*, until the debt be levied, upon a reaſonable price "or extent." That there was nothing in theſe words that imports that the moiety of each farm, or field, is to be extended; their natural ſenſe is, that a moiety in value ſhall be delivered; that the words of the writ purſue exactly thoſe of the ſtatute; and all the precedents in the books of practice, from *Raſtall* to *Lilly*, reſemble the inquiſition in

Den, Leſſee of Taylor, v. The Earl of Abingdon, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 472.

in the preſent caſe (1). In ſome inſtances they do not even mention the particular lands. In *Brooke*'s Abridgment, title *Elegit*, pl. 14. 12 *Edw.* 4. 2. it is expreſsly laid down, "that, if *elegit* iſſue againſt one who hath two manors, "the ſheriff may deliver one of the manors to the plaintiff, "in the name of a moiety of the whole, and is not bound "to deliver a moiety of each manor; and ſo of two acres; "and this ſeems to be when they are of equal value." That the only caſe found, which ſeems to warrant the doctrine contended for on the part of the defendant, viz. that a moiety of each particular field, or farm, muſt be extended, was that of Lord *Stamford* v. *Nedham*, 1 *Levinz*, 160. and 1 *Sid.* 239. Lord MANSFIELD:—The reaſon of the thing is ſtrongly with the practice contended for on the behalf of the plaintiff. BULLER, J.—There are many other caſes, beſides what have been cited, which ſhew that the inquiſition and return are good, although ſeparate lands have been extended, provided it does not appear that they amount in value to more than a moiety of the whole, 1 *Salk.* 563. 1 *Sid.* 91. *Cro. Car.* 319. The defendant's argument goes not only to every farm, but to every cloſe and field; in ſhort, the writ could not be executed according to his idea, but by delivering an undivided moiety. Yet, moſt clearly, that is not the meaning of the ſtatute, for it is agreed the moiety extended muſt be ſet out by *metes and bounds*. I take the meaning to be a moiety in value, which is aſcertained by the jury.—Poſtea to the plaintiff.

Doe *ex dim.* Da Coſta *v.* Wharton and Dixon, Mic. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 2.

A plaintiff, who claims under an *elegit* ſubſequent to a leaſe granted to the tenant in poſſeſſion, cannot recover in ejectment, though he give the tenant notice that he does not mean to diſturb his poſſeſſion.—In ejectment, the plaintiff claimed under an *elegit* againſt *Wharton*. An objection was taken at the trial by the defendants, that *Dixon, the tenant in poſſeſſion, enjoyed under a leaſe, granted to him by* Wharton, *prior to the date of the plaintiff's judgment, and, therefore, that the plaintiff could not ſucceed in this ejectment.* To this it was anſwered, on the part of the leſſor of the plaintiff, that he had given the tenant notice that he did not mean to diſturb the tenant's poſſeſſion (2), his object being only to get into the receipt of the rents and profits of the eſtate, and that the defendants ought not to be permitted to ſet up this objection. But the judge, *Lawrence*, who tried this cauſe, was of opinion that the party who had the legal (3) eſtate muſt prevail in ejectment; and that, as the

(1) *Roſt.* 262. *Cliſt.* 877. 883. *Townſh.* Judgments, 1. 17. 33. *Lilly*, 574.
(2) Vid. *White* d. *Whatley* v. *Hawkins*, M. 14 *Geo.* 3. *Doug.* 23. note to *Kaſch* v. *Hall*; and *Doe.* d. *Briſtow* v *Peggé*, *infra*, under title MORTGAGES.
(3) Vid. *Doe* d. *Hoaſden* v. *Staple*, *infra*, under title HEIR.

tenant's

tenant's title accrued prior to that of the leſſor of the plaintiff, the latter could not ſucceed in this ejectment. Accordingly the plaintiff was nonſuited. AND THE COURT were now clearly of the ſame opinion, on a motion to ſet aſide that nonſuit.

If it appear by the ſheriff's return to a writ of execution that greater fees have been taken for the levy than are allowed by 29 *Eliz. c.* 4. the *ſheriff* is liable to an action on the ſtatute for treble damages at the ſuit of the party grieved; and under that ſtatute the ſheriff cannot take any other charge except for the poundage.—This action was grounded on the 29th (1) *Eliz. c.* 4. The declaration ſtated the recompence permitted by that act on levying execution, namely, *one ſhilling for every pound under* 100l. *and ſixpence for* 20s. *beyond* 100l. and forbidding any greater recompence to be taken, under the penalty of treble damages to the party, and 40l. a moiety to the king, and the other moiety to him that would ſue. It then ſet forth a *fieri facias* for 200l. againſt the plaintiff, at the ſuit of *Charles Gilbert*, for non-performance of promiſes, indorſed to levy 116l. beſides the coſts of levying and ſheriff's fees; and that the defendant illegally received, for executing that writ, more than is limited by that act, *viz.* 55l. whereby the plaintiff is aggrieved 55l. The ſecond count ſtated another *fieri facias* againſt the plaintiff, at the ſuit of *John Seldwicke*, for a debt of 207l. 17s. 11d. and coſts 6l. 10s. indorſed to levy 214l. 7s. 11d. beſides the coſts of levying and the ſheriff's fees: and that the defendant took 19l. 2s. beyond what is limited by the ſaid ſtatute. The third count ſtated another *fieri facias* on a judgment againſt the plaintiff, at the ſuit of *Thomas Hills*, for 700l. and 3l. 3s. coſts, indorſed to levy 107l. 3s. 6d. beſides the coſts of levying and ſheriff's fees; and that the defendant took more, *&c. viz.* 7l. 19s. 6d. Plea, the general iſſue. At the trial the ſheriff's returns were read in evidence, whence it appeared, that on *Gilbert*'s execution the ſheriff had cauſed to be *levied on the plaintiff's goods* 136l. 12s. 6d. *and had retained* 20l. 12s. 6d. *part thereof for the poundage and the neceſſary expences attending the levy and ſale, and* for the land tax, and paid the remaining 116l. to the plaintiff in that ſuit *(Gilbert)*, in full ſatisfaction of his damages. On the ſecond and third writs there were the like endorſements, *mutatis mutandis*. *The return to the ſecond ſtated, that the defendant had cauſed to be levied* 241l. 6s. 11d. *and had retained* 26l. 19s. *part thereof, for the ſame purpoſe as in the firſt return, and paid the reſidue to the plaintiff in that action.* And the return to the third was of the levy of 152l. 4s. 11d. and 13l. 3s. part thereof, retained

Woodgate *v.* Knatchbull, Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 148.

(1) In 1 *Salk.* 331. it is ſaid, that it appears, by the parliament rolls, to have been paſſed in the 28th year of *Eliz.*

for

for the ſame purpoſes as in the others; but omitting the land-tax, and ſtating the payment of the reſidue to the plaintiff in that action, and 31l. 18s. 5d. the remaining ſurplus to the now plaintiff. *It alſo appeared that two auctioneers had been employed by the ſheriff's officers*; one of them under *Gilbert's* execution, who was ſent for from *Deptford*, though an auctioneer lived on the ſpot at *Sevenoaks*, who charged ſeven and a half *per cent.* and two guineas for making an inventory, but, on the latter being objected to, he returned one. The other auctioneer was employed by *Baker*, one of the ſheriff's officers in the other two executions, who raiſed 532l. 7s. 11d. and paid the money to *Baker*, and received, for that ſale, 26l. 12s. and allowed four guineas to *Baker*, out of that ſum, for acting as his clerk. The ſale laſted three days, and the auctioneer admitted that he had never paid a clerk a guinea a day before. The defendant's counſel objected at the trial that *this action did not lie againſt the ſheriff, who was a ſtranger to, and had not intermeddled with the tranſaction.* It was not controverted, however, but that the officer's taking the four guineas was an offence in him againſt the act of parliament. The verdict was taken for 54l. 14s. A rule was afterwards obtained to ſhew cauſe why the verdict ſhould not be ſet aſide; and, in ſupport of the rule, theſe two objections were relied on: 1ſt, *That this action could not be maintained by, or againſt, theſe parties.*—There is no pretence upon the letter of the act to charge the ſheriff, *perſonally*, for the miſconduct of the officer, either for the treble damages which the party may have ſuſtained, or for the penalty, unleſs the ſheriff himſelf be proved to have tranſgreſſed the act. 2dly, *That the acts ſtated to have been done did not amount to extortion in its legal ſignification*: for extortion is defined to be an illegal charge made by colour of office. *Hutt.* 53. PER CURIAM: This being a motion for a new trial, THE GENERAL QUESTION IS, WHETHER *the verdict is ſupported by the evidence?* And, ſpeaking of this caſe in particular, the return made by the ſheriff is deciſive againſt him; for, by that, he has adopted the act of the bailiff as his own, and has inſiſted on the right to retain that ſum which has been deducted by the bailiff in executing the writ. *The articles are only due as fees* to the ſheriff; *they are claimed by him as ſuch; and on that account it has been held that, if an action be brought on this act of parliament for fees, it muſt be brought by the ſheriff, and not by the bailiff.* The ſheriff is the only officer known to this Court; he may employ whom he pleaſes; but he is anſwerable, *civiliter*, for the acts of all thoſe employed by him. And this has been carried ſo far, that a return made by a ſheriff that the perſon arreſted was reſcued out of the cuſtody of the bailiff, has been held to be bad; the return muſt be, that the perſon was reſcued out of *his* cuſtody. So that *the Court look*

*to*

*to the ſheriff as the perſon who is immediately anſwerable:* and here he has returned that he has levied ſo much, which is ſufficient to charge him. On the general queſtion, there is no doubt but that the ſheriff muſt be anſwerable. This depends on the true meaning of an expreſſion in the books, that the ſheriff is anſwerable *civiliter*, but not *criminaliter*, for the acts of his bailiffs. So long ago as the caſe in *Latch.* 187, the line was drawn with ſo much preciſion that it does not admit of any doubt. There it is explained to mean, that *the ſheriff ſhall not be impriſoned or indicted for the acts of his bailiff, but that an action lies againſt him by the party grieved for damages*, and he ſhall be fined. So that he is not liable to any corporal puniſhment; but where it reſts in damages, he ſhall make the party a pecuniary ſatisfaction. This doctrine was recogniſed in the Common Pleas in the caſe of *Saunderſon* v. *Baker*, where *Gould*, J. ſaid (1): "As to the ſheriff's liability "to anſwer *civiliter*, and not *criminaliter*, for the acts of his "officers, the books mean that the ſheriff is not liable to an "indictment." Therefore the diſtinction is ſo clear that it cannot be ſhaken. It is ſaid, that there is a hardſhip on the ſheriff on account of the difficulty of his making a return; and it is firſt ſaid, that, if he had returned that he had levied 136l. that would have been wrong: it certainly would. Then the defendant's counſel admitted that, if the ſheriff had returned that he had only levied 116l. that return would have been falſe. This ſhews that he is obliged to ſtate the fact, and adopt the act of his officers; conſequently, that he muſt be anſwerable. *Thoſe caſes put at the bar, where it might be reaſonable that the ſheriff ſhould take more than is allowed by the ſtatute, go rather to the paſſions than to the judgment of the Court; becauſe they are inſtances where the ſheriff gives time as an indulgence to the party:* but, in anſwer to that, it is to be obſerved, that *it is not the duty of the ſheriff or his officers to grant indulgences.* Some time ago numberleſs motions were made on account of the inconvenience ariſing to the parties from this ſort of indulgence. We ſaw that there was a colluſion between the ſheriffs and defendants; on which the Court took this line: *wherever they found a ſheriff taking part with the defendant, they fixed him with the whole debt and the coſts upon attachment.* That put a ſtop to an evil, which was increaſing, in this court, to an enormous degree. *The ſheriff ſhould not conſider, whether delay will be advantageous to the party or not; he ought not to exerciſe his judgment upon it; it is his duty to obey the orders of the Court; to ſeize and ſell the goods immediately:* therefore, *the ſheriff cannot be allowed the expence of an auctioneer, or even the levy fee of a guinea; but the ſheriff, and the Court, are*

(1) 3 *Wilſ.* 316. *ante*, vol. I. p. 192.

*bound*

*bound by the act of parliament. If the plaintiff chooſe to have an auction, he muſt defray the expences, out of his own debt, to be levied; for there is no colour to charge the defendant with it. The ſheriff can only levy on the defendant that ſum which is given by the judgment of the Court: and if the defendant wiſh to have an auction, he muſt pay for it out of his pocket; but it ſhould make no part of the ſheriff's account.* Suppoſe the defendant's effects were but juſt ſufficient to pay the debt, ſhall the defendant be permitted to employ an auctioneer, or ſhall the ſheriff allow it? That would go in diminution of the fund out of which the plaintiff's debt is to be paid. THEN THE ONLY REMAINING QUESTION IS, Whether, in this caſe, it appears that the plaintiff is the party grieved? The firſt execution raiſed this doubt. The judgment there was for 200l. Therefore the ſheriff was at liberty, by the judgment of this Court, to raiſe 200l. but no more; and the expences of levying muſt have been paid out of the debt. For, in actions on ſimple contracts and judgments, for a debt certain, the expences of levying muſt be paid by the plaintiff, and not by the defendant; ſo that if the ſheriff over-charge, the plaintiff is the ſufferer. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent of the expences of the execution; and, in thoſe caſes, the defendant is the party injured by the ſheriff's taking more than he ought. Now, in this caſe, the plaintiff has been illegally compelled to pay more than the ſheriff had a right to take; and, therefore, he is the party grieved.—Rule diſcharged, and treble damages of the ſum recovered awarded.

Heapy v. Parris, Tr. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 368.

Judgment on a warrant of attorney, entered in Eaſter vacation againſt a defendant, who died in Eaſter term, is good: but execution cannot be ſued out upon it, until it be revived againſt his repreſentative by *ſcire facias*.—In December, 1794, the defendant gave to *Blackman* and Co. a warrant of attorney to confeſs a judgment for 1592l. upon which judgment was immediately entered up, but no execution was ſued out. The defendant died in Eaſter term, on the 5th of May. On the 19th of May, in the vacation between Eaſter and Trinity terms, the plaintiff ſigned judgment on a warrant of attorney, given by *Parris*, in his life-time, upon which execution was taken out. The latter judgment was not docketed until the 9th of June. A rule was obtained, calling on the plaintiff to ſhew cauſe why his judgment and execution ſhould not be ſet aſide; and why the goods, taken under the *fieri facias*, ſhould not be reſtored. PER CURIAM: In general, when a judgment is entered up in the vacation, on a warrant of attorney, and the defendant was alive within the preceding term, it is a valid judgment, though the defendant be not alive on the day when the judgment is actually entered up, becauſe it relates to the firſt day of

of the antecedent term. Therefore it ſeems, that there is no objection to this judgment. *But the execution is irregular;* and great injuſtice may be done to creditors, if we permit the execution to ſtand. *The plaintiff ſhould have ſued out a* ſcire facias, *to revive the judgment againſt the defendant's executor.* The moment a party is dead, the rights of his creditors are fixed. A judgment debt, is a debt of a ſuperior nature; and, when docketed, is to be paid before ſimple contract debts. But the defendant's executor could have no notice of this judgment when the execution was ſued out, and may, perhaps, be paying other debts of an inferior nature. The firſt part of the rule, as to the judgment, was diſcharged; and the latter, reſpecting the execution, was made abſolute.

A judgment, ſigned in any part of the term, or the ſubſequent vacation, relates back to the firſt day of the term, notwithſtanding the death of the defendant before judgment actually ſigned; and an execution, againſt the goods of the defendant, may be taken out upon it, teſted the firſt day of the term.—A rule, on behalf of the ſuppoſed adminiſtratrix of the defendant, was obtained, calling on the plaintiff to ſhew cauſe why the final judgment and execution, in this cauſe, ſhould not be ſet aſide, on theſe facts: on the 27th of May a *rule for judgment was given, which expired on the 1ſt of June; the defendant died on the 29th of May; final judgment was ſigned on the 2d of June; and execution iſſued againſt the goods of the defendant* on the 10th of June, in the ſame term, but teſted on the 27th of May, which was the firſt day of Trinity term, and the day to which the judgment had relation back; and the execution was levied on the 11th of June. Lord KENYON, Ch. J. If we were now to conſider, for the firſt time, whether legal relations, and legal fictions, ſhould be adopted, we would enquire into, and ſift, moſt minutely, the foundations on which they could be ſupported: but it is now too late for us, ſitting in a court of law, at the cloſe of the 18th century, to conſider, whether or not that which has, at all times, been conſidered as law, ſhould continue to be law now. In this caſe we are bound by a current of authorities, all ſpeaking the ſame language. In every caſe that has happened, it has been held, that *the execution may relate back to the firſt day of the term, though the defendant died before execution actually taken out,* unleſs ſomething be done in the interim, to ſhew an incongruity in the proceedings, as was done in the caſe of *Heapy* v. *Parris*. If that caſe had been contradictory to the preſent, though I ſhould have found myſelf preſſed by it, as being a deciſion of our own, I would have corrected my error now: but, on examining it, I am extremely glad to find that, ſo far from its having been decided in oppoſition to any former caſes, it agrees with them all.

Bragner *v.* Joſeph Langmead, Mic. Ter. 37 Geo 3. B R. 7 *Ter. Rep.* 20.

all. *There the plaintiff did not ſue out execution teſted on a day prior to the death of the defendant, as he might, perhaps, have done, ſo that it might have legal relation back; but the execution, ſued out after the death, bore* teſte *on a day poſterior to the defendant's death; and, conſequently, that execution was irregular.* What was ſaid in that caſe was applicable, only, to a caſe ſo circumſtanced: but *this is an execution againſt the goods of the defendant teſted in the defendant's life-time.* THE COURT were about to diſcharge the rule: but the defendant's counſel deſired that the rule might not be finally diſpoſed of before an accurate account of a caſe in the Exchequer, which had been cited, was procured (1); the caſe ſtood over for this purpoſe. But, on a ſubſequent day, it appearing, on affidavit, that the perſon making this application had no authority to do ſo, *not having obtained letters of adminiſtration, on that ground the rule was diſcharged:* but LORD KENYON, Ch. J. ſaid, that, ſince the caſe had been argued, he had again looked through all the caſes cited; and, alſo, that of *Chancey* v. *Needham*, reported in 2 *Str.* 1081, but of which, his lordſhip ſaid, he had a better manuſcript note; and that they all confirmed his former opinion.

## Executors and Adminiſtrators.

### *What Perſons may be Executors or Adminiſtrators.*

Rex v. Sir Edward Simpſon, Hil. Ter. 4 Geo. 3. B R. 3 *Burr.* 1463. 1 *Black. Reps.* 456.

*Executor renouncing.*] It is not decided, Whether an executor, who has formally renounced, can afterwards retract ſuch renunciation before probate is granted to his co-executor, and obtain probate himſelf. On ſhewing cauſe againſt a rule made upon the judge of the prerogative court of the archbiſhop of *Canterbury*, to ſhew cauſe why a writ of MANDAMUS ſhould not iſſue, directed to him, requiring him "*To* ADMIT *of the retraction of* Edmund Browne, *one* "*of the executors* named in the laſt will and teſtament of "*Sarah Elizabeth Angelica Latour*, widow, deceaſed, *of his* "RENUNCIATION of the ſaid will; and to *grant a probate* "thereof, with the codicils annexed, *to the ſaid Edmund* "*Browne* and *Anne Layton*, being the ſurviving executors "named in the ſaid will."—The facts were ſtated to have been as follows: The teſtatrix, by her will, made *three executors*, two of whom were *Anne Layton*, and this *Edmund*

(1) *Walker* v. *Drawwater*, in the Exchequer, Hil. 1796. There the party died on the 27th of February, the *fieri facias* was ſued out, and delivered to the ſheriff on the 3d of March; but it was teſted on the 12th of February preceding.

*Browne*,

*Browne*: which *Edmund Browne* was also a *legatee* in the will, and a *witness* to it; and so also was *Mrs. Long*, whom this *Edmund Browne* afterwards married. There were several *caveats* entered, and many *litigations* about the *probate*, and, likewise, about the *validity* of this will, and the codicils to it; in the course of which litigations, this *Browne* was, two or three times, examined, as a witness, to prove it: and, in order to render him a good and unexceptionable *witness*, *to prove* the will, *he had, no less than three times, formally* RENOUNCED *the executorship; as well as released his and his wife's legacies under the will.* There were several *sentences*, in the prerogative court, in favour of the will and codicils; and *affirmations* of them, by the delegates, upon appeal; and the cause *remitted* to the prerogative judge: and, at length, after several caveats, sentences, and appeals, the *delegates* had *decreed* "That probate should be immediately granted to the "said *Anne Layton*, under seal:" and the judge of the prerogative court, being *ready to give his opinion* (after the last litigation of all), was *served with the present rule*; against which cause was now shewn. (So that, in fact, *no probate*, under seal, was *yet* ACTUALLY *granted.)* AND THE ONLY QUESTION was, "WHETHER a *renouncing executor has a* "*right to come in and demand probate, at any time* BEFORE *pro-*"*bate is at all granted to any one.*" And it was urged, that as the testatrix had constituted both these persons her executors, the spiritual court had no right to separate them: that, in fact, Mrs. *Layton* was poor, had pawned the effects, and had even been in prison; and that they came, before any grant of probate, to her, and demanded only to be joined with her in it.—Lord MANSFIELD:—As neither of these two persons have any interest of their own in the effects, and each swears that the other is insolvent, and here is no counsel at all, on behalf of the *cestui que trusts*; it would be much the best method, and most agreeable to reason and prudence, that administration should be, by consent of all parties, granted to some third solvent person.—Therefore let the *cestui que trusts* have notice of this proposal: and let them, as well as Mrs. *Layton* and Mr. *Browne*, give their answer to it.—For which purpose it was then ADJOURNED.—This motion now coming on again, it appeared, that the *cestui que trusts* supported *Browne*; and that though he had no interest of his own, yet he acted on behalf of those who were concerned in interest. Whereupon the parties came into a RULE BY CONSENT; The substance of which was, "That probate should be "granted to both; but that Mrs. *Layton* should not receive "any more money, nor meddle any more: and *Browne* was "to indemnify her; and to pay her her own legacies, and all "such costs as she had been fairly out of pocket."

Allen, adminiſtrator of Thomas Prieſtman, otherwiſe Handy, v. Dundas, Hil. Ter. 29 Geo. 3. B. R. 3. *Ter. Rep.* 125

Payment of money to an executor, who has obtained probate of a forged will, is a diſcharge to the debtor of the inteſtate, notwithſtanding the probate be afterwards declared null, and adminiſtration be granted to the inteſtate's next of kin; and a probate, as long as it remains unrepealed, cannot be impeached in the temporal courts.—This was an action for money had and received to the uſe of the inteſtate; and to the uſe of the plaintiff, as adminiſtrator: to which the defendant pleaded the general iſſue. And on the trial a ſpecial verdict was found, ſtating, in ſubſtance, as follows: "The "defendant, as treaſurer of the navy, was indebted to the "inteſtate, in his life-time, in 58l. 13s. 6d. for money had "and received to his uſe. *Prieſtman* died on the 2d of June, "1784: on the 13th of *Auguſt*, 1785, one *Robert Brown* "proved, in the prerogative court of the Archbiſhop of *Can-* "*terbury*, *a forged paper writing*, dated the 18th of May, "1784, purporting to be the laſt will of *Prieſtman*, other- "wiſe *Handy*: whereby he was ſuppoſed to have appointed "*Brown* the ſole executor thereof; and a probate of that ſup- "poſed will iſſued in due form of law, under the ſeal of that "court, on the ſame day, in favour of *Brown*. *The defend-* "*ant, not knowing the will to have been forged, and believing* "Brown *to be the rightful executor, on* Brown's *requeſt, paid* "*him* 58l. 13s. 6d. *being the whole balance then due from the* "*defendant to* Prieſtman. On the 21ſt of July, 1787, *Brown* "was called, by citation, at the ſuit of *John Prieſtman*, the "father, and next of kin of the deceaſed, in the prerogative "court of the Archbiſhop of *Canterbury*, touching the va- "lidity of ſuch ſuppoſed will; and ſuch proceedings were, "thereupon, had in that court, that the will and probate "were declared null and void; that *Thomas Prieſtman* died "inteſtate; and that *John Prieſtman*, the father, was his next "of kin. And on the 31ſt of March, 1788, letters of ad- "miniſtration of the goods, &c. of *Thomas Prieſtman*, were "granted by that court, in due form of law, to the plaintiff, "as attorney of *John Prieſtman*." It was contended, for the plaintiff, that the payment to *Brown*, the executor, was no anſwer to the preſent action; and the principal caſe cited and relied on was, an anonymous caſe in *Com. Rep.* 152. where *Treby*, Ch. J. ſaid, that the probate of a will gives no authority to an executor; and if he be not the rightful executor, he has no authority.—PER CURIAM: The firſt queſtion to be conſidered is, What is the effect of a probate? It has been contended by the plaintiff's counſel, FIRST, that it is not a judicial act; and, SECONDLY, that it is not concluſive. But it is moſt clearly a judicial act; for the Eccleſiaſtical Court may hear and examine the parties on the different ſides, whether a will be, or be not, properly made; that

that is the only court which can pronounce whether, or not, the will be good. And the courts of common law have no jurisdiction over the subject. *Secondly*, The probate is conclusive till it be repealed: and no court of common law can admit evidence to impeach it (1). Then this case was compared to a probate of a supposed will of a living person, and an action brought by the party afterwards; but, in such a case, the Ecclesiastical Court have no jurisdiction; and the probate can have no effect: their jurisdiction is only to grant probates of the wills of dead persons. The distinction, in this respect, is this: if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all places: but where they have no jurisdiction, their whole proceedings are a nullity. As to the case in *Com.* 150. it carries its own death-wound on the face of it. It is an anonymous case, and is said to have been determined in the 5th of *Ann.* In the replication in that case, there is a traverse that the testator made such will, by which *A. B.* was appointed executor. It is rightly admitted, that such a traverse cannot be supported. The courts of common law cannot try whether it be a good will, or not; for that depends on ecclesiastical law. The chief justice, in giving the judgment of the court, begins with giving, as his reasons, "that an executor derives all his "authority from the testator himself; and that he, of himself, "as being executor, without any thing more, has the power "of disposing of the testator's estate. True it is, before an "action brought, a probate is necessary; but that is only re-"quisite to ascertain the court that the plaintiff is executor." From this admission, it appears that there are no means of ascertaining who is executor, but by applying to the Ecclesiastical Court for a probate: so that the reason destroys itself. Then he proceeds to point out the difference between a citation and appeal. Now if that distinction extend to the case of executors, as well as administrators, it will decide the present case. But he goes on to add, in that case, "but it is other-"wise in the case of an executor; for the probate of the will gives no authority at all to him." In that we differ from him; because an executor has an authority which a court of common law cannot dispute. The chief justice afterwards goes on to say, "that that case was not like the case of an "officer who officiated without legal authority, as the deputy "of the deputy of a steward, *&c.*; for rightful acts done by "him are good; for he is an officer *de facto*, and in the im-"mediate and open execution of his office. And the parties "did not know whether he had authority or not." That is just the present case; for *here there was an executor* de facto,

(1) Vid. *Kerrick* v. *Bransby*, 2 *Eq. Cas. Abr.* 421. *pl.* 4.; and 3 *Bro. P. C.* 358 to 366.

*who had obtained a probate; and the defendant neither knew, or could tell, whether he was rightful executor, or not, further than he was informed by the probate, which he could not diſpute.* Then the chief juſtice reſorts to the argument of inconvenience, if a tortious executor be permitted to diſpoſe of the right and intereſt of a rightful executor. But the inconvenience is clearly the other way; becauſe, if there be a rightful executor, and he does not come forward, he is guilty of *laches*. Suppoſe ſuch an one were to lay by for a number of years, and, in the mean time, all the debts were to be collected by another perſon, who had obtained a probate, as executor: thoſe payments ought to be protected; for, during all that time, the debtors could not controvert his authority; and, it is admitted, that if actions had been brought in ſuch caſes, the debtors could not have made any defence. Another thing to be obſerved, in the caſe in *Comyns*, is, that it was decided on the authority of a caſe in *Ro. Abr.* 919. which, is there ſaid, was never denied. From that circumſtance, it is probable, that it paſſed without much conſideration; for the doctrine in *Ro. Abr.* is contradicted in 2 *Lev.* 90. and 1 *Lev.* 158. and 236. In the laſt of thoſe caſes, the objection was firſt made at *Niſi Prius:* but the point was reſerved for the opinion of the court on a caſe (which ſhews that the practice of granting caſes is not of very modern date, for that was in *Charles* the Second's time); and it was there reſolved, by the Court, that, on the plea of *ne unques* executor, evidence might be given that the ſeal of the ordinary was forged; or that there were *bona notabilia*; for they confeſs and avoid the ſeal. But they alſo held that evidence, *that another, and not the plaintiff, was executor; or that the teſtator was* non compos mentis; *or that the will was forged*, could not be admitted; for that would be to falſify the proceedings of the ordinary in caſes of which he is judge. It ſeems, therefore, ſtrange that the chief juſtice ſhould have ſaid, in that caſe, that the caſe in *Ro. Abr.* had never been doubted; becauſe, theſe caſes determined the reverſe of the doctrine there contained. Then as to the traverſe, in the caſe in *Comyns*, it is impoſſible to ſupport it. The chief juſtice ſays, that "the traverſe is "good; for whether a will, or no will, is a queſtion triable "by a jury; and the reaſon is, becauſe the ſpiritual court "had not the original juriſdiction of the probate of wills, and "becauſe, as to trial, the temporal courts have *quaſi* a con-"current juriſdiction." Now this reaſon undoubtedly fails. The concluding reaſon, there given, is, "that the probate of "a will concludes a perſon from ſaying there was no ſuch "will; but, notwithſtanding, this matter may be brought to "trial; for the producing a will, under probate, is only evi-"dence that there was ſuch a will: and though it is evidence "of ſo ſtrong a nature that no evidence ſhall be admitted

"againſt

"against it, yet, to plead that such a will was proved is no "reason why this matter should not be tried." This reason is directly contradictory to itself; for, first, he says, that the probate is only evidence of the will, and that it may be tried; and yet, he adds, that it is conclusive, and that no evidence can be admitted against it. Therefore, this case is destructive of itself.—It is admitted, that if he had made this payment, under the coercion of a suit in a court of law, he would have been protected against any other demand for it: but that makes no difference. For as the party, to whom the payment was made, had such authority as could not be questioned at the time, and such as a court of law would have been bound to enforce, the defendant was not obliged to wait for a suit, when he knew that no defence could be made to it. This is different from payments under forged bonds, or bills of exchange (1); for there the party is to exercise his own judgment, and acts at his peril: a payment, in such a case, is a voluntary act; though, perhaps, the party is not guilty of any negligence in point of fact. But here the defendant acted under the authority of a Court having competent jurisdiction: and the law, which is founded on wise and sound principles, will never compel any person to pay a sum of money a second time, when he has once paid under the sanction of a Court having competent jurisdiction.

*Administrator under a warrant from the king.*]—If the effects of an intestate are vested in the crown by forfeiture, and letters of administration be granted to *A.* in consequence of a warrant from the king, and they run in the usual form, viz. "To pay debts," &c. but with this additional clause, "For the use and benefit of his majesty," *A.* shall be answerable as administrator for the debts of the intestate, and shall not be permitted to give evidence tending to question the validity of the letters of administration.—This was an action of debt on a bond.—The plaintiff, in his declaration, averred, that, after the death of *Lowe*, the obligor, administration was duly granted to the defendants.—To this the defendants pleaded: 1. That such administration was not granted to them: 2. *Non est factum:* 3. That they had fully administered.—On the two first pleas, issue was joined. To the third, the plaintiff replied, That, on the 23d of January, 1780, the defendants had divers goods and chattels, which were of the said *Lowe*, at the time of his death, in their hands to be administered, with which they might have satisfied the plaintiff's debt.—Upon this replication, issue was also joined. At the trial a verdict was found for the plaintiff, subject to the opinion of the Court on a case reserved. The case stated,

Megit *v.* Johnson *et al.* Administrators of Lowe, Mich. Ter. 21 Geo. 3. B.R. 2 *Doug.* 542.

(1) Vide *Le Chevalier* v. *Lynch*, *ante*, vol. II. p. 178.

That the plaintiff's demand aroſe on a bond given him by *Lowe*, dated the 6th of June, 1776; that an inquiſition had been taken on the body of *Lowe*, before the coroner, on the 10th of April, 1779, by which it was found that he, being confined in gaol on a charge of felony, had taken a large quantity of laudanum, on purpoſe to poiſon himſelf, and that he was *felo de ſe*. The caſe then ſet forth three other exhibits, viz. 1. A memorial by the defendants, as treaſurers of the ſociety, called "The Amicable Contributionſhip, or "Hand-in-Hand Office, for inſuring houſes and buildings from "fire," to the commiſſioners of the treaſury. 2. A warrant, under the ſign-manual, in conſequence of this memorial, directed to the advocate, and procurator-general, or either of them. 3. Letters of Adminiſtration granted thereupon to the defendants, by the Archbiſhop of Canterbury. The ſubſtance of the memorial was: that *Lowe* had inſured at the office of the defendants 235l. on a building; and that the landlord had alſo inſured 120l. upon it; that, afterwards, the building was conſumed by fire, and ſuſpicions ariſing in the minds of the directors, that this happened by the malicious and wilful act of *Lowe*, they had taken great pains to diſcover the truth, and bring him to juſtice, and having received abundant circumſtantial evidence of his guilt, they procured a warrant for apprehending him; that he was taken at Liverpool, and committed to gaol, but poiſoned himſelf, and died a few hours after his commitment; that, upon the inquiſition before the coroner, he had been found *felo de ſe*, and was ſentenced to be, and accordingly was, buried in the king's highway; that he died poſſeſſed of a conſiderable perſonal eſtate which the memorialiſts were informed had been, or were about to be, ſeized for the king's uſe; that the landlord of the building had demanded the 120l. of the office, and that they thought themſelves bound to pay it, and intended ſo to do: and that, in proſecuting the enquiry and apprehending *Lowe*, the office had expended 90l. 7s. 6d. *they therefore prayed, that they might be paid the ſaid ſums of* 120l. and 90l. 7s. 6d. out of the eſtate and effects of the ſaid *Lowe*. The material part of the warrant was as follows: "We do "hereby command, that you appear on our behalf before the "prerogative court of Canterbury, and aſſert our right to "the ſaid perſonal eſtate and effects of the ſaid *Ralph Lowe*, "and thereupon obtain letters of adminiſtration, for our uſe, "unto (the defendants), they giving good and ſufficient ſe"curity for their duly adminiſtering and accounting to us "for the ſame." The letters of adminiſtration were, in all reſpects, in the uſual form and words, except, that, after the concluding clauſe, *viz.* "And we do, by theſe preſents, or"dain, depute, and appoint you adminiſtrators of all and "ſingular the goods, chattels, and credits of the ſaid deceaſed,"

theſe

these words were added, "*For the use and benefit of his majesty.*" After these exhibits, the case proceeded to state, that the defendants had received, under the above circumstances, from the effects of *Lowe*, the sum of 1134l. 19s. 1d. and no more, and that, before the commencement of this action, they had paid the landlord of the building 12 5l. 5s. on his said claim, and had expended 90l. 7s. 6d. in prosecuting the aforesaid enquiry, and in the apprehending of *Lowe*. Upon the whole of the facts, it was argued, by the counsel for the defendants, that the personal estate of *Lowe* was vested in the crown by forfeiture, in consequence of the suicide found upon record, and that this property could only be divested by matter of record, which letters of administration are not; that the plaintiff, therefore, had no right to recover against the defendants, but ought to apply to the favour of the crown.—Ld MANSFIELD: It is common for the crown, in cases of outlawry, to grant a sign-manual to the creditor who has prosecuted to outlawry.—There is no doubt the justice of the case is with the plaintiff; but there is a difficulty in point of law, viz. *Whether a right vested in the crown can be waived or relinquished in any other way but by matter of record?* I think the king cannot, in point of law, resort to the Ecclesiastical Court for administration, the forfeiture having, *ipso facto*, vested the whole in him. But then can the defendants, who have *de facto* accepted these letters of administration, now object to them? They are not void on the face of them; and, if they had been granted irregularly, recourse should have been had to the Ecclesiastical Court to repeal them.—WILLES, J. and BULLER, J. were of opinion, that, by the acceptance of the letters of administration, the defendants were precluded from questioning their validity and operation; and BULLER, J. thought that, for that reason, none of the evidence which tended to impeach them, ought to have been received at the trial.—ASHHURST, J. concurred in thinking, that, if the letters of administration had been in the usual form, the defendants were, by their acceptance, bound not to question their validity. But he said, that the Ecclesiastical Court, in this case, had no inherent authority to interfere; that it was only authorized to act in consequence of the sign-manual, and that, according to the terms of the sign-manual, the administration was to be granted, without any qualification in favour of creditors, for the benefit of the crown, and the defendants were to give security that they would duly account to the crown. The Ecclesiastical Court, therefore, had exceeded its authority, and the letters of administration, inasfar as respected the payment of the debts, were a mere nullity; and there was no occasion to apply for a repeal of them. He agreed, that the justice of the case was with the plaintiff, and that he had a good ground

ground to petition to be paid before the defendants, but was afraid, that if the Court ſhould decide that the Eccleſiaſtical Court could, by ſuch an act, diveſt the property of the crown, a dangerous precedent might be eſtabliſhed.—CURIA ADVISARE VULT.—And now, PER Lord MANSFIELD, Ch. J. We are all of opinion, on conſideration, that theſe letters of adminiſtration are not void on the face of them. There are many inſtances where ſuch adminiſtration may be granted for the king's uſe. Suppoſe *Lowe* had been a baſtard, or being legitimate, had died without any next of kin. The king, in ſuch caſe, would have taken, as *ultimus hæres*, but ſubject to the debts of the inteſtate. Not being void, we think the Court cannot, in this caſe, enter into the queſtion, whether the letters of adminiſtration are voidable; and the ground of our opinion is, that the defendants, who have accepted and acted under them, ſhall not be permitted to deny their validity. That is *jus tertii*; and we are of opinion that the evidence on that part of the caſe ought not to have been admitted.—*Poſtea* to the plaintiff.

## *Executor de ſon tort.*

Padget *et al. v.* Prieſt and Porter, Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 97.

If *A.* the ſervant of *B.* ſell the goods of *C.* an inteſtate, as well after his death as before, though by the orders of *C.* and pay the money ariſing therefrom into the hands of *B.*—*B.* may be ſued as an *executor de ſon tort*. Alſo, if a perſon having intermeddled in an inteſtate's affairs, has money belonging to the inteſtate in his hands at the time when an action is brought againſt him as executor, for a debt due from the inteſtate, he is liable as an executor *de ſon tort*. And what acts make a perſon liable as executor *de ſon tort* is a matter of law for the judge to decide; it is for the jury to ſay, whether the acts are ſufficiently proved.—In caſe for goods ſold and delivered againſt the defendants as executors of *W. Shore*. They ſeverally pleaded the general iſſue; that they were not executors; and that they had fully adminiſtered. At the trial the plaintiffs proved the delivery of the goods in queſtion to *W. Shore*, who was a publican. "A few days "previous to his death, the inteſtate ſent to *Porter*, his "brewer, deſiring him to ſend a man to take charge of the "cellar, and to draw the beer, who ſent *Prieſt*, his ſervant. "*Prieſt* ſold beer as well after the inteſtate's death, as before. "The inteſtate likewiſe ordered *Prieſt* to ſell ſome hogs, "which he did after his death, and paid into *Porter*'s hands "the produce of them, and of the beer which was ſold after "the death of *Shore*. On the 7th of December, 1786, ad-"miniſtration was granted to *J. Shore*, who afterwards "brought

" brought actions against these defendants for money had and " received. On the 3d of February, *Priest* paid 8l. and on " the 10th of February, *Porter* paid 4l. into court, in those " actions. On the 31st of January the defendants pleaded in " this action, which had been commenced on the 23d of De- " cember preceding.—There was a verdict for the plaintiffs." Afterwards a rule having been obtained to shew cause why there should not be a new trial, on the ground that there was no evidence to prove the defendants executors *de son tort*; or at most, only slight evidence of facts done by them, which ought to have been left to the jury to consider with what view they had acted; and that at all events there was no evidence to affect *Priest*—Cause was shewn. PER BULLER, J. (the Judges *Ashhurst* and *Grose* agreeing):—The plaintiffs, who were creditors of *W. Shore*, find *Priest* and *Porter* selling his goods; and as they had no means of knowing whether they were lawful or wrongful executors, they looked upon them from their acts in the character of rightful executors. They therefore brought this action against them as executors; they proved effects of the intestate in their hands; that they sold them after the intestate's death; and that at the time when this action was brought, and even when the defendants pleaded in this action, they had money of the intestate in their hands.—I cannot agree with the defendant's counsel, that the question, Whether executors *de son tort* or not is to be left to a jury; that is a conclusion of law: whether the defendants had effects belonging to the intestate or not, and whether they sold them, were indeed questions to be left to a jury: but when those facts are established, the result from them is a question of law; and it is clear from all the cases, that the slightest circumstance will make a man an executor *de son tort* (1). It is said in *Dyer*, 166. *b.* that if a man even milk the cows, or take a dog, of the intestate, that will constitute him an executor *de son tort*. With respect to *Porter*, it clearly appears from the evidence, that he meant to pay himself by intermeddling with the intestate's affairs: but as to *Priest*, if there had been any circumstances in his favour, I would have left it to the jury to find for him. But I could not do so when it appeared that at the time of plea pleaded, he had money of the intestate's in his hands. With regard to the rule, of the wrongful acts of the stranger being purged by the subsequent assent of the rightful administrator, that cannot apply to the case of third persons; it only applies to the acts of the administrator himself. If indeed, previously to an action brought against the defendants as executors *de son tort*,

(1) An executor or executrix may demise before probate *dictum*. *Roe* ex dim. *Bendale* v. *Bendale*, Ea. Ter. 10 Geo. 3. C. B. 2 *Black.* 694.

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they had paid the money over to the rightful adminiſtrator, that would have been a good defence; becauſe then they would have applied the money properly. So that the courts have gone thus far, that *if an action be brought by a rightful adminiſtrator againſt an executor* de ſon tort, *whatever may have been diſpoſed of in the courſe of adminiſtration, as by paying debts, &c. ſhall be allowed to him in damages.* But that does not apply to this caſe, where the creditors find money in the hands of the defendants at the time of bringing the action.—Rule diſcharged.

Edwards *v.* Harben, executor of Tempeſt Mercer, Tr. Ter. 28 Geo. 3. K.B. 3 *Ter. Rep.* 587.

If a creditor take an abſolute bill of ſale of the goods of his debtor, but agree to leave them in his poſſeſſion for a limited time, and in the mean time the debtor die, whereupon the creditor takes and ſells the goods, he will be liable to be ſued as executor *de ſon tort* for the debts of the deceaſed; for the debtor's continuing in poſſeſſion, is inconſiſtent with the deed, and fraudulent againſt creditors. It being a general rule in the transfer of chattels, that the poſſeſſion muſt accompany and follow the deed.—Therefore, where the conveyance is abſolute, the poſſeſſion muſt be delivered immediately; where it is conditional, it will not be rendered void by the vendor's continuing in poſſeſſion till the condition be performed.—This was aſſumpſit for goods ſold to the defendant's teſtator. The defendant pleaded that he was not executor, nor had ever adminiſtered as ſuch; and, ſecondly, that he had fully adminiſtered, &c. Replication, that he had adminiſtered divers goods, &c. of the teſtator; and iſſue thereon. And to the ſecond plea, that the defendant, at the time of exhibiting the plaintiff's bill, had, and ſtill has, goods and chattels of the deceaſed in his hands, ſufficient to ſatisfy the plaintiff's demands, and iſſue thereon. At the trial a verdict was found for the plaintiff, ſubject to the opinion of the Court on the following caſe: "*William Tempeſt Mercer*, in his life-time, "and before the time of the execution of the bill of ſale "hereinafter mentioned, was indebted to the plaintiff in the "ſum of 22l. 18s. 6d. for goods ſold and delivered, which ſum "ſtill remains due to the plaintiff. *William Tempeſt Mercer*, "at the time of the execution of the ſaid bill of ſale, was "likewiſe indebted to the defendant in the ſum of 191l. for "money lent. On the 27th of March, 1786, *Tempeſt "Mercer* offered to the defendant a bill of ſale of his goods, "houſehold furniture, and ſtock in trade, in his houſe at "Lewes, by way of ſecurity for the ſaid debt. The de-"fendant refuſed to accept of the ſame, unleſs he ſhould be "at liberty to enter upon the effects, and ſell them im-"mediately after the expiration of fourteen days from the "execution thereof, in caſe the money ſhould not be ſooner "paid; to which *Tempeſt Mercer* agreed, and accordingly "on the ſame day executed a bill of ſale in the common "form,

" form, by which *Mercer* bargained and ſold to the defendant, " for ever, his houſehold furniture, medicines, ſtock in trade " [particularly ſpecifying them], and *all and every other the* " *goods, chattels, and effects whatſoever, in and about his* " *dwelling-houſe and premiſes at Lewes.* Immediately upon " the execution of the bill of ſale, poſſeſſion was delivered to " the defendant in the manner deſcribed therein, viz. by the " delivery of one corkſcrew in the name of the whole, but " in no other manner whatſoever. All the effects deſcribed " in the bill of ſale remained in the poſſeſſion of *William* " *Tempeſt Mercer*, until the time of his death, which happened " on the 7th of April, 1786. On the 8th of April, 1786, " being before the expiration of fourteen days from the " execution of the bill of ſale, the defendant entered and took " poſſeſſion of the effects contained in the bill of ſale, being " then in the houſe of the deceaſed, and afterwards ſold the " ſame for 236l. 7s. 5d. *William Tempeſt Mercer* died in- " teſtate; and no letters of adminiſtration were taken out to " the deceaſed, by the defendant, or by any other perſon, be- " fore the commencement of this action." THE QUESTION for the opinion of the Court was, Whether the defendant was entitled to retain the produce of the ſaid effects, or at leaſt the value of 191l. the conſideration of the bill of ſale? or, Whether the bill of ſale was void as againſt the creditors of *William Tempeſt Mercer*; and the plaintiff in this action entitled to recover his debt of 22l. 18s. 6d. againſt the defendant, as executor *de ſon tort?* BULLER, J. This is an action brought by the plaintiff, who is a creditor of *Mercer*, againſt the defendant as executor. It does not apppear by the caſe, that any other goods than thoſe mentioned in the bill of ſale came to the defendant's hands. The bill of ſale is dated on the 27th of March, 1786, and is a general bill of ſale of all the defendant's houſehold furniture and ſtock in trade. This bill of ſale is to take effect immediately on the face of it: but there was an agreement between *Mercer* and the defendant, that the goods ſhould not be ſold till the expiration of fourteen days from the date of its execution; and no poſſeſſion was actually taken till after the death of *Mercer*, which happened within the fourteen days: but there was a formal delivery of a corkſcrew in the name of the whole. On this caſe two queſtions ariſe; firſt, Whether this bill of ſale be void or not? and, ſecondly, If void, whether the defendant by having taken theſe goods under the bill of ſale, made himſelf liable as an executor *de ſon tort?* The firſt queſtion came before the Court in the laſt term in the caſe of *Bamford* v. *Baron*, vide vol II. p. 31, on a motion for a new trial from the Northern circuit: and after hearing that caſe argued, we thought it right to take the opinion of all the judges upon it. Accordingly

cordingly we conſulted with all the judges, who are unanimouſly of opinion, that *unleſs poſſeſſion accompanies and follows the deed, it is fraudulent and void;* I lay ſtreſs upon the words "accompanies and follows," becauſe I ſhall mention ſome caſes where, though poſſeſſion was not delivered at the time, the conveyance was not held to be fraudulent. There are many caſes on this ſubject: from which it appears to me that the principle which I have ſtated never admitted of any ſerious doubt. So long ago as in the caſe in 2 *Bulſtrode*, 218. *Stone* v. *Grubham*, the Court held that an *abſolute conveyance* or gift of a leaſe for years, unattended with poſſeſſion, was fraudulent; but if the deed or conveyance be *conditional*, there the vendor's continuing in poſſeſſion does not avoid it, becauſe by the terms of the conveyance the vendee is not to have the poſſeſſion till he has performed the condition. Now here the bill of ſale was on the face of it abſolute, and to take place immediately, and the poſſeſſion was not delivered; and that caſe makes the diſtinction between deeds or bills of ſale which are to take place immediately, and thoſe which are to take place at ſome future time. For in the latter caſe, the poſſeſſion continuing in the vendor till that future time, or till that condition is performed, is conſiſtent with the deed; and ſuch poſſeſſion comes within the rule, as *accompanying and following* the deed. That caſe has been univerſally followed by all the caſes ſince. One of the ſtrongeſt is quoted in *Bucknal* and others v. *Roiſton*, *Pr. in Chan.* 287; there one *Brewer*, having ſhipped a cargo of goods, borrowed of the plaintiff 600l. on bottomry, and at the ſame time made a bill of ſale of the goods, and of the produce and advantage thereof, to the plaintiff. There Sir *E. Northey* cited a caſe, "where a man took out execution againſt another; by agreement between them, the owner was to keep the poſſeſſion of them upon certain terms, and afterwards another obtained judgment againſt the ſame man, and took the goods in execution; and it was held that he might, and that the firſt execution was fraudulent and void againſt any ſubſequent creditor, becauſe there was no change of the poſſeſſion, and ſo no alteration made of the property." And he ſaid it had been ruled forty times in his experience at Guildhall, that, if a man ſell goods, and ſtill continue in poſſeſſion as viſible owner of them, ſuch ſale is fraudulent and void as to creditors, and that the law has been always ſo held. The Lord Chancellor held in the principal caſe, that the truſt of thoſe goods appeared upon the very face of the bill of ſale. That though they were ſold to the plaintiffs, yet they truſted *Brewer* to negotiate and ſell them for their advantage, and *Brewer*'s keeping poſſeſſion of them was not to give a falſe credit to him as in other caſes which had been cited, but for a particular purpoſe agreed upon at the time of the ſale. So that the Chancellor, in that caſe, proceeded on the diſtinction which I have taken; he ſupported

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the deed, because the want of possession was consistent with it. This has been argued by the defendant's counsel, as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law: that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent. On the other hand, there are cases, where the vendor has continued in possession, and the bill of sale has not been adjudged fraudulent, if the want of immediate possession be consistent with the deed. Such was the case of Lord *Cadogan* v. *Kennet*, *Cowp.* 432 (1), because there the possession followed the deed. So also the case of *Haselinton* and another, v. *Gill* (*ante* vol. II. p. 323): there personal property, consisting *(inter alia)* of some cows, was settled on the marriage of the plaintiff's wife on certain trusts; and the Court held, that only those which were purchased after the marriage could be taken to satisfy the debts of the husband. THE SECOND QUESTION then is, Whether the defendant's having taken possession of these goods after *Mercer*'s death, though under the bill of sale, will make him an executor *de son tort?* The two cases, which were cited by the plaintiff's counsel, are decisive of this point. In 2 *Bac. Abr.* 605. it is said, "if a man make a deed of gift of his goods, in his life-"time, by covin, to oust his creditors of their debts, yet after "his death the vendee shall be charged for them." There too the possession was delivered to the vendee. To support this doctrine, 13 *H.* 4. 4. *b. Rol. Abr.* 549. are both quoted. Then in what manner shall he be charged? He can only be charged as executor; because any intermeddling with the intestate's effects makes him so. The cases in *Cro. Jac.* 271. and *Yelv.* 196. cited at the bar, prove it, and state the manner in which he shall be charged. There is, also, another strong case on this point in *Dyer*, 166. *b.* In short, every intermeddling, after the death of the party, makes the person, so intermeddling an executor *de son tort.*—GROSE, J. Agreed.—*Postea* to the plaintiff.

An executor *de son tort* cannot discharge himself from an action brought by a creditor, by delivering over the effects to the rightful executor *after the action is brought*. Nor can he retain for his own debt of a higher nature, by consent of the rightful executor given after the bringing of the action by the creditor.—This was case on promises by the testator. Pleas, 1st, *Ne unques* executor. 2dly, *Plenè administravit.* 3dly, That *Palmer* died intestate, and that the defendant never was executor, nor ever possessed any of his goods, save as executor of his own wrong; that after *Palmer*'s death, and before the

Curtis *et al. v.* Vernon, executor of Palmer, Ea. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 587.

(1) See title FRAUDULENT CONVEYANCE, *infra.*

14th

14th of May, 1789 (1), administration was granted to his widow, *S. Palmer*; and that on the 16th of May, 1789, the defendant delivered over to the administratrix all the goods, &c. belonging to the intestate which came to his hands. 4thly, That the defendant never was executor, &c. save as executor of his own wrong; that administration was granted to *S. Palmer* (as before); that the defendant recovered 3000l. on a bond in this Court in the intestate's life-time; that no goods or effects of the intestate ever came into the defendant's possession, except goods of the value of 794l. 13s. 9d. which are not sufficient to satisfy his said debts; and that the administratrix, on the 15th of May, 1789, assented to his retaining those goods in satisfaction of his debt. To the two last pleas there was a general demurrer, and joinder in demurrer. After argument, THE COURT took time to consider of the question. AND LORD KENYON, CH. J. now said, that they had looked into the authorities (2), and that, from all the authorities, it was clear, first, that an executor *de son tort* must deliver over the goods of the intestate to the rightful administrator *before* an action is brought against him; and, 2dly, that, though he be a creditor of a superior nature, he cannot retain in satisfaction of his own debt. Therefore we are of opinion, that both these pleas are bad; and, consequently, there must be judgment for the plaintiffs.

Vernon, executor of Palmer *v.* Curtis *et al.* in the Exch. Ch. in error, Hil. Ter. 32 Geo. 3. 2 *Hen. Black.* 18.

The defendant being dissatisfied with the above judgment, brought a writ of error in the Exchequer Chamber, where the case was again elaborately argued. AND after full consideration, LORD LOUGHBOROUGH declared the unanimous opinion of the Court, that whatever hardship or inconvenience there might be in the decision, yet as the law was settled, the Court ought not to overturn it. That on both the points rested upon in the argument, the law was established; by a series of authorities from *Coulter*'s case, to that in *Salk.* 313. that an executor *de son tort* could not retain for his debt, though of a superior nature: nor could he avail himself of a delivery over of the effects, to the rightful administrator, after action brought; nor of the assent of the administrator to his retainer; so as to defeat the action of the creditor.—Judgment affirmed (3).

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(1) The day when the plea was filed.

(2) *Keble* v. *Osbaston*, *Hob.* 49. *Bradbury* v. *Keynal*, *Cro. Eliz.* 565. *Salk.* 313. *Anonymous*, and *Padget* v. *Priest*, *ante*, 490. *Coulter*'s case, 5 *Rep.* 30. *Whitehead* v. *Sampson*, *Freem.* 295; 2 *Show.* 373; *Baker* v. *Berisford*, 1 *Sid.* 76; 2 *Ventr.* 180; *Williamson* v. *Norwich*, *Sty.* 337; 1 *Rol. Abr.* 923 *L. pl.* 12; and *Vaughan* v. *Brown*, 2 *Str.* 1106; *And.* 328.

(3) At the close of the first argument, a doubt was suggested by Mr. Justice *Gould*, whether the stat. 43 *Eliz.* c. 8. s. 2. had not given an executor *de son tort* a general right to retain for his own debt, and the counsel for the defendants in error were desired to advert to that statute, previous to the second argument. Afterwards *Bower* said, that according to the desire of the Court, he had looked into the statute, but that it appeared to him clearly to relate only to the case of fraudulent administrations, which it was designed to prevent. To which opinion the Court seemed to assent.

*In*

## *In what Cases Executors and Administrators may make themselves liable* de bonis propriis.

Where the defendant bound himself *as administrator* to abide by an award to be made touching matters in dispute between his intestate and another, and the arbitrators awarded that he, *as administrator*, should pay, &c. held that he could not plead *plene administravit* to debt on the bond.—This was debt on bond. *The plea* first craved oyer of the bond (by which the defendant, as administrator, bound himself, his heirs, &c. to the plaintiff as executrix); and then of the condition, which (after reciting that the plaintiff and the defendant had agreed to submit to arbitration certain disputes which had before arisen between the plaintiff and defendant's intestate, touching certain articles of agreement between the intestate and the plaintiff's testator) was for the performance of an award to be made by arbitrators concerning the matters aforesaid, and also concerning all other matters, accounts, &c. between the said parties, or either of them. It then set forth that the arbitrators had awarded that the defendant, as administrator, should pay to the plaintiff, as executrix, 298l. on 27th June following, and the parties should execute general releases. The defendant then pleaded that he had fully administered; and that at the time of entering into the bond, or afterwards, he had no assets, &c. To this plea there was a general demurrer, and joinder. ASHHURST, J. The entering into the bond amounts to an admission of assets; and the defendant shall not afterwards be permitted to dispute it. The bond given by the defendant to abide by the award is an undertaking to pay whatever sum the arbitrator shall award, without any regard to assets. BULLER, J. agreed and said, with regard to the releases, it must be expounded by the rest of the award. It will be sufficient for the defendant to give a release in the character of administrator.

Barry *v.* Rush, E. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 691.

But the mere submission to an award by an administrator is not an admission of assets; and a promise by an administator to pay the debts of the intestate, if there be no assets, is *nudum pactum*.—On the trial of an action of *assumpsit* for golds sold and delivered to the defendant's intestate, and the common money counts; to which there was a plea of *plene administravit* alone. *The plaintiffs, in order to prove assets in the defendant's hands, gave in evidence a submission to an award by him, as administrator, between these parties*, and the award, whereby the sum of 2014l. was awarded to be due from the intestate's to the bankrupt's estate, without saying by whom it was to be paid; but the arbitrators directed that the defendant should

Pearson *et al.* assignees of Scott *v.* Henry, administrator of Henry. Mic. Ter. 33 Geo 3. B.R. 5 *Ter. Rep.* 6.

pay 13l. being half of the expences of the arbitration. *The plaintiffs alſo offered a witneſs to prove, that when the defendant entered into the arbitration bond, he had expreſsly undertaken to pay whatever might be found owing from the inteſtate (who was his ſon) to the plaintiffs.* But Lord KENYON rejected that teſtimony; and alſo thought that there was no evidence to charge the defendant with aſſets, and, therefore, non-ſuited the plaintiff.—It was afterwards moved to ſet the nonſuit aſide. Lord KENYON, Ch. J. It is not pretended that in fact there were aſſets, but it is ſaid that the defendant has precluded himſelf from denying that he had aſſets, for that every ſubmiſſion to arbitration by an adminiſtrator, in that character, is concluſive evidence againſt him that he has aſſets. In many caſes an executor or adminiſtrator is deſirous of aſcertaining whether or not there be any foundation for the demand which is made upon him, without diſputing it in an action; and it is frequently advantageous to both parties that the matter in diſpute ſhould be referred: but if the reference be attended with this ſuppoſed conſequence, it will in future prevent every executor or adminiſtrator from ſubmitting to arbitration. The caſe of *Barry* v. *Ruſh*, was properly decided, but it does not affect the preſent. *There the defendant ſubmitted in broad terms to pay whatever ſhould be awarded, and the arbitrator did award that he ſhould pay a certain ſum:* whereas, here, the arbitrator has only aſcertained the amount of the debt due from the inteſtate, but has not directed the defendant to pay it. It is impoſſible then to ſay that the arbitrator decided that the defendant had aſſets; and the ſubmiſſion to arbitration by an adminiſtrator is not of itſelf an admiſſion of aſſets. *What was ſaid by* ASHHURST, J. *in the caſe of* Barry *v.* Ruſh, *reſpecting the admiſſion of aſſets, muſt be taken to refer to the particular caſe then under diſcuſſion, but ought not to be extended further.* And, indeed, he immediately ſubjoined that the bond given by the defendant to abide by the award was an undertaking to pay whatever the arbitrator ſhould award, without any regard to aſſets; and BULLER, J. went expreſsly on that ground. BULLER, J. I only recollect two caſes, in which the queſtion, what ſhall be conſidered to be an admiſſion of aſſets, has been diſcuſſed; *Barry* v. *Ruſh*, and *Cleverly* v. *Brett* (1). In the laſt of thoſe the executor had paid intereſt on a bond due from the teſtator, which was held on the trial to be an admiſſion of aſſets: but that opinion was over-ruled in this court on a motion for a new trial, when it was thought highly unreaſonable that, becauſe the executor, thinking the demand juſt, had

(1) *Cleverley* v. *Brett* and another, executors. M. 13 *Geo.* 3. B.R. In that caſe Lord *Manſfield*, Ch. J. ſaid, "To be ſure the evidence eaſes the creditor from proving aſſets, and throws the onus on the other ſide."

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choſen to pay a part of a debt out of his own pocket, he ſhould be liable for the whole debt; or that becauſe, having enough to pay the intereſt, he ſhould be thereby concluded to diſpute aſſets for the principal. The other caſe was an action of debt on a bond given by the defendant, by which he bound himſelf, his heirs, &c. for performance of the award; and, therefore, it was a perſonal engagement by the defendant to perform the award. Another ground has alſo been mentioned, that the adminiſtrator perſonally promiſed to pay whatever ſhould be awarded: but that would not avail the plaintiffs in this action; for this action is brought againſt the defendant as adminiſtrator, and it is brought againſt him to recover the plaintiff's demand out of the inteſtate's effects; and if there were no aſſets, the perſonal promiſe by the adminiſtrator would be *nudum pactum*. GROSE, J. agreed.—Rule diſcharged.

Worthington *et al. v.* Barlow, adminiſtratrix, Mic. Ter. 38 Geo. 3 B.R. 7 *Ter. Rep.* 453.

But if an arbitrator, under a reference between *A.* and *B.* adminiſtrator, award that *B.* ſhall pay a certain ſum as the amount of *A.*'s demand, *B.* cannot afterwards object that he had no aſſets, but may be attached for non-payment.—It was moved for an attachment againſt the defendant for not paying the ſum of 2664l. 13s. 8d. according to an award, in which the arbitrator had aſcertained the amount of the plaintiff's demand, as above, and directed the defendant to pay it. Cauſe was ſhewn againſt the rule, on this ground, that *the adminiſtratrix had no aſſets, and that the ſubmiſſion to an award by an adminiſtrator was not an admiſſion of aſſets.* Lord KENYON, Ch. J. In *Pearſon* v. *Henry* the arbitrator only aſcertained the amount of the demand, without ordering the adminiſtrator to pay it: BUT here the arbitrator has awarded that the defendant, the adminiſtratrix, ſhall pay the plaintiff's demand. The ſubmiſſion to arbitration by the adminiſtratrix was a reference not only of the cauſe of action, but alſo of the other queſtion, whether or not the adminiſtratrix had aſſets. And as the arbitrator has awarded the defendant to pay the amount of the plaintiff's demand, it is equivalent to determining as between theſe parties that the adminiſtratrix had aſſets to pay this debt. The defendant, therefore, is concluded by this award, though it will not operate as an admiſſion of aſſets in any other action to be brought by any other creditor.—Rule abſolute.

Gardner *v.* Baillie, Hil. Ter. 46 Geo. 3. B.R. 6 *Ter. Rep.* 591.

A power of attorney, given by an executrix to act for her *as executrix*, does not authorize the accepting of bills of exchange to charge her in her own right, though for debts due from her teſtator.—On a motion to ſet aſide a verdict obtained by the plaintiff in an action on a bill of exchange, drawn by the plaintiff on the defendant by the name and deſcription of Mrs. *C. Baillie*, executrix of *J. B. accepted by* E. Thornton *for and on behalf of the defendant, it being averred that* Thornton *was duly authorized by the defendant to accept the*

*ſame on her account.* It appeared, and it was proved, that *Thornton*, who acted under a letter of attorney, accepted the bill in queſtion, *which was drawn and accepted for a debt due to the plaintiff from the defendant's teſtator;* and evidence was offered to prove that the defendant had paid other bills drawn on her by other creditors of *J. Baillie*, and accepted on her account by *Thornton*, who on thoſe occaſions alſo acted under this power of attorney, but this was rejected, and a verdict taken for the plaintiff for the amount of the bill, with liberty for the defendant to move to ſet it aſide, and to enter up a nonſuit. The defendant, by this letter of attorney, after reciting that ſhe had been appointed executrix of *J. Baillie*, who was entitled to conſiderable ſums of money on mortgage, bonds, bills, notes, unſettled accounts, &c. appointed *Thornton* her attorney, *as executrix*, to aſk, demand, ſue for, and receive all ſums, &c. "which, at the time of *J. B.*'s death, were due to him, and which were then due to her *as executrix*:" in her name, *as executrix*, to adjuſt and ſettle all accounts, differences, &c. wherein ſhe, *as executrix*, was intereſted: to ſubmit the ſame to arbitration (if neceſſary), and for that purpoſe in her name, *as executrix*, to execute any bond, &c.: to execute for her, and in her name, as executrix, aſſignments of mortgages, receipts, releaſes, &c.: for her, and in her name, as executrix, and agreeably to the due courſe and order of law to pay all debts, &c. due from her *as executrix*, whether on mortgage, bond, bill, note, or otherwiſe: and generally for her, *as executrix*, to do all ſuch further acts for receiving debts, and diſcharging the powers given by the letter of attorney: and giving full power to do and act "touching and concerning all or any of the ſaid premiſes as effectually to all intents, conſtructions, and purpoſes whatſoever, as ſhe, *as executrix*, could, &c." It was contended that, as *Thornton* was expreſsly authoriſed to receive and pay all ſums due to and from the defendant, to refer any matters in diſpute between her and any other perſon to arbitration, and generally to do all further and other lawful and reaſonable acts as to him ſhould ſeem proper, he had power to bind the defendant by accepting the bill in queſtion on her account, it being for a legal debt due from her as executrix. BUT THE COURT were all clearly of opinion, that *Thornton* had no authority to bind the defendant by accepting the bill of exchange on her account, and, conſequently, that this action could not be maintained.—Rule to enter a nonſuit abſolute.—

The Court of KING'S BENCH delayed giving the above judgment for ſome time, as there was a ſimilar cauſe depending in the Court of COMMON PLEAS. AND NOW LORD KENYON, after delivering the opinion of the Court as above, added, *that they had conſulted with the judges of the court of Common Pleas, who authorized him to ſay, that they concurred in this opinion reſpecting the conſtruction of the letter of attorney, but that there were other circumſtances in the caſe depending in* C.B.

From

From the evidence in the case in C.B. (which was alluded to as above stated) it appeared that the executrix had admitted that a bill which had been accepted by *Thornton*, with the knowledge of the executrix, was for a just debt, and that it ought to be paid; and this was held to be sufficient evidence of an authority given, to accept that particular bill, without resorting to the letter of attorney.—There was a motion for a new trial in this cause; in which, the plaintiffs (being the drawers of a bill of exchange upon the defendant, dated the 10th of January, 1794, for 290l. 18s. 3d. *value, in account with James Baillie* (whose executrix the defendant was), payable upon the 1st of September, 1795, to their own order, and which bill of exchange was accepted by the defendant, by *Edmund Thornton*, her procurator), had recovered a verdict for 330l. damages. The ground made for this application was, that upon the case in evidence Mr. *Thornton was not the procurator of the defendant duly authorized to accept this bill for her.* And it was insisted that he had no authority to provide for the payment of the testator's debts in this manner, that he was to administer the assets for the executrix, but that he could do no act whereby she should become *chargeable with the debts in her own right, and particularly that he was not authorized to give a security for the payment of any debts in her name.* Lord LOUGHBOROUGH.—The general scope of this power of attorney is to put the whole estate into the hands of the attornies, to commit the collecting of it and the disposition of it entirely to them, to delegate to them all the authority that the executrix possessed, and to constitute them, as far as it was possible to constitute them, executors in her name. The first part of the instrument respects, more particularly, the collecting of the estate. The authority to pay, discharge, and satisfy debts, is described in few words, and with a qualification properly applicable to this branch of the power, "*agreeably to the due order and* "*course of law, to pay, discharge, and satisfy,*" which I consider as tantamount to saying, *in a course of administration.* Then follows a general authority to do such *further lawful and reasonable acts, for the better performing the powers and authorities intended to be given, as to them should seem meet,* the executrix professing to give to them her full and whole power and authority to do and act, touching and concerning all or any of the premises, as fully and effectually, to all intents, constructions, and purposes, as she, as executrix, could do, if personally present, and undertaking to ratify all that the attornies should lawfully do in and about the premises. *There is also power to appoint attornies* to act in the name of the executrix. The authority to pay debts, upon the first view of it, seems to be more confined and specified

Howard, *et al.* v. Baillie, executrix of Baillie, Hil. Ter. 36 Geo. 3. C.B. 2 *Hen. Black.* 618.

than the authority to collect the effects; but, if we conſider it more attentively, we ſhall find that the effect of this part of the inſtrument is to commit the application of the perſonal eſtate in payment of debts to thoſe attornies, abſolutely and excluſively; and it will alſo be found, without the aſſiſtance of general words, that *an authority of this nature neceſſarily includes medium powers, which are not expreſſed.* By medium powers, I mean all the means neceſſary to be uſed, in order to attain the accompliſhment of the object of the principal power, which, in this caſe, is the paying, ſatisfying, and diſcharging the defendant's debts. It muſt occur to every man who reflects upon the nature of this truſt, that numberleſs arrangements would be to be made by thoſe who were to execute it, accounts to be ſettled, diſputed claims to be adjuſted, unjuſt ones to be reſiſted, ſuits at law and in equity to be inſtituted and defended, payments to be poſtponed or inſtalled according to the ſtate of the fund, and, perhaps, if the eſtate ſhould be diſcovered to be inſolvent, a diſtribution to be made among the creditors in equal degree, *pari paſſu.* Theſe and many other ſubordinate powers, though not expreſsly given, as in the former part of the inſtrument, muſt be underſtood to be included in this power to pay debts; and I take it to be clear, that in the conſtruction of ſuch power they are included. Our books ſay, that theſe kind of authorities are to be purſued ſtrictly; they inſtance, that an authority given to three cannot be executed by a leſs number than the whole; and the ſtat. of 21 *H.* 8. c. 4. was thought neceſſary to be made, to remedy the inconvenience ariſing from it in the caſe of executors, where ſome have declined to act: but our books alſo ſay, that they are to be ſo conſtrued, as to include all the neceſſary means of executing them with effect: *thus an authority to receive and recover debts includes a power to arreſt.* In ſuch a caſe as the preſent, which is not that of mere miniſterial authority, capable of being defined and executed ſtrictly, but a caſe where the whole care of the adminiſtration is delegated by the executrix to the attornies, and all the means of executing the office of executrix put into their hands, I am of opinion that both the particular proviſions, and the general words, ought to receive the moſt liberal conſtruction, which conſtruction ſhould, as far as poſſible, place the attornies where the executrix intended to place them, in her room and ſtead, inveſted with all her authority, and with all her diſcretion. Aſſuming then that this authority to pay debts is larger and more comprehenſive, in its nature, than the words conſtrued very ſtrictly would import, and that it implies authority to make all neceſſary arrangements which the executrix herſelf might make, in order to the payment of the debts, I aſk, among the arrangements which it may be

neceſſary

neceſſary for an executrix, or for thoſe to whom ſhe has delegated all her authority, touching the payment of the teſtator's debts, to make, is there one more likely to occur, more uſeful, in many caſes more neceſſary, than that they ſhould aſk and obtain, from the creditors of the eſtate, time for payment of the debts, when the time given may prevent all the vexation and expence of a ſtruggle for priority? That an executrix herſelf might make this arrangement, no one can doubt: that it is alſo neceſſary that they who are to have all the funds in their hands, who know, and are the only perſons who can know, within what time thoſe funds can be got in, and who have the whole application of them entruſted to their care, who repreſent the executrix, and in effect are themſelves the executors, ſhould have it in their power to make it, is equally clear. The conſequence of ſuch an arrangement in either caſe, and, indeed, in every one of the inſtances which I before put, would be, that the executrix might, by poſſibility, become perſonally, and in her own right, chargeable with debts, as ſhe might become chargeable in a variety of other caſes, expreſsly within the power of attorney. But upon whatever ground, and by whatever medium, in the inſtance of poſtponed debts, this perſonal charge is produced, the debt ſtill remains a debt due from the eſtate, and payable out of the aſſets. Such an arrangement amounts to an admiſſion, that, at the expiration of the credit given, there will be aſſets ſufficient to pay the debt, which ſtill remains a charge upon the executrix as executrix, and only becoming eventually a charge upon her in her own right, if it ſhould turn out that, by ſome unforeſeen event, there ſhould be a failure of aſſets, or, by miſconduct, a *devaſtavit* incurred. If we are to argue from the intent of the inſtrument, to be collected from the particular wording of it, I aſk, can it be reaſonably doubted, whether this executrix, who truſted the whole of this large eſtate in the hands, and to the care of theſe attornies, under her perſonal reſponſibility for every ſhilling of the amount of it, if they ſhould fail in the collection or application of it, would have heſitated to commit to their diſcretion, upon their view of the ſtate of the property, and of the time within which it could be realized, the aſking and obtaining from the creditors twenty months further time for the payment of their reſpective debts? I aſk whether the executrix did not mean to throw all the burden of the adminiſtration of the effects upon the attornies, and whether there was not a convenient and neceſſary diſcretion to be entruſted to them? When it is objected that the authority given is reſtrained to an authority to pay in her ſtead as executrix, and "*agreeably to the due order and courſe of law*," I anſwer, that taking theſe words to amount to a direction to the attor-

nies to pay in a courſe of adminiſtration, they were not meant to control, nor can they control, the authority of the attornies in any thing neceſſary to that payment, in a courſe of adminiſtration. It is perfectly clear, notwithſtanding this direction, that they might take time for the payment of the debts, *having aſſets to pay them when the time came*, for then they would pay in a courſe of adminiſtration, and there can be nothing repugnant to that direction in aſking for the time, even though the aſſets ſhould afterwards fail, becauſe it is a ſtep taken upon a conviction, that there will be aſſets to be adminiſtered in a due courſe of law, and to the end that they may be adminiſtered. Where the executrix has entruſted all to the care of her attornies, with a reſponſibility in herſelf to the extent of all the property, it is a ſmall circumſtance to be obſerved upon, that though the payment of a debt, not in a courſe of adminiſtration, is within the authority, as between the creditor and the executrix, yet that ſhe might be obliged to anſwer to other creditors, as for a *devaſtavit*, in reſpect of it. In truth, *this direction to pay, in a courſe of adminiſtration, may operate as between her and her attornies, but as againſt creditors receiving payment of their debts, it ſeems to me that it can have no operation.* Much ſtreſs was laid in the argument on there being no expreſs power given to the attornies to ſign acceptances for the executrix, but the objection proves too much. As well might it be argued, that if the caſh of the eſtate was kept at a banker's, the attornies ſhould not draw for it in her name. The true queſtion appears to me to be, Whether the attornies under this power have a diſcretion to agree with creditors for the forbearance of the debts? And that the reſt of the difficulty has more of form than ſubſtance in it. If the foundation is well laid, the application of the argument to the particular caſe in queſtion ſeems obvious and deciſive. The acceptance of this bill of exchange is called a ſecurity, but is, in ſubſtance, merely a mode of taking twenty months further time for payment of a debt due from the teſtator to theſe plaintiffs, and payable out of the aſſets. Had the twenty months' credit been taken by a mere agreement to forbear, and ſhe had been ſued as executrix after the expiration of the time given, ſhe could not have pleaded *plenè adminiſtravit*, becauſe, by taking the credit, ſhe admitted aſſets. There is a formal difference only between that caſe and the preſent, the acceptance appears upon the face of the bill to be an acceptance by her as executrix, and the conſideration of it is value in account with teſtator. If ſhe is ſued in her own name, and not as executrix, ſhe is ſo ſued upon the ſame principle upon which aſſignees of a bankrupt are ſued for what they do after they become aſſignees for the eſtate, and at the

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expence of the eſtate. The debt is ſtill ſubſtantially the debt of the teſtator, which, when paid by her, will be carried to the account of the teſtator's eſtate. I think ſhe might have been ſued as executrix upon this acceptance, but as ſhe could not, in that caſe, have availed herſelf of a plea of *plenè adminiſtravit*, it was not neceſſary ſo to ſue her. In neither caſe could any defence be made againſt the demand, and, in truth, no defence ought to be made, for the creditor who accepts this kind of payment purchaſes the benefit of it, the eſtate has had its advantage, and this defendant, as executrix, has had her advantage of the forbearance. I have hitherto avoided any mention of the particular circumſtances of this caſe, which very ſtrongly imply the knowledge of the defendant, and her approbation of the making theſe acceptances (1); but here they ought to have their weight, by way of anſwer to the ſuggeſtion of poſſible inconvenience, which the ſuffering this verdict to ſtand might produce. I confeſs that they appeared to me upon the trial, and do now, upon the beſt conſideration that I can give to the caſe, appear to me to be ſtrong enough to raiſe an implication of a ſpecial procuration, if that were thought neceſſary, from the executrix to her attornies, to authorize theſe acceptances, and that the defence now made upon the ſtrict law is againſt conſcience and good faith. I have already taken an opportunity of obſerving on the caſe depending in the court of King's-bench, and what I ſuppoſed would be the deciſion of that Court. I will only now repeat, that we underſtand that it *did not appear in that caſe, that the acceptance was given for the payment of a debt due from the teſtator* (2), the payment of which had been agreed to be poſtponed, or indeed that it did in any manner touch or concern the execution of this truſt, which

(1) There was evidence to ſhew that the defendant knew that *Thornton* had accepted the bill in queſtion in her name, in payment of the plaintiff's debt; and, when the officer ſerved her with proceſs, ſhe acknowledged the juſtneſs of the debt, ſaying that the plaintiff had behaved handſomely, and ſhould be paid. Perhaps, therefore, the caſe may reſt with greater ſafety on the ground of a ſpecial authority given to accept the particular bill in queſtion, than on the conſtruction of an inſtrument, which demonſtrates, on the face of it, the intention of the parties, that the power delegated to the procurator ſhould not be extended to make the defendant *perſonally* liable.

(2) In the courſe of the argument it was ſtated, that a ſimilar queſtion on the conſtruction of the ſame letter of attorney was then depending in the court of King's Bench: and a few days afterwards the chief juſtice ſaid, that he had been informed that the queſtion in the caſe in that court was, Whether the attornies were authorized to give or accept bills generally in the name of the defendant, not being in payment of the debts of the teſtator? Th s his lordſhip was clearly of opinion they could not do under the letter of attorney, in which he apprehended the court of King's Bench would concur.—But, according to the report of that caſe in 6 *Ter. Rep.* B.R. 591, *ante*, 499, it is ſtated that the bill *was drawn and accepted for a debt due from the plaintiff to the teſtator. Qu.* Therefore, how that fact really was?

is the great and distinguishing feature between that case and the present. We agree, that this power cannot authorize the giving acceptances in the name of Mrs. *Baillie*, which are *neither expressed nor proved to be in payment of the testator's debt.* The case now in judgment in this court rests on its own particular circumstances, upon which we decide.—Rule discharged.

Secar *v.* Atkinson, administratrix of Atkinson, Hil. Ter. 29 Geo. 3 C.B. 1 *Hen. Black.* 102.

If an action be brought against an administrator on promises of the intestate, and the declaration is on an *insimul computassent* with the administrator, *as such*, of money due from the intestate: this does not make him *personally* liable.—This was an action brought against an administratrix for a debt due from the intestate. The first count of the declaration was for goods sold and delivered to the intestate; the second was on a *quantum valebant*; the third, for money paid to the intestate's use; and the fourth, on which the question arose, was *on an account stated between the plaintiff and defendant, as administratrix, of money owing from the intestate, and in consideration of the intestate being found indebted, a promise is stated from the defendant to pay.* To this declaration it was objected, that there was a misjoinder of action; that the judgment on the three former counts must be *de bonis testatoris*, and on the latter *de bonis propriis*, because in the last count the defendant is said to be charged in her own right. Per Curiam: Unquestionably, if the judgment were to be, as it has been contended, in one instance *de bonis testatoris*, and in the other *de bonis propriis*, the declaration would be bad; but we are of opinion, that the objection is not founded in truth, and that the defendant is charged, as administratrix, on all the counts. The authority chiefly relied upon was an anonymous case in *Ventris*, 1 *Ventr.* 168. more correctly reported in 2 *Levinz*, 122. by the name of *Hawes* v. *Smith*, which was a writ of error, on an action in this court, against an executor, in which the plaintiff declared on an account stated at the request of the defendant: the judgment was for the plaintiff *de bonis propriis*; and, on error brought, this judgment was affirmed in the King's Bench, it being holden not to be error, because the plaintiff was *not bound* to account with the executor, and yet did account at the request of the executor; therefore a good consideration was raised. But it is very difficult to reconcile that case with any true principle of law. The plaintiff was bound in equity and conscience to account. The defendant might have had a writ of account against him, by the statute 31 *Ed.* 3. as appears from Lord *Coke*'s Commentary on the statute of *Westminster*, the second, 2 *Inst.* cap. 23. p. 404. It is also said, in the case of *Hawes* v. *Smith*, that the promise was in consideration of forbearance to sue; but so far is it from being like forbearance to sue, that the defendant desires

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to account, and facilitates the bringing a ſuit by aſcertaining the ſum due. The principal caſe cited on behalf of the plaintiff was that of *Ekwes* v. *Mocatoe*, 1 *Salk.* 207. but that was on an *inſimul computaſſent* brought *by* an executor, and, whether good law or not, does not affect the preſent caſe. It was alſo ſaid, that the plaintiff did not account at the requeſt of the defendant, and ſo there was no conſideration for the promiſe; but it is expreſsly ſtated that they accounted together, and that the defendant promiſed as adminiſtratrix. This is the common mode of declaring againſt executors and adminiſtrators, to ſave the ſtatute of limitations; but if it were to be conſidered as making them perſonally liable, who would ever take out adminiſtration?—Judgment for the plaintiff.

Roſe and Mercy his Wife v. Bowler and Read, executors of Bowler. Hil. Ter. 29 Geo. 3. C.B. 1 *Hen. Black.* 108.

An executor cannot be charged *as ſuch*, either for *money had and received* by him, *money lent* to him, or on an account ſtated of money due from him *as ſuch*; thoſe charges making him perſonally liable: alſo the wife can only join with the huſband in bringing an action, where ſhe is the *meritorious cauſe of action.* And where the cauſe of demurrer to a declaration is, that the counts are improperly joined, the plaintiff cannot enter a *nolle proſequi* as to ſome, and leave the others remaining.—This was an action of *aſſumpſit*, brought to recover a legacy left by the teſtator (1) (of whom the defendants were executors) to *Mercy Roſe*, the plaintiff, after her marriage. The firſt count of the declaration ſtated the deviſe, &c. and averred aſſets in the hands of the defendants ſufficient to pay the legacy, over and above the debts, legacies, and funeral expences, whereby the defendants, *as executors*, became liable to pay, &c. and being ſo liable, promiſed *as executors*, &c.; ſecond count, money had and received by the defendants, *as executors*, to the uſe of the plaintiffs, &c.; third, money lent to them, *as executors*, by the plaintiffs; fourth, an account ſtated of money due from them, *as executors*, to the plaintiff, and as ſuch a promiſe, &c. —There was a ſpecial demurrer, that the plaintiffs had declared againſt the defendants *as executors*, whereas they ought to have been declared againſt in their own right; that the plaintiffs had declared againſt the defendants, on debts and promiſes, &c. as having reſpectively accrued, and been made, by them *as executors*, whereas ſuch debts and promiſes could not by law accrue, or be made, in that capacity, but *perſonally only*; and that there was a miſjoinder of action in this, that ſome of the cauſes of action accrued to the plaintiffs jointly, and others to the huſband alone, &c. The plaintiffs entered a *nolle proſequi* as to the three laſt

(1) Vide vol. I. p. 287, 289.

counts,

counts, and joined in demurrer. PER CURIAM: There is no caſe to prove, that in this ſtage of the proceedings a *nolle proſequi* can be entered, and, as it is certain that no experiment of this kind has ever been made, it affords a ſtrong argument that it cannot be made. It was contended at the bar, that there was an analogy between entering a *nolle proſequi* in this ſtate of the pleadings, and ſevering of iſſues after a verdict; but here the objection is, that diſtinct and inconſiſtent rights of action are joined; for this cauſe there is a demurrer, and, after joining in demurrer, there is no inſtance of the plaintiff being permitted to do away the ground of the demurrer, by ſeparating the rights of action. On this point, therefore, we are of opinion againſt the plaintiff. The next objection is, that the huſband is improperly joined with the wife. As to this the rule is, that where the wife is the meritorious cauſe of action, there ſhe may join with the huſband, but not otherwiſe, as is evident from the authorities of *Croke James*, 644. (1), and 2 *Wilſon*, 414. (2). Now in the preſent caſe, though in the firſt count the legacy appears to have been left to the wife, yet there is no meritorious conſideration on her part, for the three laſt promiſes, which are on general money counts. Theſe counts are alſo ſuch as would make the defendants perſonally liable, and with which they could not be charged as executors, and are, therefore, not to be joined with the firſt.—Here are then ſeveral counts, in one of which the huſband is entitled in right of his wife, and on the others, in his own right; but he is joined with his wife in all. The defendants are alſo declared againſt as executors in every count; but the latter are ſuch as can only make them perſonally liable. For theſe reaſons, therefore, we give—Judgment for the defendants.

## *How far Executors and Adminiſtrators are liable, as ſuch.*

Braithwaite *v.* Cookſey, Tr. Ter. 30 Geo. 3. C.B. 1 *Hen. Black.* 465.

Where the leſſee of lands dies before the expiration of the term, and his adminiſtrator continues in poſſeſſion during the remainder and after the expiration of it; a diſtreſs may be taken for rent due for the whole term.—In an action of *Replevin*, for taking, on the 13th of October, 1788, the goods of the plaintiff, there were three ſeveral avowries and conuzance. The firſt was, that for ſix years next before and ending on the 29th of September, 1788, one *W. B.* deceaſed, in

(1) *Abbott* & ux. v. *Bloſield*,
(2) *Welter*, et al. v. *Eaker*, under title PLEADING, *infra*.

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his life-time, and *E. B.* as his administratrix, held and enjoyed the premises in manner following, viz. The said *W. B.* for and during part of the time aforesaid, and until the time of his death, and the said *E. B.* as his administratrix, from the death of the said *W. B.* for and during the residue of the term aforesaid, under a certain demise thereof, thentofore made, and before the time when, &c. determined, at a certain yearly rent, viz. 65l. 3s. and that such yearly rent was in arrear, and unpaid for six years of the said demise, ending on the said 29th of September, 1788, to the amount of 396l. 18s. and, therefore, the defendants avowed and acknowledged the taking of the goods and chattels in the declaration mentioned, for and in the name of a distress, for the rent so due and in arrear. The second avowry and conuzance stated the yearly rent to have been 42l. and the arrears to be 252l. The third stated the yearly rent and arrears to be the same as the first, and that the plaintiff was the tenant at the time of the distress made. And the fourth was like the third, except that the yearly rent was stated to be 42l. and the arrears to be 252l. To each avowry and conuzance, there was a general demurrer; and after argument, the Court were very clearly of opinion, that the three principal statutes concerning distresses for rent in arrear made these avowries good. The 32d *Henry* VIII. chap. 37. sec. 4. enables the landlord to distrain against executors and administrators. The 8th *Ann*, chap. 14. sec. 6 and 7, to distrain within six months after the end of the term. And the 11th *Geo.* II. chap. 19. sec. 22. to avow generally. And, therefore, judgment was given for the defendants.

Cooke, administratrix, *v.* Colcraft, Hil. Ter. 13 Geo. 3. C.B. 2 *Black.* 856. 3 *Wils.* 380.

On a covenant that, in consideration of a weekly payment to *A.* and his executors for a term certain, *A.* shall not exercise a particular trade; the executors of *A.* are not bound to abstain from exercising it.—This was an action of debt on bond for 300l. from the defendant to *William Cooke*, the intestate, husband of the plaintiff. The defendant prayed *oyer* of the bond and condition, which was to secure the payment by the defendant, his heirs, executors, or administrators, to the said *William Cooke*, his executors, administrators, or assigns, of 8s. per week, during the lives of *Cooke* and his wife, and the survivor of them, in pursuance of certain articles of agreement, dated the 7th of November, 1761, and for performance of the covenants and agreements therein-contained, according to the true intent and meaning of the articles. These articles recited, that *Cooke*, being a newsman, was entitled to receive thirty copies every morning of the first impression of a newspaper, called the Daily Advertiser, and had agreed to assign his right to the same to the defendant; in consideration whereof the defendant had

had agreed to pay *Cooke* 8s. weekly, during the lives of himſelf and his wife, and the ſurvivor of them; therefore *Cooke*, for the conſideration aforeſaid, aſſigned to the defendant, his executors, and adminiſtrators, his right to the ſaid thirty copies, and all his buſineſs as a newſman, and covenanted to procure the ſaid thirty copies to be regularly delivered. *Cooke alſo covenanted, that he would not thereafter exerciſe the buſineſs of a newſman*, but would uſe his utmoſt endeavours to procure his cuſtomers in that buſineſs for the defendant; and in conſideration of the premiſes, the defendant covenanted to pay the 8s. per week to *Cooke*, his executors, &c. during the lives of himſelf and his wife, and the ſurvivor of them; and that the defendant would not, during his natural life, deal in ſtationary wares, books, or pamphlets, except magazines and periodical pamphlets, which are uſually eſteemed the buſineſs of a newſman, provided, that if default ſhould be made in the weekly payments, to the amount of 4l. or upwards, the aſſignment of the thirty copies ſhould be void, and *Cooke* ſhould be at liberty to reſume his buſineſs as a newſman; but, nevertheleſs, the weekly payment of 8s. ſhould continue during the lives of *Cooke* and his wife, and the ſurvivor of them. The defendant then pleaded payment of the 8s. per week to *Cooke* and the plaintiff, till the 16th of July, 1770; and his own not dealing in ſtationary wares, &c.; but that, ſince the death of *Cooke*, the plaintiff had vended and dealt in the buſineſs of a newſman, contrary to the tenor and effect of the articles. To this plea the plaintiff demurred, and, after argument, THE COURT WERE OF OPINION that the demurrer was good, upon the manifeſt diſtinction of expreſſion in the two covenants, viz. that *Cooke* himſelf, without naming his executors, &c. ſhould abſtain from the buſineſs of a newſman; but that the payment was to be made to him, his executors, adminiſtrators, and aſſigns. This payment was now to be made to the plaintiff, not as the wife of *Cooke*, but as his adminiſtratrix, and was aſſets for the payment of his debts. It would, therefore, be very hard to debar her from exerciſing a lawful occupation for her own livelihood, in conſequence of this perſonal covenant of her huſband; but if this had been an action of covenant, it might perhaps have borne another conſtruction.

A. and J. Rawlinſon v. Shaw, executor of Woodhouſe, Hil. Ter. 30 Geo. 3 B.R. 3 *Ter. Rep.* 557.

If a debtor make his creditor and another perſon executors, and the creditor neither proves the will nor acts as executor, he may maintain an action againſt the other for his demand on the teſtator.—This was an action of *aſſumpſit*, on promiſes made by the teſtator: the laſt count was on promiſes by the defendant, as executor. To the firſt counts the defendant pleaded, that *Woodhouſe*, the teſtator, in his life-time (to wit), on, &c. duly made and publiſhed his laſt will

will and teſtament in writing, and thereof conſtituted and appointed the defendant and *J. Rawlinſon*, and three other perſons, joint executors, and ſoon afterwards died, without altering or revoking it. And as to the laſt count, that that promiſe and undertaking (if ſuch were made) was made by the defendant, together with the ſaid *J. Rawlinſon*, and thoſe three perſons, and not by the defendant alone. The plaintiffs, by their replication, ſaid, that *J. Rawlinſon* never proved the will of *Woodhouſe*, nor took upon himſelf the burthen of the execution thereof, nor in any manner whatſoever ever accepted of the ſuppoſed appointment of him, the ſaid *J. Rawlinſon*, to be an executor of the ſaid will, nor ever adminiſtered any goods or chattels which were of the ſaid *Woodhouſe*, deceaſed, at the time of his death, as executor of the laſt will and teſtament of the ſaid *Woodhouſe*. And as to the other plea they replied, that the promiſe in the laſt count was not made by the defendant, together with *J. Rawlinſon*, and the other three perſons, as in the plea alleged.—To the replication to the firſt plea there was general demurrer, and joinder in demurrer.—PER CURIAM: The argument in ſupport of this demurrer is fully anſwered by the plain words of the replication. The foundation of the argument is, that this is an action in reſpect of property, and that the plaintiff has poſſeſſion of that property: but the replication pointedly ſtates, that he never proved the will, nor in any manner whatever acted as executor, nor adminiſtered. Then, if he has not the poſſeſſion of the property of the teſtator, he ſtands in the ſame ſituation as any other ſtranger, and may equally ſue the perſon who has the legal poſſeſſion of that property.—It is laid down univerſally in all the authorities on that ſubject, from the year books down to the preſent time, that a defendant, who is ſued as executor, cannot plead that another perſon is alſo executor with him, unleſs he aver that that other has adminiſtered. The caſe of *Swallow* v. *Emberſon*, 1 *Lev.* 161. is directly in point. The only difference is, that here the defendant ſays, that the plaintiff himſelf is one of the executors, but that does not vary this caſe for the reaſons already given.—Judgment for the plaintiffs.

A count, on a promiſe made by the defendant, as adminiſtrator, to pay money received by him, as ſuch, to the plaintiff's uſe, cannot be joined with other counts, on promiſes made by the inteſtate.—The four firſt counts, in this declaration, were on promiſes made by the inteſtate; the fifth ſtated, that after the death of the inteſtate, the defendant, as adminiſtratrix, was indebted to the plaintiff in 1000l. for ſo much money by the defendant, as ſuch adminiſtratrix, had and received to, and for, the uſe of the plaintiff. To this there was

Jennings v. Newman, adminiſtratrix, Tr. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 347.

was a ſpecial demurrer, becauſe the two cauſes of action, the one from the inteſtate, and the other from the adminiſtratrix, could not be joined: AND THE COURT were clearly of opinion, that theſe counts could not be joined, becauſe the laſt count ſtated a cauſe of action after the inteſtate's death, which would exclude one of the pleas that might be pleaded to the other counts, and would warrant a different judgment. But they gave the defendant leave to amend, by ſtriking out the laſt count, on payment of coſts.

Mara v. Quin, executrix, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 1.

A *ſcire facias*, on a judgment, muſt purſue the terms of the judgment: and, therefore, where an executor pleads *plenè adminiſtravit*, and the plaintiff does not take iſſue on it, but takes a judgment of aſſets, *quando acciderint*, the *ſcire facias*, on that judgment, muſt only pray execution of ſuch aſſets as have come to the executor's hands ſince the former judgment; and if it pray execution of aſſets generally, without confining it to that time, it cannot be ſupported.—This was a *ſcire facias*, upon a judgment, in an action of debt recovered by the plaintiff againſt the defendant, as executrix of *M. Quin*. After ſtating the proceedings in the former action, that the defendant there pleaded other judgments recovered, and *plenè adminiſtravit*, on which the plaintiff prayed, and the Court adjudged, that his debt ſhould be levied of the goods and chattels of the teſtator "*which ſhould thereafter come to the hands of the defendant to be adminiſtered*," after ſatisfaction of the judgments, &c. it proceeded to ſtate that divers goods, &c. of the teſtator, ſufficient to pay, as well the other judgments, as the plaintiff's, had come to, and were in the hands of, the defendant, to be adminiſtered, &c. (without ſaying that thoſe goods had come to the defendant's hands ſince his judgment); and prayed execution againſt the defendant, to be levied of thoſe goods, according to the form and effect of his ſaid recovery, &c. The defendant pleaded *(inter alia)* that, after the plaintiff's judgment, no goods, &c. of the teſtator had come to the defendant's hands to be adminiſtered, &c. To this the plaintiff replied, that divers goods, &c. had come to the defendant's hands, &c. (without adding "*ſince the former judgment*, &c.") ; and the defendant demurred.—PER CURIAM: The writ of *ſcire facias* appears to be wrong, becauſe it does not purſue the terms of the judgment. When an executor pleads *plenè adminiſtravit*, the creditor has an opportunity of denying the truth of that allegation; or, if it be true, he may admit it: if he deny it, the enquiry is then to be gone into on the trial of ſuch an iſſue; if he admit it, he takes judgment, and prays that his debt may be levied of ſuch aſſets as may afterwards come to the hands of the executor to be adminiſtered. But the ſeaſon, when the creditor muſt aſcertain whether or not there be

be any assets in the executor's hands, is, when the issue of *plenè administravit* is tried: that question is settled by the judgment given on such a plea. This is the language in all the books of entries. In 2 *Saund.* 219. the recital of the judgment in the *scire facias*, is, that the debt should be levied of the goods, &c. *quæ ad manus prædicti Martini executoris, &c. tunc postea devenirent, &c.*: and, in point of convenience, it is right that such should be the rule of law; for if it were permitted to a creditor to litigate a second time that which has been once settled between the parties, either by a verdict, or by admission, the executor would be harassed and involved in infinite expence and litigation.—Judgment for the defendant.

Accordingly, after the above judgment was given, it was applied to amend the judgment in the former action, on which the *scire facias* was brought, and which was entered up in Michaelmas term, 1793, by making it a judgment of Michaelmas term, 1791; and to amend the proceedings on the *scire facias* conformably to the judgment, on payment of costs; grounded on an affidavit, setting forth, that the original action was brought, and that the defendant pleaded in Michaelmas term, 1791; that soon after the plaintiff cited the defendant in the Spiritual Court, to exhibit an inventory of the goods, &c. of the testator; but that he could not obtain an account until the 23d of July, 1793; that that delay prevented his entering up judgment until Michaelmas term, 1793, when he entered up the judgment of assets, &c. *quando acciderint*; and that he has since discovered, that assets, to the amount of 146l. 6s. 3d. came to the defendant's hands, between the time of pleading in the former action, and entering up judgment.—Lord KENYON, C. J. The forms of the court are always best used when they are made subservient to the justice of the case; and that judgments have been amended, in a variety of instances, when it has been thought necessary to answer the justice of the case, cannot be doubted. If there never had been any amendment in courts of justice, or if there had been no one instance of the Court permitting a judgment to be entered *nunc pro tunc*, we should have paused before we made this rule absolute. For wise purposes, the law has said, that judgments shall have a certain effect in binding lands: there must be a docquet of the very day on which it is entered, to protect *bonâ fide* purchasers for a valuable consideration, under the register acts; and where the interest of no third person is affected, judgments are frequently altered on the other side of the Hall. Therefore, without infringing any rule of law, in order to forward the justice of this case, I think, we are bound to make this rule absolute, as the defendant has not shewn, by any affidavit, that injustice will be

done to any perſon by it.—Ashhurst, J. It is ſaid, that, perhaps, injuſtice will be done by our granting the application, ſince, poſſibly, other creditors may have ſigned judgments againſt the executrix, in the interval between Michaelmas term, 1791, and Michaelmas term, 1793: but the executrix muſt know, to a certainty, whether or not that ſuppoſition be true; and ſhe has not ventured to ſtate it in an affidavit.—Grose, J. Though this is an application to amend a judgment againſt an executor, it is like the common caſe of entering up a judgment, *nunc pro tunc*, which is done perpetually. It appears, from the affidavit, that the executrix is in poſſeſſion of the ſum of 146l. which ought to be applied in diſcharge of the plaintiff's demand, but which will be kept by the executrix for her own uſe, in defiance of law and equity, unleſs we interfere in the manner propoſed. When ſuch a motion as the preſent is made, the Court ought to pauſe a little, and conſider whether the granting of the rule will be prejudicial to the defendant, or to other creditors; for it is true, that an executor ſtands in a perilous ſituation, and is entitled to certain indulgencies: but we can only pauſe for the purpoſe of enquiring whether or not the executor will ſuffer in conſequence of our making the rule abſolute. Here the defendant has had an opportunity of anſwering the plaintiff's affidavit, and ſhewing (if the fact were ſo) that other creditors of the teſtator have uſed more diligence than the plaintiff, and obtained judgment againſt her between the years 1791 and 1793: and even if it were now ſaid, that the defendant had been ſurprized by the ſuppoſed novelty of the application, and it were ſuggeſted that ſhe could now anſwer the affidavit, I confeſs I ſhould wiſh to enlarge the rule, to give her an opportunity of anſwering it. But as that is not even inſinuated, I think we ought to make the rule abſolute; ſince it will only be doing juſtice to the plaintiff, and it will do no injuſtice to the defendant.—Lawrence, J. agreed. Rule abſolute.—Lord Kenyon, C. J. Then obſerved, that it had occurred to him, on looking into the precedents ſince the judgment was given on this demurrer, that the ordinary mode of entering up a judgment of aſſets, *quando acciderint*, was not correct; for as on the iſſue of *plene adminiſtravit* no evidence could be given of aſſets after the writ ſued out, if the judgment were to affect aſſets received after the judgment, there was an interval between the commencement of the action and the judgment, in which, if the executor received any aſſets, they could not be taken at all. His lordſhip, therefore, thought, that the judgment, in ſuch a caſe, ought to be entered up in ſuch a manner as to reach all aſſets received by the executor after the time of ſuing out the writ.—Ashhurst, J. Obſerved, that as the plea of *plene adminiſtravit*

*administravit* was that "the executor hath not, nor had, at "the time of suing out the writ, nor at any time since, any "assets, &c." he saw no objection to the plaintiff's replying to the latter part of the plea, "that the executor had "assets since, &c." if the fact were so (1).

A creditor has a right, *ex debito justitiæ*, as well as the next of kin, to sue upon an administration bond, in the name of the archbishop, or his ordinary.—Upon a rule to shew cause, why the proceedings in an action upon an administration bond, sued in the name of the Archbishop of *Canterbury*, should not be staid, with costs; upon two grounds, *first*, because in fact the assignee, who was a creditor, had only an authority from the Archbishop of *Canterbury*; *secondly*, that it was not competent to the archbishop to depute such authority to a creditor, but only to the next of kin. Lord MANSFIELD, C. J. With respect to the last point; the act requires the archbishop, or his ordinary, "to grant administration, "and to take bond, with condition that the administrators "shall duly administer the intestate's effects; that they shall "give an account of such their administration, and make an "inventory of the goods and chattels; and that they shall "pay the surplus to the next of kin." Now it is agreed, that if the next of kin is desirous of suing upon this bond, the Court will direct the ordinary to permit his name to be used; because the next of kin is interested in the surplus. In like manner, if such application is made by a creditor, there is no reason why he should not have the same privilege; nor is there any authority which says, that the ordinary cannot impower him to put the bond in suit. On the contrary, it is *ex debito justitiæ* that he ought to do so; for though a creditor has no concern in the latter part of the condition, namely,

The Archbishop of Canterbury *v.* House, Tr Ter. 14 Geo. 3. B.R. *Cowp.* 140.

(1) Afterwards, on the last day of the term, an affidavit was produced on behalf of the defendant, in which it was stated that she should be damnified if the rule were to stand as pronounced by the Court; for that other creditors, on simple contracts, had obtained judgments against her in the interval between Michaelmas term, 1791, and Michaelmas term, 1793; and that, in fact, she had paid more than she had received in the character of executrix. To this it was objected, that the plaintiff's action was on a bond; and, that after notice of this specialty debt, the executrix ought not to have paid any debts of an inferior nature. BUT THE COURT SAID, that as the plaintiff applied to the Court for a favour, in desiring that the judgments in the former action might be entered up, as of a term prior to that when, in strictness, he was entitled to enter it, they ought only to grant that favour on condition that the executrix was not prejudiced by it; and that the executrix ought, under these circumstances, to be allowed all debts that she might fairly have paid in the interval, whether those debts were, or were not, of an inferior nature. On which both parties agreed to refer the account to the master.

" the diſtribution of the ſurplus among the next of kin," yet he is moſt materially and principally intereſted in the adminiſtrators' delivering in a true inventory, and in the due adminiſtration of the effects. To one who has a right, it is *ex debito juſtitiæ* to grant the liberty of ſuing in the archbiſhop's name; to one who has no right, it is *ex debito juſtitiæ* to refuſe it. As to the objection, that it is liable to be abuſed: if any bad uſe was made of it, the Court would, no doubt, ſet aſide the proceedings; but, in the preſent caſe, there is no pretence, or even ſuggeſtion, of any abuſe. And, therefore, the Court were clearly of opinion, that the plaintiff was well entitled to put the bond in ſuit. As to the other ground, that the archbiſhop, in his private perſon, gave no ſuch authority to the plaintiff: a perſonal application to him would have been very improper; for it is not his perſonal affair; his name is only uſed officially.—Rule diſcharged.

## *Right of Executors and Adminiſtrators to retain.*

Loane v. Caſey, executrix, Hil. Ter. 25 Geo. 3. C.B. 2 *Black.* 965.

A marriage covenant, with a truſtee for ſecuring proviſion for the wife, may be given in evidence by her, on a plea of *plenè adminiſtravit*, in an action brought againſt her as executrix. And ſhe may retain, out of the perſonal aſſets, ſo much as is equal to the damages ſhe has ſuſtained by the breach of ſuch covenant. On the trial of an action of *aſſumpſit* where the plea was *plenè adminiſtravit*, and iſſue joined thereon.—The plaintiff proved aſſets in the defendant's hands; but the defendant gave in evidence a deed, dated the 2d of June, 1756, made between the teſtator and *Robert Baillie*, the defendant's father, previous to the marriage between the teſtator and defendant; whereby, in conſideration of the marriage, and 2000l. portion, the teſtator bound himſelf to the ſaid *Baillie*, that in caſe he died without iſſue, in the lifetime of the defendant, he would leave her all his perſonal eſtate, and 200l. *per annum* for life, out of his real eſtates; or, in caſe of leaving iſſue, a moiety of his perſonal eſtate, and 100l. *per annum* for her life. THE QUESTIONS were, firſt, Whether this inſtrument was admiſſible in evidence, the ſame not having been pleaded? Secondly, If admiſſible, whether the defendant, as executrix, was, by law, entitled to retain the ſaid aſſets towards ſatisfying the claim under the ſaid inſtrument?—DE GREY, C. J. Wherever an executrix has a right to a ſum of money, whether it be ſtrictly a debt to herſelf, or nominally to another, ſhe may retain it. This is a ſpecialty debt, which is, in its nature, to be ſued for

for by action of covenant, and recovered in damages, being not a ſpecific ſum, but matter of computation. The only objection of weight is, that the debt is not ſpecifically aſcertained. But whatever diſcharges the executor may be given in evidence without pleading, and this retainer is a diſcharge of the executor.—In a caſe before *Eyre*, Chief Juſtice, a widow, executrix, was allowed to retain the money, with which ſhe paid off a mortgage on her jointure, the huſband having covenanted it to be free from incumbrances, this being a ſatisfaction for his breach of covenant. This differs very little from the preſent caſe. I am, therefore, upon the whole, of opinion, that this inſtrument was admiſſible in evidence, without pleading it; and that the executrix was entitled to retain the aſſets.—BLACKSTONE, J. Of the ſame opinion. Debts of a higher nature, ſubſiſting and undiſcharged, muſt be pleaded by the executor: debts diſcharged may be given in evidence, to ſhew that the aſſets are exhauſted. This is the diſcharge of a debt. It is equivalent to a recovery on an action of covenant. For the executrix cannot ſue herſelf. Damages, that are in their nature arbitrary, cannot be retained, becauſe, till judgment, no man can foretel their amount. Such are damages founded upon *torts*. But, where damages ariſe from the breach of a pecuniary contract, there is a certain meaſure for them, and ſuch damages may well be retained. *Nares*, J. Of the ſame opinion.—Judgment of nonſuit.

Plumer, Spr. *v.* William Marchant, adminiſtrator of Peter Marchant, Ea. 1 er. 3 Geo. 3. B R. 3 *Burr.* 1380.

And a retainer may either be given in evidence, or pleaded. —This was an action of debt upon a bond of the defendant *William Marchant's* inteſtate. The defendant pleaded *plenè adminiſtravit*.—The plaintiff replied, "that the defendant "then had, and on the day of exhibiting the bill, had ſuf- "ficient goods and chattels, &c. to have ſatisfied to the "plaintiff the debt and damages aforeſaid." And iſſue was joined thereon. At the trial, the defendant's counſel offered to give in evidence, a covenant contained in a deed of ſettlement, viz.: certain articles of agreement, dated 7th Auguſt, 1759; whereby the inteſtate, *Peter Marchant*, had covenanted "that he, the ſaid *Peter Marchant*, would in, and by, his "laſt will and teſtament, or, that his executors or admini- "ſtrators ſhould, within ſix months after his death, well and "truly pay and deliver, either in money, goods, chattels, or "effects, out of his perſonal eſtate, the full ſum of 700l. "unto the ſaid *William Marchant* [the defendant] and *John* "*Balcomb*, or the ſurvivor of them, or to the executors or "adminiſtrators of the ſurvivor of them;" upon certain truſts. "And, for the better performance of the ſaid cove- "nant, he, the ſaid *Peter Marchant* [the inteſtate], did bind "and oblige himſelf, his heirs, executors, and adminiſtra-

" tors unto the said *William Marchant* [the defendant] and " *John Balcomb*, their executors and administrators, in the " penal sum of 1400l." THE QUESTION was, " *Whether* " *the defendant, as administrator of the intestate*, Peter Mar- " chant, *the younger, could, upon the plea of* plene administra- " vit, *give in evidence the covenant above stated, to support his* " *plea.*" Lord MANSFIELD: It is now settled, that *a retainer of a debt may be given in evidence.* The real justice of the case is, that the plaintiff should have judgment of assets, *quando acciderint.*—DENISON, J. This is a real debt, and the assets are bound by it; and it is a debt by specialty: therefore it is of an equal nature with another debt by specialty. Consequently, the present action being brought upon a debt by specialty, the administrator has a right to retain against it. This case is just the same as if there were two executors; for, payment to one is payment to both: he may retain what he might have paid. An action of covenant is as much a lien upon the assets, as an action of debt. Judgment of assets, *quando acciderint*, would have admitted the debt.—WILMOT, J. Wherever the executor might have been sued, he may retain; and this is a debt of equal nature with that for which the action is brought. Therefore he may retain. The intestate was himself bound: and the lien falls upon his representatives, though he himself could not have been sued. But, without that, I think, this is a debt for a sum certain, and secured by specialty, therefore there is no distinction, whether the man himself was to pay it, or his representatives. Lord MANSFIELD now observed, that there might be difficulties in the method of taking judgment *de bonis quando acciderint*; (which had before appeared to him to be the right method); therefore let there be judgment of nonsuit.

Picard *v.* Brown, administrator of Bradshaw, Hil. Ter. 34 Geo. 3. B.R. 6 *Ter. Rep.* 550.

In debt, on bond, against an administrator; to which he pleaded a bond debt due to himself and retainer: it was held not necessary to aver in the plea that such bond was given to himself for a just and true debt; nor to set out the letters of administration, for the plaintiff, by his declaration, admits him to be a lawful administrator.—The defendant was sued, as administrator, on a bond for 3430l. 4s.; to which he pleaded, that he had fully administered all the effects, &c. of *Bradshaw*, except 1176l. 4s. 4d. which he retained towards and in part satisfaction of a debt of 6000l. due to him from *Bradshaw* on bond. The plaintiff demurred, and shewed for causes, that it did not appear, by the plea, that the bond, executed by the intestate to the plaintiff, was given for a just and true debt; and that the defendant did not make any profert of the letters of administration, to shew that he was the legal administrator of *Bradshaw*, and had any right to retain, &c. towards satisfaction of his own debt in preference to the plaintiff's debt. Lord KENYON, Ch. J. There is nothing

nothing in the first objection. This is the usual way of pleading; and if the consideration of the bond can be impeached, the matter ought to be replied.—As to the other point, the case of *Caverly* v. *Ellison*, which has been cited from Sir *T. Jones*, p. 23, is by no means like the present; there the action was brought against the defendant as executor (which is the case, as well when the defendant is charged as rightful executor, as when he is charged as executor *de son tort*): but as the defendant in that case claimed to retain as administrator, which was a different character from that in which he was charged, it became necessary for him to shew the letters of administration. Whereas, here the plaintiff himself sues the defendant, as administrator, which cannot be in his own wrong; and being so charged, it was sufficient for the defendant to plead generally in that character to the action. ASHHURST, J. and GROSE, J. concurred. LAWRENCE, J. The plaintiff, by his action against him, admits him to be a legal administrator. THE COURT were about to pronounce judgment for the defendant; but the plaintiff desiring to withdraw the demurrer, and to reply *per fraudem*, it was granted; the debt claimed by the defendant amounting to a large sum.

## *Plea of* Plenè Administravit.

If an executor plead (to an action on bond) payment; and omit to plead *plenè administravit*, and a verdict be given against him on such plea; it operates as an admission of assets in an action founded on that judgment, suggesting a *devastavit*.—In debt on a judgment recovered by the plaintiffs in this Court, in last Trinity term, against the defendant, as executor of *Moffat*, for 1477l. 10s. debt, and 95l. damages, adjudged to be levied of the goods of the intestate in the defendant's hands to be administered, if he had so much, and, if not, then the 95l. to be levied of the defendant's own goods: the declaration then suggested a *devastavit*; to which the defendant pleaded, that he had not wasted the testator's goods, &c.; on which issue was joined. At the trial a verdict was taken for the plaintiffs for the said debt and damages, subject to the opinion of this Court on the following case: The plaintiffs produced in evidence the record of the judgment mentioned in the declaration, by which it appeared that they had, in Easter term, 1789, brought their action against the defendant, as executor of *Moffatt*, upon a joint and several bond, executed by *Moffatt* and two other persons, as his sureties, to *J. Erving*, deceased, dated the 29th of January, 1765, conditioned for the payment of a smaller sum of money on the 29th of January, 1766. It appeared by that record, that the defendant pleaded to such action that the bond was not the deed of *Moffatt*, together with three other separate

Erving *et al.* executors of J. Erving, *v.* Peters, Tr. Ter. 3 *Ter. Rep.* 685.

pleas of payment at the day, by *Moffatt* and his ſureties reſpectively; and that the plaintiffs having tendered iſſues upon thoſe ſeveral pleas, and iſſues having been joined thereon, the ſame had been in due manner tried in London, and verdicts found for the plaintiffs upon all the iſſues; whereupon ſuch judgment had been duly given by the Court as is mentioned in this declaration. The plaintiffs alſo gave in evidence upon the trial, a writ of *fieri facias*, iſſued upon the ſaid judgment on the 23d of January, returnable on the 10th of February then enſuing, commanding the theriffs of London to cauſe the ſaid debt and damages to be levied of the goods and chattels of *Moffatt*, in the hands of the defendant, as executor of *Moffatt*, to be adminiſtered, if he had ſo much thereof in his hands to be adminiſtered; and, if he had not ſo much, &c. then to cauſe the ſaid damages to be levied of the proper goods and chattels of the defendant. The plaintiffs further gave in evidence the ſheriffs' return to the ſaid writ before the commencement of the preſent action; whereby they certified, that there were no goods or chattels in their bailiwick, of *Moffatt*, at the time of his death, in the hands of the defendant, whereof they could cauſe to be levied the debt and damages, or any part thereof; and that the defendant had not any proper goods or chattels in their bailiwick, whereof they could cauſe to be levied the damages, or any part thereof; and that the defendant ſold, eloigned, and waſted, divers goods and chattels, &c. of *Moffat*, to the amount, in value, of the debt and damages. The plaintiffs gave no other evidence of a *devaſtavit*; and no evidence was offered on the part of the defendant. The queſtion was, Whether the evidence ſo given was ſufficient to ſuſtain the verdict. PER CURIAM: The reaſon on which the law has directed that the judgment in the firſt action ſhall be entered againſt the effects of the teſtator is obvious, when it is conſidered, the action is brought for a debt due from him; and the creditor has no right to call on the adminiſtrator or executor, but in reſpect of the effects which he has in his hands belonging to the deceaſed: by law, therefore, the creditor is to be paid out of thoſe effects; and, unleſs it appear that there are none ſuch, the proper judgment is, that the debt ſhall be paid out of the effects in the hands of the executor. That is the ground of the firſt judgment by a creditor; and, if ſo, it has nothing to do with any queſtion that may ariſe on ſubſequent facts. The queſtion then is, Whether the executor, by his own acts, and in what caſes, may make himſelf liable *de bonis propriis?* on this the authorities are deciſive. In the caſe of *Harriſon* v. *Beecles* (1) it was held by Lord MANSFIELD,

(1) *Cor.* Lord *Mansfield*, at Guildhall, June 2, 1769.

that

that the executor is only liable to the amount of the aſſets in his hands. "There, to an action of *aſſumpſit*, the defend-"ant pleaded *non aſſumpſit & plenè adminiſtravit.* It was in-"ſiſted, that if the plaintiff could prove aſſets unadminiſtered, "to any ſmall amount, the plaintiff muſt have a verdict for "his whole demand. But Lord *Mansfield* ſaid, the law was "certainly underſtood to be ſo, and there are a hundred "caſes ſo determined. This ſtruck me as abſurd and wrong; "I, therefore, conſulted my brother *Deniſon* and the other "judges, who were all of opinion, that the plaintiff ought "not to recover of the executor or adminiſtrator more than "the aſſets in his hands. The plaintiff proved two notes, "which amounted to 80l. and took a verdict on the *non* "*aſſumpſit* for the ſum; and having proved 25l. aſſets unad-"miniſtered, he took a verdict on the *plenè adminiſtravit* for "that ſum, and judgment *quando*, &c. for the reſidue." That caſe ſtruck Lord *Mansfield* as being ſingularly hard, and attended with injuſtice; and, he thought, that he was deciding on principle againſt the current of authorities. It is true that there were many authorities againſt his deciſion, but the doctrine there eſtabliſhed was not new; for, in ſome of the precedents in *Townſhend*'s judgments, there is the very form of judgment which was given in *Harriſon* v. *Becles*. *That caſe, however, does not govern the preſent:* here the ſimple queſtion is, Whether an executor, or adminiſtrator, who has no effects in his hands belonging to the teſtator, and will not take advantage of that defence at the proper time, ſhall be permitted to do it afterwards? Now it is an univerſal principle of law, that if a party do not avail himſelf of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it, either in another action founded on it, or in a *ſcire facias* (1). This very queſtion appears to have been fully and finally ſettled in the caſe of *Rock* v. *Leighton* (2). Then followed the caſe of *Ramſden*

(1) Vide *Earle* v. *Hurton*, 2 *Str.* 732.

(2) [*Mary Rock* v. *Leighton*, late ſheriff of the county of Salop. action upon the caſe againſt the defendant, ſetting forth, that *Richard Pugh*, and others, had brought an action of debt againſt *Mary*, as adminiſtratrix to her huſband, *Rock*, upon a bond of 160l. entered into, by him, in his life-time; and that judgment was had againſt her *de bonis*, &c.; and thereupon a *fieri facias* being taken out, according to the judgment, and delivered to the ſheriff, who levied 20l. and, for the reſt, returned falſely, that ſhe had waſted the goods of the inteſtate, and thereupon a judgment was given to have execution againſt her *de bonis propriis, ubi revera* ſhe had not waſted the goods of the inteſtate that were of the value of the reſidue of the debt. Upon not guilty pleaded, the cauſe came to be tried, ſitt.

*Ramſden* v. *Jackſon*, where Lord *Hardwicke* thought himſelf bound by the authority of *Rock* v. *Leighton*, on the very queſtion;

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ſitt. after Hil. 15 Feb. 12 *Wil.* 3. Upon the evidence it appeared, that upon a treaty of marriage with the inteſtate, *Richard Rock*, and the plaintiff, *Mary*, it was agreed, by articles in writing, that, in conſideration of 150l. which ſhe brought as a marriage portion, *Richard Rock* (if ſhe ſurvived him) ſhould leave her worth 300l.; and he covenanted with *Richard Pyke*, the brother of *Mary*, to pay the 300l. to him for her uſe, if he departed this life before *Mary*. *Richard Rock* died; *Mary* took out adminiſtration, and put in an inventory that amounted to 279l. In Michaelmas term, 1694, *Richard Pyke* commenced an action of debt againſt *Mary* for the 300l. and recovered by *nihil dicit*, and execution was had upon the goods by a bill of ſale upon a *fieri facias* iſſued in Eaſter term following, at the ſuit of the executor of *Pyke*, who had recovered the judgment. In Hilary term, 1694, *Pugh*, &c. commenced their action in the Common Pleas againſt the plaintiff, *Mary Rock*, as adminiſtratrix to her huſband, *Richard Rock*, and ſhe let judgment go by default, and had no aſſets above the 279l. mentioned in the inventory. HOLT *was of opinion, that, by letting judgment go by default when ſhe might have pleaded the judgment with* riens inter mains ultra *to ſatisfy that judgment, which would have been a good bar, ſhe had tacitly admitted that ſhe had aſſets* ultra, *and was concluded by ſuch her omiſſion*; for which purpoſe he cited *Kilborn* and *Rack*, B. R. Hil. 1657. A judgment in debt was had againſt tenant in tail, who died; and *ſcire facias* being iſſued againſt the heir and terre-tenants, the defendant, *Rock*, was returned heir and terre-tenant, and that he was ſummoned: upon his not appearing, judgment of award of execution was given againſt him, and a moiety of the lands were extended by *elegit*. And ejectment being brought thereupon, it was ſpecially found that the lands of the defendant in the judgment were entailed, and that the defendant, in the ejectment, was heir in tail: but in regard he might have pleaded that matter to the *ſcire facias*, and had omitted it, he had loſt the benefit thereof. So the plaintiff, *Mary*, might have pleaded the judgment at her brother's ſuit; that would have defended the aſſets that ſhe had againſt the action brought by *Pugh*: but ſhe, having admitted the aſſets ſhe had to be liable to the action of *Pugh*, by letting judgment go againſt her by *nihil dicit*, is in the ſame condition as if there had been no judgment againſt her at her brother's ſuit upon the covenant for 300l. And the ſheriff hath done her no wrong; for if, upon an enquiry, the jury had found the *devaſtavit* in the plaintiff, the plaintiff, upon traverſing the inquiſition, could not have given this judgment in evidence to defend herſelf, becauſe ſhe might have pleaded it in bar to the action. THIS CASE WAS AFTERWARDS moved in court, and TURTON and GOULD, juſtices, concurred with HOLT in opinion; and ſo the verdict that was given for the plaintiff, by conſent, to be ſubject to the opinion of the Court, was ſet aſide. If debt be brought againſt an executor, and he lets judgment go by *nihil dicit*, or confeſſion, it ſeems to be an admiſſion of aſſets. For, firſt, the want of aſſets is a good bar to the action that the plaintiff hath brought; and if iſſue be joined thereupon and found for the defendant, the plaintiff is for ever barred. *Hob.* 196. *Brickhead* v. Archbiſhop of York, 1 *Cro.* 373. Now there is the ſame reaſon that ſince the defendant waives pleading the matter that would have barred the plaintiffs, he thereby admits the having aſſets. It is true that when the defendant pleads a

*pleni*

queſtion; and the opinion of Lord Ch. J. *Lee*, in the caſe in 1 *Wilſon*, 258. is to the ſame effect. Then there are three caſes all determining the ſame point. And if an executor may plead *plenè adminiſtravit*, and neglect to do ſo, there is

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*plenè adminiſtravit*, the plaintiff may admit the plea to be true, and pray judgment *de bonis et catallis* of the teſtator, *et quæ ad manus* of the executor *in futuro devenirent adminiſtrand'*. 8 Rep. *Mary Soipley's* caſe, 1 *Saund.* 226. *Neal* v. *Nelſon*. But that is a different judgment from what is given upon a *nihil dicit*, or a confeſſion of the action; for that is the ſame as is given upon a *plenè adminiſtravit* pleaded where there is a verdict for the plaintiff, viz. to recover *de bonis teſtatoris ſi tantum in manibus habuit adminiſtrand'*; from which none can infer that, if he hath fully adminiſtered before, he is not affected by the judgment: but it is to be conſidered that though it be found upon a *plenè adminiſtravit* that the defendant hath aſſets, yet 'tis the judgment the ſame, and ſo ought to be; for if the defendant hath aſſets in his hands, there is no reaſon to levy the money upon the executor's own goods unleſs he hath waſted; and, that being matter of fact, it muſt appear upon record, and judgment muſt be given thereupon before his own goods can be affected. But if a *fieri facias de bonis teſtatoris* doth iſſue upon a judgment had againſt the executor upon a *plenè adminiſtravit* pleaded, if the goods cannot be found that were the teſtator's, namely, if the executor will not expoſe them to the execution, the ſheriff may return a *devaſtavit*, it being found by verdict that he had aſſets. Now, then, ſince the pleading of *riens enter mains* would have been a good bar to the action (and if the plaintiff ſhould admit it, he ſhould not have a judgment to have a preſent execution), yet the defendant, by not pleading that plea, hath left the plaintiff to have a judgment upon which a preſent execution is to iſſue, which he could not have had, unleſs the defendant had aſſets; and ſuch an admiſſion is as good as a finding of a jury upon a *plenè adminiſtravit*. Secondly, The caſe of an executor doth not, in this caſe, differ from that of an heir; for if the heir let judgment go by *nihil dicit*, or confeſſion, he admits aſſets. It is true the judgment is different; for an heir is chargeable upon the account of the aſſets which he hath in his own right, and the executor is chargeable in reſpect of aſſets that he hath in the right of the teſtator: but ſtill the admiſſion of aſſets is as much by a *nihil dicit*, or confeſſion, in one caſe as in the other. The like if an heir plead *non eſt factum*, or conditions performed, a general judgment ſhall be given, if the matter pleaded be found againſt him. So in the caſe of an executor, if the matter pleaded be found againſt him, he admits aſſets; for if he hath none, why doth he plead the matter; it will be enough to deny aſſets, and that will bar the plaintiff. Objection, *Hob.* 178. *Bird* v. *Culmer*. Debt againſt an executor who pleaded *plenè adminiſtravit*, and afterwards *relictâ verificatione cognovit actionem*. It was moved that it might be entered that he confeſſed aſſets. It was denied, becauſe the confeſſion can be only to the charge, which is the action; from whence it is inferred that the confeſſion of the action is not a confeſſion of aſſets. Anſwer. Rather the contrary is to be inferred, namely, that *plenè adminiſtravit* and a *cognovit actionem* are inconſiſtent; for he cannot confeſs the action without a *relictâ verificatione* of the *plenè adminiſtravit*; ſo he muſt relinquiſh one to confeſs the other; for the one is a bar, but the other confeſſes all things requiſite to maintain the plaintiff's action. And as to the caution of the Court, it was no more but to confine itſelf to the order and method of the law, which is to make a proper entry, namely, to confeſs the whole action." Ld. Holt's MSS.]

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no difference between such a case, and one where he does so plead, and the plea is found against him.—*Postea* to the plaintiffs.

Waters *v.* Ogden *et al.* administrators of Miel, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 452.

If an executor or administrator plead *plenè administravit præter* a certain sum, and afterwards to another action brought in the same term plead also *plenè administravit præter* the same sum, and as to that sum that he had confessed it in the other action, such plea is a good bar.—This was debt upon a bond against the administrators of the obligor. The defendants pleaded *plenè administravit*, except goods and chattels to the value of 48l. 2s. 10d. and with respect to the said 48l. 2s. 10d. that they had confessed assets to that amount to another action on a bond of the intestate's then depending against them. To this there was a general demurrer. PER CURIAM: This is certainly a new case; and there never has been such a plea before; but justice is so clearly in favour of the defendants, that, unless there were the strongest authorities against the plea, the Court must support it. This is a case which is entitled to greater favour than where there is a priority in the judgment and not in the plea; for as to confessing judgment that, is an act of preference shewn by the executors themselves, but here the preference has been obtained by the greater vigilance of one of the plaintiffs, in calling for a plea before the other. All legal means may be used to obtain such a preference. The defendants, in the first plea they put in, told the real truth of their situation, which they were obliged to do, and having confessed assets to a certain amount, they became bound by the course of law, to pay those assets to the plaintiff in that action; and shall not this be a sufficient answer to the demand? It would be a monstrous hardship, indeed, if the defendants should be obliged to pay the money twice over, and be turned round to seek for redress in a court of equity. This is a good plea. But the plaintiff had leave to withdraw the demurrer, on payment of costs, and to take judgment of *quando acciderint*.

Cox *et al. v.* A. Joseph, executrix of T. Joseph, Ar. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 307.

To assumpsit on a bill of exchange by the plaintiffs, as indorsees, *against the defendant as executrix of the acceptor*, the defendant, after pleading four judgments recovered against her as executrix, pleaded that the testator became bound to *T. J.* in 2,800l.; (among other things) to indemnify *T. J.* against a certain other bond, made by *E. J.* jointly with *T. Joseph*, the testator, but for the proper debt of *T. J.* the testator, to *T. Saxelby*, in 800l.; and which sum of 800l. became and was due in the life-time of the testator, and was still unpaid; and that upon the death of the testator, the indemnity bond *became forfeited, and the money therein contained was still unpaid.* And that the defendant had fully administered, &c. except goods to the value of 1,545l.; which were not sufficient to satisfy the several

several sums due upon the several judgments, and the indemnity bond. To this there was a special demurrer, in which these causes were assigned; that the defendant *did not aver in the plea, that* T. Joseph (the elder) *had been, in any respect, damnified by reason of the non-payment of the* 800l. for which the bond was made and executed with *T. Joseph*, the elder, jointly with *T. Joseph* the testator to *T. Saxelby*; and that the defendant did not in her plea shew *how and by what means the same bond became forfeited*; for want of which averments it did not appear that the defendant was liable to any action at the suit of *T. Joseph*, the elder, on account of the said bond.—PER CURIAM: If the bond be forfeited, the party may either plead the penalty as the debt, or the sum really due, though the Court always recommend the latter: if it be not forfeited, he can only plead the sum due. But here the joint bond became forfeited in the testator's life-time: for it is stated that the bond for 800l. from the testator to *Saxelby*, and against the effect of which this indemnity bond was given, became due and payable in his life-time; and that the indemnity bond was also forfeited on the testator's death. But though this indemnity bond in 2800l. conditioned for the payment of 800l. be forfeited, and the day of payment passed, the plaintiff may reply *per fraudem*, if the executrix has the money, and does not pay it. But it has been said that perhaps this bond may have been forfeited for some other cause besides the non-payment of the 800l.; if so, it is an additional damage to the defendant. But that cannot be taken to be the case on these pleadings; for the executrix has relied on the bond for 800l. as the ground of damnification; and if the plaintiff had taken issue on the forfeiture of the bond for 800l. which would have been a single fact to be tried, the defendant would have been precluded from setting up any other ground of damnification. Then it was urged, that if we determine against the plaintiff, we shall destroy the plea of *non-damnificatus*: but that plea will not be at all affected by this determination; for where an action is brought on an indemnity bond, if there be no damage or cause of action, the plea will stand good; and if there be a damage, the plaintiff must reply it.—Judgment for the defendant.

To a plea of *plenè administravit præter*, the plaintiff may pray judgment of the sum admitted by the plea, and reply assets *ultra*.—This was debt upon a bond against the executors of an executrix of the obligor. And after oyer of the obligation and condition, the defendants pleaded payment by the executrix after the day. 2dly, That the plaintiff and the executrix did account together. And that she was in arrear, and indebted to the plaintiff in 466l. for which she gave him a bond and warrant of attorney to confess judgment, which he received in satisfaction; which judgment was entered of record, and a writ of *fieri facias* was executed upon the goods of

Lockyer, esq. *v.* Coward *et al.* executors of Frampton, widow, executrix of Frampton, Ea. Ter. 10 Geo. 3. C.B. 3 *Wils.* 32.

of the executrix for the debt and damages. 3dly, The ſame as the ſecond plea, except that the third did not ſet forth a *fieri facias* iſſued and executed. 4thly, *Plenè adminiſtravit*, except goods of the value of 10l. THE REPLICATION to the firſt plea, *quod non ſolvit poſt diem*, &c. Replication to the ſecond plea, that the plaintiff did not receive and accept the bond and warrant to confeſs judgment in ſatisfaction. The like replication to the third plea. In replication to the 4th plea, *the plaintiff prays judgment as to the* 10l. *in defendant's hands. And further ſays, that on the day of ſuing forth the original writ, the defendants had goods of the teſtator to the value of the reſidue of the debt, over and above the ſaid* 10l.—It was moved to ſet the fourth replication aſide, on the ground that the plaintiff ought to have accepted of the 10l. confeſſed to be in the defendant's hand unadminiſtered, and to have prayed judgment for the ſame, and of aſſets *in futuro quando acciderint*, or ought to have replied ſingly, that defendants had aſſets in their hands *ultra* the 10l. and to have gone to iſſue thereupon. But upon ſhewing cauſe, it was inſiſted that the replication was a good one, founded in truth, juſtice, and good reaſon; that the defendant having acknowledged he had 10l. in his hands unadminiſtered, the plaintiff had an immediate right to have judgment for *that* ſum in part of his debt, and to reply and ſay further that the defendant had aſſets *ultra that* 10l. ſufficient to ſatisfy the reſidue of the debt, and for this were cited, Raſt. Ent. 323. a. pl. 11. old book of Entr. 59. AND OF THAT OPINION WAS THE COURT; and they declared the fourth replication was a very good one in every reſpect, and ſaid, that if it had been doubtful whether it was ſo or not, they would not have determined that matter upon a motion, but would have put the defendant to demur to it.

Smedley *v.* Hill, executrix, Tr. Ter. 16 Geo. 3. C.B. 2 *Black. Rep.* 1105.

On a plea of judgment recovered, and *plenè adminiſtravit præter*; replication that the defendants had and hath aſſets: if aſſets are proved in the defendant's hands, he may give evidence of the payment of other debts, with thoſe aſſets, *previous to the action brought*.—On the trial, the plaintiff proved 134l. in the defendant's hands, which gave a balance of 40l. 10s. 8d. beyond the judgment, and the plaintiff had a verdict for that ſum. The defendant offered to prove, that ſhe had paid the funeral expences and other debts of the deceaſed to more than the amount of 40l. 10l. 8d. *before the ſuing out of the writ*. But the judge refuſed to admit ſuch evidence, apprehending this not to be properly a plea of *plenè adminiſtravit*.—BUT THE COURT, on a motion for a new trial, were of a different opinion, and made the rule abſolute. PER CURIAM: The iſſue on the replication is clearly, whether at the time of ſuing out the writ ſhe had aſſets. Aſſets are proved to be in her hands before the action brought. She may certainly anſwer this, by ſhewing that ſhe had paid thoſe aſſets away before the ſuing

out

out of the writ. There is, in this reſpect, no difference between pleading a *general* and *ſpecial plene adminiſtravit.*

An executor having pleaded *non aſſumpſit*, and a ſpecialty debt ſufficient to cover the aſſets, was permitted to withdraw the firſt plea, on payment of the coſts occaſioned only by that plea.—In an action of *aſſumpſit*, the defendants pleaded, 1ſt, The general iſſue. 2dly, Certain debts by ſpecialty, and *non aſſets ultra*. And it was moved that the defendant might have leave to withdraw his plea of the general iſſue on payment of the coſts occaſioned by the ſaid plea. This was oppoſed, unleſs the defendant would conſent to pay *all* the coſts hitherto incurred; the defendant, upon his own ſhewing, having been hitherto in the wrong. The prothonotaries reported, that if the cauſe had gone to trial in its preſent ſtate, and a verdict had been found for the plaintiff on the firſt plea, and for the defendant on the ſecond, the defendants muſt have been liable to coſts *de bonis propriis*. But if only the ſecond plead had been originally pleaded, the plaintiff (who muſt at all events have judgment *de bonis teſtatoris cum acciderint)* would have his coſts eventually *de bonis teſtatoris*. DE GREY, CH. J. Any delay to the plaintiff, occaſioned by the executors, will entitle him to recover coſts againſt them *de bonis propriis*. *Cro. Car.* 518. 1 *Roll. Abr.* 933. which ſeems to be the ground of the practice. Here the plaintiff is in poſſeſſion of a right to all his coſts from the executors, if he goes on and proves his debt, which is admitted to be a juſt one. I am, therefore, of opinion, not to make the rule abſolute *without payment of the whole coſts hitherto incurred.* But the judges *Gould* and *Blackſtone* were of a different opinion.—*Gould*, J. Here has been no delay on the part of the defendant, nor has the plaintiff been put to any coſts except thoſe occaſioned by the firſt plea. BLACKSTONE, J. I conſider the two pleas as one complicated one, containing variety of matter. In ſuch a caſe, if the defendant moves to amend by ſtriking out ſome facts, which he finds he cannot ſupport, the known courſe is, that he ſhall only pay the coſts occaſioned by ſuch amendment. If the plaintiff's *extra* coſts are now paid, he is in juſt the ſame plight as if the plea had not been put in; and is put to no other expence in obtaining his judgment, than he neceſſarily muſt incur. NARES, J. agreed.—Rule abſolute, on condition not to bring any writ of error, or bill in equity.

Dearne *v.* Grimp *et al.* executors, Ea. Ter. 19 Geo. 3. C.B. 2 *Black. Rep.* 1275.

To *aſſumpſit* for goods ſold and delivered, the defendants pleaded two judgments, recovered and unſatisfied, one for 240l. and the other for 60l.; and then pleaded *plene adminiſtravit*, except to the value of 130l. which was not ſufficient to ſatisfy thoſe judgments. *To this the plaintiff replied, that both judgments were obtained by fraud*; on which iſſue was taken. At the trial, it was admitted that there was due upon the firſt demand only 119l. 10s. and upon the ſecond only 29l. 18s. 6d.; that

Peaſe *v.* Naylor, and wife, executrix of M. Hall, Mic. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 30.

that these were simple contract debts; that the judgments were *confessed* by the defendants, being nearly for double the sums due; and that there was due to the plaintiff 61l. 1s. 1d. *The defendants offered to prove, that their confessing the judgments for nearly double the sums due to the creditors mentioned in the plea was merely a mistake; that this was known by the plaintiff before the action was brought; and that he could not, in fact, be defrauded by it, inasmuch as the amount of the real debts to those creditors was more than sufficient to exhaust the assets.* It was insisted, on the other hand, for the plaintiff, that the facts admitted precluded all further enquiry; and that on the pleadings he was entitled to recover. The judge was of that opinion; and a verdict was given for the plaintiff. A rule having been obtained to set aside the verdict on the ground of a misdirection, and cause shewn, the rule for setting aside the verdict was made absolute. BUT the Court at the same time added, that the defendants ought to have pleaded the sums really due; and they gave leave to amend the pleadings and the former judgments. BULLER, J. The plaintiff in reply should have relied on the sums, which were pleaded to cover the assets, not being the true debts; and that the judgments were kept on foot *per fraudem*, to prevent the plaintiff's recovering. The plaintiff should have shewn what were the sums really due upon the judgment: *but he has thought proper to reply upon fraud generally in his replication;* therefore the Court must examine into the circumstances, and see if there be any fraud *in fact*. Now can we say that there was, when it appears that the judgments were by mistake entered up for more than the real sums due, and that the plaintiff was apprized of that fact by the defendants before any action was brought. Therefore, there being no fraud in fact, it cannot be said that there was any in law.

Sawyer *v.* Mercer, administrator, Ea. Ter. 27 Geo. 3. B.R. 3 *Ter. Rep.* 690.

A plea of judgment recovered on a simple contract, pleaded by an administrator to debt on bond, must aver *that such recovery was had before notice of the bond debt;* for if a plea were to be permitted without such an averment, it would enable an administrator in many cases to defeat a specialty creditor by confessing as many judgments as he pleased on simple contract debts.

Steel *v.* Rorke, administratrix, Tr. Ter. 38 Geo. 3. C.B. 1 *Pul. & Bos.* 307.

An outstanding judgment against a testator or intestate, not docketted according to the direction of 4 & 5 *W.* & *M.* c. 20. cannot be pleaded by an executor or administrator to an action on simple contract.—Assumpsit for goods sold and delivered to the defendant's intestate. Plea: Judgments and bonds outstanding. Replication: That the judgments were not at the time of sueing out the writ docketted and entered according to the provisions of 4 & 5 *W.* & *M.* c. 20. The rejoinder was, "that *the defendant before and at the time she pleaded, had notice* "*of the records of the said judgments*, which still remain in full

"force,

" force, &c." To this there was a general demurrer and joinder therein. EYRE, Ch. J. I think on principle that the rejoinder is bad; but I have no objection to allowing the defendant to amend. The ſtatute declares that judgments not docketted ſhall have no preference againſt heirs, executors, and adminiſtrators. Why are executors and adminiſtrators allowed to plead outſtanding judgments? Becauſe they have a preference, and it is for that reaſon that they are allowed to plead them, in order to prevent a *devaſtavit*. But it is ſaid that an executor is at liberty to ſet up judgments not docketted. Certainly he may pay them, and when he has paid them, they are like other ſimple contract debts, which, when paid, may be given in evidence under the plea of *plenè adminiſtravit*. But if the law has allowed executors and adminiſtrators to plead debts of a ſuperior nature to debts of an inferior nature, only becauſe they are bound to pay them; when the law has ſaid that certain debts ſhall not be debts of a ſuperior nature, unleſs certain ceremonies are obſerved, they will no longer ſtand in that claſs, and there is no reaſon why they ſhould be ſet up againſt a demand on ſimple contract. The caſe is too clear to admit of a queſtion. BULLER, J. This caſe is clear on the words of the ſtatute; and the deciſion in the King's Bench, in *Hickey* v. *Hayter*, is directly in point. Mr. J. *Groſe* and Mr. J. *Lawrence* were there of opinion, that the ſituation of judgments not docketted was reduced to that of ſimple contract debts; and I agree with Lord *Kenyon*, that no notice is ſufficient but that which the ſtatute has required. HEATH, J. The object of the ſtatute was not only to protect executors and adminiſtrators, but alſo creditors: for there cannot be a greater inſtrument of fraud than a judgment not docketted. If a party means to act honeſtly, he ſhould follow the directions of the act. ROOKE, J. Of the ſame opinion.—But leave given to ſtrike out ſuch part of the plea as relates to the judgment in queſtion, and to ſtate what is really due on the bonds, but not on the penalties.

And on a plea of *plenè adminiſtravit*, to debt on a judgment againſt the inteſtate not docketted, the defendant may give in evidence payment of bond and other ſpecialty debts, which exhauſted all the aſſets.—This was an action of debt on a judgment recovered againſt the inteſtate in his life-time, to which the defendant pleaded *plenè adminiſtravit*. At the trial, the plaintiff gave in evidence an inventory of the inteſtate's effects, ſigned by the defendant, in which it appeared that ſhe had received aſſets to the amount of 374l. In order to diſcharge herſelf, ſhe proved payment of bond and other ſpecialty debts amounting to 618l. The plaintiff contended that the payment of theſe debts before the plaintiff's, which aroſe on a judgment regularly entered up againſt the inteſtate, was a devaſtavit in the defendant. This was anſwered on the part of

Hickey v. Hayter, adminiſtratrix, Tr. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 384.

the defendant by ſaying, that as the judgment was not docketted in purſuance of the ſtat. 4 and 5 *W.* and *M.* c. 20. it was not entitled to any preference over any other debts. A verdict, however, was taken for the plaintiff, with liberty to the defendant to move to ſet it aſide, and to enter a nonſuit. Lord KENYON, Ch. J. This act of parliament meant to put executors and adminiſtrators in a ſtate of ſecurity, provided they uſed due diligence in adminiſtering their teſtator's or inteſtate's effects. It directs that all judgments ſhall be docketted by the officers of the reſpective courts, and put into an alphabetical order, that the parties intereſted in ſuch judgments may, by ſearching the proper records, know what judgments are outſtanding; and if the plaintiff had regularly docketted his judgment, the defendant, by uſing due diligence, would have known that there was ſuch a judgment ſigned againſt her inteſtate: but as the plaintiff did not purſue the directions of the act, the defendant could not by ſearching in the proper office have learnt that the judgment was properly ſigned. If this had been the caſe of a bond, and the plaintiff had given notice that he had ſuch a debt before the defendant had paid debts of an inferior nature, ſhe would have been bound to pay the bond firſt: but the act of parliament expreſsly ſays, that "no judgment, not docketted and entered in the books as aforeſaid, ſhall affect any lands. &c. or have any preference againſt heirs, executors, or adminiſtrators, in their adminiſtration, of their anceſtors, teſtators, or inteſtate effects." The defendant by her plea admits that the plaintiff has recovered a judgment againſt her inteſtate, but ſhe does not by that admit that that judgment is to overturn all that ſhe has been doing in the courſe of her adminiſtration, becauſe the judgment is not docketted. And late as the time is when this queſtion comes before us, we muſt give effect to the act of parliament. It never has been doubted but that this is the operation of the ſtatute reſpecting lands; and I think it is equally clear that this caſe comes within the miſchief and the proviſions of the act. The plaintiff who relies on his judgment, and wiſhes that that judgment ſhould diſaffirm every thing that the adminiſtratrix has done, ſhould have gone further, and ſhewn that his judgment was docketted. If the defendant, indeed, had had notice of this judgment debt, perhaps ſhe would have been warranted in paying it before the bond debts; but in order to make her liable as for a devaſtavit, the judgment ſhould have been docketted. I doubt whether any other notice of the judgment than that required by the ſtatute would have been ſufficient for this purpoſe; it is beſt to abide by the words of the act of parliament. ASHHURST, J. of the ſame opinion. GROSE, J. The queſtion is, Whether a debt on a judgment, not docketted, is a debt of a ſuperior nature to a bond debt? To this the ſtatute gives the anſwer in the negative. For the ſtatute ſays, that

that it is not to have any preference unleſs it be docketted. LAWRENCE, J. The act of parliament having ſaid that this debt ſhall have no preference becauſe it is not docketted: it is put on the footing of a ſimple contract debt; and on the plea of *plenè adminiſtravit* the adminiſtratrix may give in evidence payments of all debts not of an inferior nature. Therefore payment of the bond debts in the preſent caſe was properly received in evidence under the plea of *plenè adminiſtravit*.—Rule abſolute.

## *Coſts.*

If an action of *aſſumpſit* is brought againſt an inhabitant of Middleſex *by an adminiſtrater*, and the damages found are under 40s. the defendant is entitled, under the ſtat. 23 *Geo.* 2. c. 33. by which, in ſuch caſes, the plaintiff is not to have his coſts, but to pay double coſts to the defendant, to have that ſuggeſted on the roll in the ſame manner as if the plaintiff had ſued in his own right; for there is no exception as to adminiſtrators in the ſtatute.

Wafe, adminiſtrator, *v.* Wyburd, Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 240.

But if an executor or adminiſtrator *be ſued*, it is otherwiſe. —This was an action brought upon an apothecary's bill, *owing by the defendant's teſtator*, in which the plaintiff had a verdict for 11. 5s. A rule to ſhew cauſe, why the defendant ſhould not have leave to ſuggeſt on the roll that he lived in Middleſex, and that the debt was under 40 ſhillings, having been obtained, the cauſe ſhewn was, that it could not be meant that executors ſhould be ſued in the county court of conſcience. That the legiſlature could not intend to give to ſuch a court an authority to enquire into the conduct of executors, and take an account of aſſets. That the juriſdiction is only given againſt perſons who *owe* any debt to the plaintiff, and an executor is not in law conſidered as *owing* his teſtator's debts. PER CURIAM: The Court will not permit the ſuggeſtion of a matter on the roll, unleſs it appears to be relevant, and it could not be meant to give this court of conſcience a juriſdiction over executors. If there is no expreſs exception, there is one implied from the nature and reaſon of the thing.—Rule diſcharged.

Ailway *v.* Burrows, Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 263.

The Court ſet aſide a judgment and warrant of attorney given to ſecure an annuity for a defect in the memorial; but it being obſerved that as this was the caſe of an executor who could not be aware of the nature of the deeds, it would be hard to oblige him to pay coſts.—THE COURT being of that opinion, made the rule abſolute without coſts.

Dickenſon, executor, *v.* Burn, Mic. Ter. 19 Geo. 3. C.B. 1 *Pul. & Dey.* 335.

In this caſe, it was decided that if an executor declare on a trover and converſion in the teſtator's life-time, and alſo on a trover and converſion after his death, and be *nonſuited* at the trial, he is not liable to pay coſts.—Trover for goods. The firſt count ſtated the *trover and converſion to have been in*

Cockerill, and Wife, executrix of Moody, *v.* Kynaſton, Eaſ. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 277.

*the life-time of the teſtator.* The ſecond count ſtated the *trover in the life of the teſtator, and the converſion afterwards.* The third count was for a trover and converſion after the death of the teſtator. At the trial the plaintiffs were nonſuited; and a rule having been obtained to ſhew cauſe why they ſhould not pay coſts to the defendant. PER CURIAM: The caſes upon this ſubject are ſo contradictory, that it is impoſſible to reconcile them: but thoſe which are beſt founded on reaſon, ſhew that the plaintiffs in this action ought not to pay coſts. The caſe of *Gale* v. *Till*, in 3 *Lev.* 375. is a very material one, where the queſtion was, Whether the adminiſtrator ſhould pay the coſts of a writ of error? For whether there were any error or not, was apparent on the record, and muſt have been known to the inteſtate: but, as it was neceſſary for him to ſue in the character of adminiſtrator, it was held that he was not liable to pay coſts. The caſe of *Bull* v. *Palmer*, in 2 *Lev.* 165, where the plaintiff executor only declared on an account ſtated by the defendant and himſelf, is alſo a very ſtrong one. So too is that of *Maſon* v. *Jackſon*, in 3 *Lev.* 60. There are, indeed, caſes the other way; and therefore it is neceſſary to conſider the principle upon which the exemption ſtands. One rule is, that *if a plaintiff name himſelf executor when he need not, and fail, he ſhall pay coſts;* as where his declaration ſtates a cauſe of action due to him perſonally. Another rule is, that *a plaintiff cannot join in the ſame declaration a cauſe of action in his character of executor with another which accrued in his own right.* And that will govern the preſent queſtion; for if it be true that the laſt count in this declaration applies to a cauſe of action in the plaintiff's individual capacity, the declaration is bad upon the face of it, and the defendant might have demurred to it. But every cauſe of action ſtated in the declaration accrued to the plaintiffs in their repreſentative character; for though the converſion be ſtated in the two laſt counts to have been made in the life-time of the executrix, yet it was a cauſe of action which accrued to the wife as executrix, and muſt have appeared ſo at the trial. If the goods, which were the ſubject of the action, never were in the actual poſſeſſion of the executrix, it was abſolutely neceſſary for her to declare in that character: and if no demand were made in the life-time of the teſtator, it was neceſſary to declare on a converſion after the teſtator's death. Even on the third count we are not to conclude that the teſtatrix ever had actual poſſeſſion of the goods; and if not, they were not aſſets till recovered. But the principle ſtated in ſome of the caſes cited againſt the rule, is the true one, that, *whether the converſion happened before or after the teſtator's death, if the goods when recovered would be aſſets in the hands of the executrix, ſhe muſt ſue for them in her repreſentative capacity;* and then ſhe is not liable to coſts.

But,

But, in this case, where the plaintiffs declared in trover for the goods of the intestate, of which the wife *as administratix was possessed*, and which came to the defendant's hands, by whom they were converted, &c. The plaintiffs being non-suited at the trial, the defendent obtained a rule for referring it to the master to tax the costs for him, which rule was made absolute without any cause being shewn. Afterwards it was moved to discharge that rule, on the ground that *the administratrix, having sued of necessity in that character (because it appeared at the trial* (1), *that the goods had never come to her possession since the intestate's death, though the conversion was in her time)*, was not liable to pay costs.—PER CURIAM: The rule has been long settled, that where an executor or administrator brings trover on his own possession, alleging the conversion after the testator's or intestate's death, and fails, he must pay the costs. There must have been some mistake in the case of *Cockerill* v. *Kynaston*. Suppose an intestate dies possessed of a term for years, and the administrator instead of selling the term receives the rent for several years, this rent is part of the assets of his intestate, and yet if any part of that rent be unpaid, the administrator need not in an action to recover it declare as administrator. The rule in favour of executors and administrators is already sufficiently extensive: we all of us remember a variety of actions improperly brought by them, and which would not perhaps have been brought had it not been for the privilege they have of being exempt from paying costs. The rule, excusing them from paying costs, is founded on this principle, that they are not supposed to be conusant of the real situation of the testator's affairs; and therefore when they act according to the best of their judgment they are not liable to costs. But even when they are sued, if they plead a plea which is false within their own knowledge, the judgment for the costs is *de bonis testatoris, et si non de bonis propriis*. In this case the action was brought by the administratrix for a cause of action arising in her own time, and as she has failed, there is no reason why the defendant should not have his costs.—Rule to discharge the former rule discharged.

Bollard, and Wife, administratix, *v.* Spencer, Tr. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 358.

If an executor sue as executor for money received by the defendant since the testator's death to the plaintiff's use, and fail, he is liable to pay costs.—The plaintiff's wife was executrix to *Wood*, her former husband; and this action for money had and received was brought against the defendant to recover back money received by him, after *Wood*'s death, to the use of the plaintiff's wife, as executrix. One count charged the defendant with the receipt of this money to the use of the plaintiff's wife, as executrix, before she married

Goldthwayte, and Wife, executrix, *v.* Petrie, Ea. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 234.

(1) This was stated in an affidavit, but the Court said the question could not depend on any facts not appearing on the record.

*Goldthwayte;* and another since. *After verdict for the defendant*, a rule was obtained calling on the plaintiffs to shew cause why the master should not be directed to tax the defendant his costs.—PER CURIAM: It is an established rule, that where an action is brought by an executor, as executor, for transactions arising in the life-time of the testator, he is not liable to pay costs though he fail in the action. But in this case it was not necessary to name the wife as executrix; she might have brought the action in her own right; for it is stated in both the counts that the money was received, and the promises made, by the defendant after the testator's death. We have looked into the authorities, which we find have settled this point; and which decide that the plaintiffs in this case are liable to pay costs. *Jenkins* and wife v. *Plombe*, 6 *Mod.* 91. 181.; and *Salk.* 207. 314.—Rule absolute.

Harris *v.* Jones, Hil. Ter 4 Geo 3. B.R. 3 *Burr.* 1451. 1 *Black. Rep.* 451.

An executor, *on discontinuing* his action, shall pay costs, where he has knowingly brought it wrong.—On a question, "Whether an executor should be permitted to discontinue, "without payment of costs?"—THE COURT were clear, that the giving an executor leave to discontinue, was a matter of discretion in the Court; and that they ought not to give him such leave, in any case where he had knowingly brought his action wrong, unless he would consent to pay costs.

Bennet *v.* Coker, Mic. Ter 7 Geo. 3 B.R. 4 *Burr.* 1927.

It was moved, on behalf of the plaintiff, an administrator, for leave to discontinue, without payment of costs.—It was an action upon a bond, against an heir, and when it came down to trial, the plaintiff *first discovered* "that the estate "had been conveyed;" and was then satisfied, "that there "was a deed of conveyance, which would be produced at "the trial." Whereupon he withdrew the record, and now desired to discontinue, which was opposed on behalf of the defendant, without paying costs. And *Hawes* v. *Saunders* was cited to shew, that an executor shall pay costs for not going on to trial, after having given notice of trial.—Lord *Mansfield*, CH. J. This may be reasonable where the executor may probably bring another action. But here he will be bound not to bring another action.—*Aston*, J. The defendant has saved all the fees of Court: which he must have paid, if there had been a verdict.—*Yates*, J. It is not in all cases, that an executor shall discontinue without paying costs: for, if it is plainly his own fault, he shall not have such leave. So, in case of not going on to trial, if it is his own laches, he shall pay costs. (To which also Lord *Mansfield* agreed.) Therefore, the question is, "Whether there is "*laches or delay:* or whether it be a fair transaction?" Now this was fair and candid. The plaintiff has done better for the defendant, than if he had gone on to trial: he discovered he was in the wrong; and as soon as he knew it, desisted.—The Court granted the motion, "to discontinue without "payment

"payment of costs:" but the plaintiff was not to bring any new action, without leave of the Court. [There might, perhaps, arise assets in *futuro:* and then it would be reasonable for the executor to have leave to bring a new action.]

An executor shall pay the costs of a *non pros*, for not declaring in due time.—The question was, "Whether "an executor shall pay costs upon a judgment of NON-PROS?"—In this case the executrix brought an action; and was non-prossed for not declaring in time.—YATES, J. observed, that the case of a *non-pros*, and that of a discontinuance, differ. The former arises from the executor's own delay: and therefore he thought, and so also did Lord MANSFIELD, "That it was similar to the "case of his not going on to trial according to his "notice."—Lord MANSFIELD: The privilege of executors is too great already. They ought to be properly informed, before they bring actions. The distinction made between a discontinuance and a *non-pros*, is a very good one: it is very reasonable that the executrix should pay costs in the present case. So that the determination of the Court was, "That an executor shall pay costs of a *non-pros*." But an executor does not pay costs upon a nonsuit. *See Cro. Jac.* 229. *Haywarth* v. *David.*—This Court now put it upon the foot of *laches* in the executor; this being a *non-pros* for want of declaring in due time.—So an executor shall pay costs, if he does not go to trial, after having given notice of trial.

Hawes, executrix, *v.* Saunders, Mic. Ter. 5 Geo. 3. B. R. 3 *Burr.* 1584.

So also in this case, it was held, that executors and administrators, plaintiffs, are liable to pay the costs of a *non-pros*. The defendant having demurred to the plaintiff's declaration, because it did not appear in the profert by whom the letters of administration were granted, the plaintiff did not join in demurrer, and *the defendant signed judgment of* non-pros *in the last term.* And this was a rule, calling on the defendant to shew cause why so much of the judgment of non-pros as related to the allowance of costs to the defendant should not be vacated.—Lord KENYON, Ch. J. It is hard that executors and administrators, who have been in fault, should be excused paying the costs. Here the action has produced no fruits, and the administratrix has been in fault; then, as she has proceeded improperly, the question is, Whether she ought not to pay costs? This precise point has been adjudged in the case of *Hawes* v. *Saunders*; I am therefore inclined to abide by that determination.—ASHHURST, J. Where an executor fails in proving his case at nisi prius, he is excused paying costs, because he is not supposed to know, with certainty, the situation of his testator: but here the administratrix herself made a mistake, and therefore she ought to pay the costs of it.—GROSE, J. The reason why executors are excused paying the costs of a nonsuit is, because of the

Higgs, administratrix, *v.* Warry, Ea. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 654.

uncertainty of the teſtator's demand: but in this caſe the plaintiff is in fault on her own ſhewing; ſhe omitted to ſtate in her declaration, what, by the law of the land, ſhe was bound to ſtate.—LAWRENCE, J. The caſe of *Hawes* v. *Saunders* was decided after conſideration; and being founded on the reaſon and juſtice of the caſe, it ought to govern the preſent caſe.—Rule diſcharged.

Booth *et al.* executors, *v.* Holt, Hil. Ter. 34 Geo. 3. C.B. 2 *Hen Black.* 277.

Executors are not liable to coſts, on a *judgment as in caſe of a nonſuit*, under the ſtatute 14 *Geo.* 2. c. 17.—The defendant had obtained judgment as in caſe of a nonſuit, under the ſtat. 14 *Geo.* 2. c. 17. And a rule was granted to ſhew cauſe, why it ſhould not be referred to the prothonotary to tax the defendant his coſts; againſt which it was inſiſted that as this was an action brought by executors for a debt due to the teſtator, they were not liable to coſts on a judgment as in caſe of a nonſuit on the ſtatute, any more than they would have been if they had been nonſuited at the trial (1), and *Howard* v. *Radburn*, was cited. On the other hand it was urged in ſupport of the rule, that the plaintiffs were guilty of laches, and where there is laches in executors, they are liable to coſts. As on a *non-pros*, *Hawes* v. *Saunders*, on a diſcontinuance, *Harris* v. *Jones*. And that the principle is the ſame in one caſe of laches as in another.—BUT THE COURT held clearly, that the plaintiffs were not liable to coſts, the words of the ſtatute being ſo ſtrict, as to preclude all argument from principle.—Rule diſcharged.

Williams *et al.* executors of Braham, *v.* Riley in the Exchequer Chamber in error. Hil. Ter. 31 Geo. 3. C B. 1 *Hen. Black.* 566.

Executors and adminiſtrators are liable to *coſts in error* in caſes where they would be liable in the original action.—Judgment *de bonis teſtatoris* (2) having been given in the court of King's Bench againſt the plaintiffs in error, on a verdict in an action of *aſſumpſit* againſt them as executors, and that judgment affirmed (without argument) in the Exchequer Chamber, the clerk of the errors allowed coſts to the defendant in error.—In conſequence of this it was moved for a rule to ſhew cauſe why the coſts ſhould not be diſallowed, on the ground that where executors and adminiſtrators were plaintiffs in error, eſpecially on a judgment *de bonis teſtatoris*, they were not liable to coſts; and the authorities cited were, *Cro. Jac.* 352; *Goldſmith* v. *Platt*, 1 *Sid.* 368;

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(1) The directions of the ſtatute are, "that all judgments given by virtue of "that act, ſhall be of the like force and effect as judgments upon nonſuit, and of no "other force or effect." And, "that *the defendant ſhall upon ſuch judgment, be "awarded his coſts in any action or ſuit, where he would upon nonſuit be entitled to "the ſame, and in no other action or ſuit whatever.*"

(2) The entry of the judgment was in the uſual form, the damages and coſts "to be levied of the goods and chattels which were of the ſaid — (the teſtatrix "at the time of her death, in the hands of the ſaid — (the executors) to be ad-"miniſtered, and if they have not ſo much in their hands to be adminiſtered, "then the coſts and charges to be levied of the proper goods and chattels of the "ſaid — (the executors), &c."

*Fitzwilliams*

*Fitzwilliams* v. *Moore*, 1 *Lev.* 245; *S. C.* 1 *Ventr.* 166; *Legg* v. *Richards*, 1 *Stra.* 1072; *Saltern* v. *Wynne*, *Rep. temp. Hardwicke*, 307. *S. C.* and ſtat. 16 and 17 *Car.* 2. c. 8. ſ. 2. —SED PER CURIAM: Where executors and adminiſtrators are liable to coſts in the original action, they are alſo liable if error be brought on the judgment; and as theſe executors were defendants in the original action, in the preſent inſtance they are liable to coſts in that action, and that liability continued in error.—Rule refuſed

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The adminiſtratix of an executor cannot ſue for the double value of lands held over after notice to quit under a demiſe from the teſtator, contrary to 4 *G.* 2. c. 28. without taking out adminiſtration *de bonis non*; even though the tenant has attorned to her.—This was debt for double the yearly value of lands held over contrary to 4 *G.* 2. c. 28. The firſt count of the declaration ſtated a demiſe by one *Judith Tingrey* (who was poſſeſſed for a long term of years) to the defendant, of the premiſes in queſtion, for twenty-one years; that ſhe died, having by her will made *Francis Tingrey* her ſole executor, who proved the will, and took execution upon himſelf, "by "reaſon whereof, he, the ſaid *Francis*, then and there became "entitled to the ſaid demiſed premiſes, ſubject to the ſaid "leaſe;" that he died inteſtate, and that the plaintiff took out adminiſtration of his effects, "by virtue whereof ſhe "became, and was, and is entitled to the ſaid remainder of "the ſaid demiſed premiſes for the ſaid term, which is yet "unexpired, and ſo demiſed to the defendant as is aforeſaid; "of all which premiſes, the defendant afterwards (to wit) on, "&c. at, &c. had notice, and then and there attorned to, and "became the tenant to the plaintiff for the reſidue of the ſaid "term." It then ſtated that after the expiration of the defendant's term, and notice in writing to quit, he continued to keep poſſeſſion, whereby, &c.—To this count there was a general demurrer and joinder. On the part of the plaintiff, it was contended, that as this was not a debt due to the teſtator, it was not neceſſary for the plaintiff to clothe herſelf with the character of adminiſtratix *de bonis non*.—SED PER CURIAM: Is not every thing unadminiſtered; which has not been reduced into the actual poſſeſſion of the executor, and converted by him? Moſt certainly in any caſe in which the plaintiff means to make title, ſhe muſt take out adminiſtration *de bonis non*. It is not incumbent on thoſe who reſiſt, to ſhew that there are debts of the teſtator unſatisfied, but the plaintiff muſt ſhew that there are no debts, and that the executor poſſeſſed himſelf abſolutely in his own right.—Judgment for the defendant.

Tingrey, widow, v Brown, Tr. Ter. 38 Geo. 3. C.B. 1 *Pul.* & *Boſ.* 310.

Extent.

# Extent.

Uppom v. Sumner, Hill. Ter. 19 Geo 3. C.B. 2 *Black.* 1251. and Ea. Ter. 19 Geo. 3. C.B. 2 *Black.* 1254.

A *fieri facias* upon a judgment recovered by a ſubject, though not completely executed, ſhall be preferred to the king's extent, ſued out poſterior to the judgment.—This was an action againſt the ſheriff for a falſe return, wherein a verdict was taken for the plaintiff, ſubject to the opinion of the Court on this caſe.—*Uppom*, the plaintiff, having recovered a judgment againſt one *Thomas Cann*, *on the 16th of April*, 1777, *ſued out a* fieri facias, returnable the 12th of May. A warrant on which writ was, on the 18th of April, delivered to *Benjamin Hall*, an officer of the ſheriff of Surrey, who the ſame day took the goods of *Cann* in execution, and kept poſſeſſion of the ſame, by virtue of the ſaid warrant. *On the 24th of April, before any ſale of the goods, an extent was ſued out and delivered to the ſheriff againſt the goods of the ſaid* Cann, for a debt to the king, and the ſheriff's warrant thereon was the ſame day delivered to *Benjamin Hall*, then in poſſeſſion of the ſaid goods under the former warrant; who, about two days after, had the goods appraiſed; and on the 30th of April took an inquiſition on the ſaid extent, which valued the goods at 421l. 2s; the plaintiff, *Uppom*'s attorney then attending, and putting in his claim to the ſame. The goods were ſold the 23d of May, and the ſheriff being called upon by *Uppom* to return the writ, returned *nulla bona*.—THE QUESTION was, Whether the plaintiff's execution was in point of law to be preferred to the extent? It was ſet down in the paper for argument, and the plaintiff's counſel at firſt declaring they could not ſupport their caſe, the verdict was (without argument) directed to be ſet aſide, and a verdict entered for the defendant. But afterwards, having conſidered the point, they were deſirous to argue it, and a rule was made, that, *on payment of coſts to the defendant, proceedings ſhould be ſtayed on that judgment; and the cauſe argued next term*, the plaintiff conſenting not to bring any writ of error in this cauſe.—This caſe accordingly was fully argued.—PER CURIAM: In this caſe the extent did not take place of the execution, the king's ſuit being commenced after the judgment. The judgment was of Eaſter Term, 1777, previous to the 18th of April, when the *fieri facias* was ſued out. The king's ſuit commenced on the 24th of April, by the fiat of Baron *Hotham*, which is the true commencement of the ſuit. *Gilb. Rep.* 222. This opinion being grounded on the ſtatute, 33 *Hen.* 8. c. 39. it will be proper to conſider, 1. The act itſelf; 2. The authorities on which this interpretation is built.—1. King *Henry* VIII. about the 21ſt year of his reign, appears to have formed a plan to regulate the receipt of his revenue, in an eaſier manner than by carrying the whole through the courſe of the Exchequer. For this purpoſe ſeveral new courts were erected,

erected, or old ones new regulated, viz. (beſides the court of Exchequer, and duchy court of Lancaſter), the court of Augmentations, of Firſt Fruits, of Wards, and laſtly, by this ſtatute of 33 *Hen.* 8. the court of Surveyors General. To modify and regulate theſe courts is the principal object of this ſtatute, which contains beſides a few general rules and amendments of the revenue law. About fifty ſections of this ſtatute are now entirely obſolete, by the abolition of the ſeveral courts to which they relate. About twenty-five more affect only the king's auditors, collectors, and other revenue officers, or the proceſs in the Exchequer and Duchy Courts, which have ſurvived the other four; theſe proviſions being originally adapted to them all: ſuch in particular as ſect. 79. uſually called in the Exchequer the Statute of Equity, and which empowers the judges to admit any matter of equity in diſcharge of any debts to the king. About ſeven ſections only (ſect. 50, 74, 75, 76, 77, 78, 80), contain general proviſions, extending to all the king's ſubjects, and are applicable to all the king's courts, as well as to his courts of revenue, where the ſubject of them falls under conſideration. Indeed it would be abſurd to have one law prevail in the King's Bench and Common Pleas, and another in the Exchequer and Duchy, with regard to ſuch queſtions as the preſent; the priority of the king's debts before thoſe due to a ſubject: *Bro. Prerog.* 71. *Godb.* 295. *Dyer*, 296, 7. 1 *Andr.* 129.—The preſent clauſe, ſect. 74. enacts, that the king's ſuit or proceſs for recovery of his debts, ſhall be preferred before the ſuit of any other perſon. And that the king ſhall have firſt execution againſt any defendant for his ſaid debts, before any other perſon. "*So always that the king's ſaid ſuit* "*ſhall be taken or commenced or proceſs awarded for the ſaid* "*debt at the king's ſuit, before judgment given for the ſaid* "*other perſon or perſons.*" The former part of this clauſe is declaratory of the old prerogative law, the latter is a new reſtriction of it, ſo that it ſhall not take place after judgment given for the ſubject.—2d. As to authorities. *Stringfellow*'s caſe, *Dyer*, 67. b. may be admitted to be law, as was ſtrongly held by Chief Baron *Parker*, in the *King* and *Cotton*, *Park*, 125. It was merely an extent on a ſtatute ſtaple, not an execution on a judgment. And the property remained in the defendant, or at leaſt in *cuſtodiâ legis*, till *liberate* made to the plaintiff. The king's prerogative might therefore be well allowed in that caſe, without having any effect on this. In *Lechmere* and *Thoroughgood*, it appears by *Comb.* 123. and 3 *Mod.* 236. that firſt *Herbert*, and then *Holt*, were clearly of opinion, that *after execution begun but not completed* (and of courſe after judgment ſigned) *the king's extent came too late.* This caſe is a little obſcure, ariſing from its being reported only piecemeal and in different books. But with ſome attention

tention it will be found to be clear and conſiſtent by reading the ſeveral parts of it in order of time; as they occur: *viz.* the pleadings, 2 *Jac.* 2.; 2 *Ventr.* 159.; 1ſt argument, 4 *Jac.* 2.; 3 *Mod.* 236.; 2d argument and judgment, 1 *W.* and *M. Comb.* 123.; 1 *Show.* 12.; and a ſubſequent action between the ſame parties in effect, in the Common Pleas, viz. *Lechmere* and *Toplady*; 1 *Ventr.* 169.; 1 *Show.* 146.—In *Attorney General* and *Andrew. Hardr.* 23. It was held by the court of Exchequer, that *where there was a judgment and an execution by elegit, a debt of the king prior to the judgment, but the proceſs thereon ſued out after it, ſhould be poſtponed to the judgment.* And from theſe authorities, Lord Chief Baron *Comyns* in his Digeſt. II. 538. collects this doctrine, "that "*if execution be upon a judgment againſt the king's debtor, and* "*before a* venditioni exponas, *an extent comes at the king's ſuit* "(which is the very caſe at bar), *thoſe goods cannot be taken* "*on the extent.*" And this opinion is alſo ſupported by the king and *Dickenſon*, 1692, reported by Sir *Thomas Parker*, 262.—Poſtea to the plaintiff.

Rooke v. Daxrell, Mic. Ter. 32 Geo. 3. B.R. 4 *Tes. Rep.* 402.

And the like was determined in this caſe; which was an action upon the caſe brought by the plaintiff againſt the defendant as ſheriff of the county of Bucks for a falſe return of *nulla bona* to a writ of *fieri facias*. On the trial the jury found a verdict for the plaintiff, ſubject to the opinion of the Court on the following caſe: In Hilary term, 1787, *the plaintiff obtained judgment againſt* Michael Clarke; on which judgment, on the 5th of January, 1788, he ſued out a *fieri facias*, teſted the 28th of November, 1787, and returnable on the 12th of February, 1788, directed to the defendant, being then ſheriff of the ſaid county. The plaintiff delivered the writ to the under-ſheriff on the 7th of January, 1788, which was indorſed to levy, &c. On the next day, the 8th of January, the ſheriff ſeized all the goods and chattels of *Clarke* in his bailiwick by virtue of that writ; *but before any of them were ſold*, namely, on the 11th of January, 1788, *a writ of extent teſted that day iſſued out of the court of Exchequer*, directed to the defendant as ſheriff, on a bond to the crown under the ſeal of *Clarke*, dated the 5th of April, 1782. On the 12th of January, 1788, notice was given to the defendant's officers, who were in poſſeſſion of *Clarke*'s goods under the *fieri facias*, of the iſſuing of the writ of extent, and on the next day the ſame writ of extent was delivered to the under-ſheriff. The caſe then ſtated that another writ of extent iſſued on the 17th of January, 1788, on another bond of *Clarke*, &c. which was delivered to the ſheriff on the 18th of January. On the 22d of January, 1788, by two ſeveral inquiſitions taken under and by virtue of thoſe two ſeveral writs of extent, it was found that *Clarke then had the ſeveral goods and chattels ſo as aforeſaid taken under the* fieri facias, *and remaining*

*remaining in the defendant's hands unſold*; and the defendant therefore, then extended, took, and ſeized, the ſaid goods and chattels into the hands of the king by virtue of the ſaid two ſeveral writs of extent. The caſe alſo ſtated three other writs of extent againſt *Clarke*, two of them teſted the 23d of January, and the other on the 1ſt of February, 1788. The caſe further ſtated that on the 1ſt of February, 1788, *a writ of* venditioni exponas, *teſted that day, iſſued out of the court of Exchequer*, directed to the defendant as ſheriff, upon the firſt writ of extent; and alſo four other writs of *venditioni exponas*, on the 1ſt, 4th, 11th, and 21ſt of February, 1788; *by virtue of which ſeveral writs of* venditioni exponas, *the defendant, as ſheriff*, on the 23d of February, 1788, *ſold all the goods and chattels of Clarke*, which he had ſeized or could ſeize, for 983l. 9s. 2d. which ſum was inſufficient to ſatisfy the ſeveral writs of extent and *venditioni exponas*, and the ſum of 219l. 13s. which was due to the landlords of the premiſes on which the goods and chattels were ſeized for one year's rent. On the 12th of July, 1789, the defendant made the return of *nulla bona* to the plaintiff's writ of *fieri facias*. This caſe depended on 33 *H.* 8. c. 39. ſ. 74. which enacts, "That if "any ſuit be commenced or taken, or any proceſs be here- "after awarded, for the king, for the recovery of any of the "king's debts, then the ſame ſuit and proceſs ſhall be pre- "ferred before the ſuit of any perſon or perſons; and that "our ſaid ſovereign lord, his heirs and ſucceſſors, ſhall have "firſt execution againſt any defendant, of and for his ſaid "debts before any other perſon, *ſo always that the king's ſaid "ſuit be taken and commenced, or proceſs awarded, for the ſaid "debt at the ſuit of the king before judgment given for the ſaid "other perſon.*"—Lord KENYON, Ch. J. This is a caſe of great importance, becauſe it reſpects one of the prerogatives of the crown, exiſting in the crown for the public good. For *the prerogatives are not given for the perſonal advantage of the king, but they are allowed to exiſt becauſe they are beneficial to the ſubject.* They are therefore to be guarded on account of the public; they are not to be extended farther than the laws and conſtitution of the country have allowed them; but within thoſe bounds they are entitled to every protection. I do not think this a caſe of difficulty. I believe the judgment in *Uppom* v. *Sumner* is warranted by the authorities which are there mentioned as its foundation. In giving my opinion, I therefore refer in general to the authority of that caſe, and to all the caſes there mentioned; not, however, without examining the grounds on which they may be ſupported. Now *where the king and a ſubject ſtand in equal degree, there is no doubt but that the king's prerogative muſt prevail:* and, *therefore, wherever the property in the goods remains in the king's debtor at the time, and an execution at the ſuit of the king, and another at*

*the*

*the inſtance of a ſubject, are ſued out, the former will be preferred.* On this principle the caſe of *Rex* v. *Cotton* proceeded: that was not the caſe of an execution, but a diſtreſs; the goods taken, were in *cuſtodiâ legis*, as a pledge, to anſwer the demand of the landlord, and the property in the goods was not diveſted out of the tenant. So, an execution iſſuing after a commiſſion of bankrupt will fall within the ſame rule. Suppoſe the commiſſion of bankrupt iſſued on the 1ſt of January; a *fieri facias* on the 1ſt of February; an extent on the ſecond; and no proviſional aſſignment till afterwards: In ſuch a caſe the *fieri facias* comes too late, but the extent does not. For the ſeizure by the meſſenger binds nothing: but, as far as reſpects the ſubject, the goods of the bankrupt are diveſted out of him, and veſted in his aſſignees by relation from the time of the act of bankruptcy; but inaſmuch *as no relation operates to the prejudice of the crown, till a proviſional aſſignment is made, the king's prerogative attaches on that property*, which, with reſpect to the king, remains the property of the bankrupt. But this does not break in upon the propoſition which I ſtated at firſt, *that as long as the property of the debtor remains unaltered, and an execution at the ſuit of a ſubject, and an extent at the king's ſuit iſſue againſt the debtor, the title of the latter muſt prevail*; for the point to be conſidered in theſe caſes is, in whom is the property. I have always underſtood it to be clear and ſettled (and this queſtion has very frequently occurred in the Exchequer), that, *if an extent at the ſuit of the crown be teſte'd prior to the time when the ſubject's execution is delivered to the ſheriff, the former ſhall have the preference.* But as by the common law, abridged as it is by the ſtatute of frauds, the property of the debtor's goods is bound by the delivery of the writ to the ſheriff, there then remains no property in the debtor, on which the prerogative of the crown can attach. Now in this caſe the ſheriff had actually ſeized the goods under the plaintiff's writ of execution; and an execution once begun ſhall proceed; it ſhall not ſtop on the iſſuing of a commiſſion of bankrupt againſt the debtor; and, in this reſpect, I know no diſtinction between the caſe of the crown and that of the ſubject. On theſe grounds I am perfectly ſatisfied with the deciſion of *Uppom* v. *Sumner*, and that the plaintiff in this caſe is entitled to the poſtea.—As to the ſtatute 33 *Hen.* 8. c. 39. ſ. 74.; either it did or did not give ſome new privilege to the crown: if the counſel for the crown contend that it did, they muſt take the word *execution* as referring to perſonal chattels, and then the words are againſt the king, becauſe here there was a judgment by the plaintiff. If it did not introduce ſome new benefit, then the crown muſt be referred to its ancient prerogative, which only extends to the caſe I ſtated at firſt, namely, when the king and a ſubject ſtand in equal degree, and the property is not altered, there the former ſhall prevail.

vall.—Ashhurst, J. agreed.—Buller, J. This case arises on the statute 33 *Hen.* 8.; for previous to that act *the crown could not issue immediate execution on a bond debt*; and therefore perhaps it might be sufficient to confine the judgment of the Court to this particular case. Though the cases that have already happened on this statute shew that the act is not to be confined to bond debts only, but that it extends to all debts and executions: it is so stated in express terms by Lord *Coke*, in Sir *T. Cecil*'s case, 7 *Rep.* 18. b. With regard to the three cases put, of a commission of bankrupt, a distress, and a statute staple, I lay them entirely out of the case; because they do not fall within the words of this act of parliament, which applies singly to a case where a judgment is given. If this act of parliament be restrictive on the crown, it goes a great way to determine this question; for if it be, it expressly requires that the king's suit shall be commenced before judgment is given for the subject. Now, that was expressly decided in the case in *Hardres*, where the whole Court were of opinion that the statute does abridge the king's prerogative. And there Chief Baron *Steel* said, "The subject's title is prior to the king's, and is executed." On this ground I put a question, "*What effect a judgment obtained by a subject would have, where he lay by till the king's extent were executed?*" I am inclined to think that in such a case the execution by the subject would be postponed: but it is not necessary to decide that point in the present case. It is observable that it is said in the case in *Hardres*, that *the king is only to be preferred to the subject, when they both stand in equal degree.* So too in 9 *Co.* 129. b. it is said, *quando jus domini regis et subditi insimul concurrunt, jus regis præferri debet.* So that there appears to be great weight in the words of the Lord Chief Baron, in *Hardres*, that the execution of the subject must be executed. As to the effect of the statute 33 *Hen.* 8. c. 39. it is impossible to have a more direct authority for the restriction on the king's prerogative, than that in 7 *Rep.* 19. b.; where it is said, that "The act hath given a benefit and advantage to the king; 1. In making every bond made to the king in nature of a statute staple. 2. In giving remedy to the king himself, for obligations made to others to his use. 3. To recover costs and damages. 4. In suing of execution for all his debts. 5. In charging the issue in tail, and the heir who hath the land of the gift of his ancestor; and therefore it was the intent of the act to gratify the subject, that where a new provision was made for the levying of the king's debt in a more speedy and beneficial manner than the king had before, the subject also should have some new benefit which he had not before." Now, that new benefit was to give him a preference in cases where his judgment was obtained before the extent of the king issued. This is the fullest exposition of the statute *Hen.* 8. In this case, therefore, the plaintiff is entitled

titled to judgment.—GROSE, J. alſo agreed that the plaintiff was entitled to recover.—Poſtea to the plaintiff.

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## Factor.

Wright and Rathbone, aſſignees of Scott, v. Campbell and Hays, Ea. Ter. 7 Geo. 3. B. R. 4 *Bur.* 2051. 1 *Black.* 628.

*When, and in what caſes, an aſſignment of a bill of lading by a factor, transfers the property of the goods before their arrival.*] In an action of trover, for ſome wheat and beans. A ſpecial caſe was made, *viz.* 2 June, 1766. *Lewis Fontaine* ſhipped the goods, value 400l. from London to Liverpool, *to be delivered to order or aſſigns*; and took two bills of lading. *Fontaine* endorſed one of the bills to *Richard Swanwicke* at Liverpool, or his order: who, being arreſted for debt, applied to *Richard Scott*, another creditor of his for 800l., who had dealt with him in bills and notes, to become bail for him. He conſented, on condition, that *Swanwicke* gave him ſecurity, not only for the debt upon which he was arreſted, but for his own debt of 800l. alſo. *Swanwicke upon this, endorſed the bill of lading to Scott*, pretending the goods were his own. Next day, *Fontaine* came down from London; and being informed of this tranſaction, applied to *Scott*, aſſuring him, the goods were conſigned to *Swanwicke* as a factor only; which was the truth; and endorſed the other bill of lading to the defendant; who, when the ſhip arrived, having given the maſter ſecurity, obtained poſſeſſion. *Scott* afterwards became a bankrupt, and the plaintiffs his aſſignees.—It was argued FOR THE PLAINTIFF, that the conſignment of the bill of lading conveys the property (*Evans* and *Martlet*, Lord *Raym.* 271.) as much as an endorſement of a bill of exchange. The aſſignee is not bound by any equitable right, without notice. The truſt ſhould have been declared, *for the uſe* or *on account* of the conſignor; and then the truſt would have been apparent. The contrary preſumption ariſes upon the words, *or order*.—FOR THE DEFENDANT, it was inſiſted, that the bill of lading is only a promiſe, to deliver goods to the conſignor or order. *Whitecombe* and *Jacob. Salk.* 160. That a factor cannot pledge, for his own debt. *Stra.* 1178. That the indemnity, being for *both* debts, is not a good conſideration, for the aſſignment to *Scott*; but carries a fraud on the face of it.—Lord MANSFIELD, Ch. J. This is clear, that if there is an authority never ſo general, by indorſement upon a bill of lading, without diſcloſing that the indorſee is factor, the owner (as between him and the factor) retains a lien, till delivery of the goods, and before they are actually ſold and turned into money.—If the factor pays it over, *with notice*, to a third perſon, then it may be followed in the hands of ſuch third perſon: for, in ſuch caſe, it remains in his hands juſt as it did in the

the hands of the *factor himself*.—But if the goods are *bonâ fide* ſold by the factor *at ſea* (as they may be, where no other delivery can be given) it will be good, notwithſtanding the ſtatute of 21 *Jac.* 1. c. 19. the vendee ſhall hold them by virtue of the bill of ſale, though no actual poſſeſſion is delivered: and the owner can never diſpute with the vendee; becauſe the goods were ſold *bonâ fide*, and by the owner's own authority (1).—If ſo, then the whole of this caſe turns upon this queſtion, "Whether this was a fair tranſaction, *bonâ fide*, "between *Swanwicke* and *Scott*, for a valuable conſideration, "and without notice; or a trick and contrivance between "them to cheat an honeſt owner out of his property?"—Now this, which is the material fact, is *not ſtated*.—Security againſt the conſequences of becoming bail is the pretence. But the being *bail* for *Swanwicke* could be *no part of the conſideration*: for *Scott*'s debt from *Swanwicke* was at leaſt 800l. And the value of the goods was only 431l. Therefore nothing was left for the ſecuring him as bail.—The THREE other JUDGES agreed that there ſeemed to be a fraudulent colluſion between *Swanwicke* and *Scott*: but that the facts were not ſufficiently ſtated. Therefore, PER CURIAM: Let there be a new trial, without coſts.

Every conſignment to two factors jointly, imports a conſent by the conſignor for them to truſt one another, but both are anſwerable and accountable for the whole; they have a right by the contract to deliver over to one another. Joint factors are co-obligors, and are anſwerable for one another for the whole, and if none were anſwerable but the factor who embezzled the effects, it would be juſt the ſame, as if that one was only intruſted. The conſignor may have a better ſecurity by conſigning his goods to joint factors, and that ſecurity cannot be leſſened or impaired without the moſt clear intention of the conſignor.

Godfrey *v.* Saunders, Ea. Ter. 10 Geo. 3. C. B. 3 *Wils.* 114.

A bill drawn on a factor, and payable out of the produce of goods in his hands, after diſcharging prior acceptances, and accepted by him generally, is chargeable on him, notwithſtanding any balance then due to him in a running account with his principal.—On a motion for a new trial, it appeared that one *Watts* (who afterwards became bankrupt) drew the following bill upon *Maſſias*: "Sir, pleaſe to pay to Meſſrs. *Maber* "and *Kentiſh*, or order, 195l. 14s. 10d. out of the produce of "goods you have of mine, now laying at Gibraltar, Barbary, "and Leghorn, as ſoon as the ſame ſhall come into your "hands, after diſcharging the preſent acceptances." Which bill *Maſſias* accepted in the following words, underwritten thereto, "I agree to conform to this order—*Moſes Maſſias*." The defendant having refuſed payment, gave evidence of

Maber *v.* Maſſias, Ea. Ter. 16 Geo. 3. C. B. 2 *Black.* 1072.

(1) Vide vol. II. p. 583, 589, 38, 55, 58, 60, 64.

divers prior engagements, which did not cover the whole account; *and alſo that there was at the time of the acceptance a balance due to* Maſſias *himſelf of* 870l. ſufficient to cover the whole. PER CURIAM: At the time of the acceptance, *Maſſias* knew how the balance then ſtood. *If he meant to have reſerved his own balance, he ſhould have made a ſpecial acceptance.* But having accepted it generally in the terms of the draft, that is, ſubject only to prior acceptances, he ſhall not ſhelter himſelf by this concealed balance due to himſelf in the courſe of a running account.—Rule diſcharged.

Daubigny *et al.* v. Duval *et al.* Ea. 34 Geo. 3. B.R. 5 *Ter. Rep.* 604.

If a factor pledge the goods of his principal, the latter may recover the value of them in trover againſt the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee.—This was an action of trover for four cheſts of hair and rabbit-down, which the plaintiffs in 1792 conſigned, with ſome other cheſts, from Lyons, to *Davallon*, a broker in England, to be ſold by him as their factor on commiſſion. *Davallon* not having ſold them in 1793, and being in diſtreſſed circumſtances on account of his bills being returned from France, *depoſited the cheſts in queſtion with the defendants as a ſecurity for* 325l. On the trial the defendants attempted to prove *that* Davallon *had an expreſs authority by letter from the plaintiffs, to pledge the goods in queſtion*, but they failed in that proof; and then the caſe was reduced to this point, whether or not the plaintiffs ſhould have tendered to the defendants the money advanced by them; Lord *Kenyon* was of opinion that they ought, it being within the money due from the plaintiffs, as principals to their factor *Davallon*; and the plaintiffs were nonſuited. A rule to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and a new trial granted, having been obtained, cauſe was ſhewn.—Lord KENYON, Ch. J. As this is a caſe of great importance, and as my brothers are of opinion that a new trial ſhould be granted, I ſhall not reſiſt it, though I have conſiderable doubts in my mind upon the queſtion.—BULLER, J. The rule is general that a factor cannot pawn the goods of his principal at all (1); and the qualification now attempted to be engrafted on that rule, would deſtroy the rule itſelf; for the queſtion can only ariſe where the factor has ſome debt due to him from his principal, or has ſome occaſion to detain the goods. A lien is a perſonal right, and cannot be transferred to another. And it ſeems to me that there would be great inconvenience in deciding that the principal muſt tender to the pawnee what is due to him; for if there be a diſpute between the factor and the pawnee as to the amount of the pledge, the principal has no means of aſcertaining it. It is ſaid, however, that the factor cannot object to the tender being made to the pawnee,

(1) *Patterſon v. Tatſ.* 2 *Strange*, 1178.

nor even to his principal's paying the latter more than is due to him, becauſe the factor, by his own act, authorizes the pawnee to receive; and payment to the pawnee would, under theſe circumſtances, be equivalent to payment to the factor himſelf: but it muſt be remembered that the rule, that a factor cannot pledge the goods of his principal, was introduced for the ſake of the principal, and not of the factor. The queſtion of lien can only ariſe between the principal and the factor; the former is not entitled to have his goods again without paying the latter what is due to him. But if the principal has redeemed himſelf as againſt the factor, he need not enquire into the tranſaction between the factor and the pawnee; for if the factor has no right to pledge the goods, the pawnee holds them wrongfully as againſt the principal.—GROSE, J. agreed.—Lord KENYON, Ch. J. The rule, on which I proceeded at the trial, was merely this, that the principal was not bound to tender a larger ſum to the pawnee than was due from himſelf to the factor.—Rule abſolute.

A factor who becomes ſurety for his principal, has a lien on the price of the goods ſold by him, for his principal, to the amount of the ſum for which he has ſo become ſurety.—Upon the trial of an action for goods ſold and delivered, there was a verdict for the plaintiffs, ſubject to the opinion of the Court on the following caſe.—"The bankrupt, *Dowding*, was a "clothier, and employed *Jeffries*, a factor, who ſold to the de- "fendant, *Goodwin*, the cloths in queſtion (marked *J. Dowd-* "*ing* (1), before any act of bankruptcy committed by *J.* "*Dowding*); but did not receive the money for them till after "the action was brought. The cloths were ſold by *Jeffries* "as factor, and the defendant, *Goodwin*, knew him to be ſo, "in the uſual courſe of buſineſs, and in his own name. The "money was paid by *Goodwin* to *Jeffries*, after notice to him "from the aſſignees not to pay it to *Jeffries*.—*Jeffries* was a "creditor of *Dowding* for ſeveral ſums of money, excluſive of "the bonds hereafter mentioned; for which ſums he received "full ſatisfaction by the money in his hands, or by cloths in "his poſſeſſion.—As to the bonds, *Dowding* borrowed money "to the amount of 3000l. and upwards, and by letter ap- "plied to *Jeffries*, his factor, to be ſecurity for him, jointly "in theſe bonds, *therein promiſing to ſend him all the cloths that* "*he ſhould make of ſuch monies as* Jeffries *might be ſecurity for* "*with him.* *Jeffries*, by letter, agreed to join his name in "the ſecurity, if he were put in the ſame ſtate as if he ad- "vanced the money himſelf; and for this purpoſe he propoſed

Drinkwater, *et al.* aſſignees of Dowding, *v.* Goodwin, Ea. Ter. 15 Geo. 3. B.R. *Coupe.* 251.

(1) *Jeffries* ſold theſe goods to the defendant, *Goodwin*, in his own name, without any reference to the principal, or without even making the principal creditor for them. But the goods were marked *J. Dowding*, wherefore the defendant muſt have known he was the principal.

" *that the money ſhould be paid into his* [Jeffries'] *hands, which* " Dowding *might draw for as in the common courſe.* No part " of the money due upon the bonds was paid before the act " of bankruptcy, but the whole was afterwards paid by " *Jeffries*; and *Jeffries* had not ſufficient from the cloths in " his hands, or the money due from the defendant, to ſatisfy " the bonds." THE QUESTION was, Whether the aſſignees were entitled to recover againſt the defendant? And it was inſiſted on the behalf of the defendant, that the factor had a lien on the price. PER CURIAM: Upon the *general queſtion*, we think that a factor who receives cloths, and is authorized to ſell them in his own name, but makes the buyer debtor to himſelf, though he is not anſwerable for the debts, yet he has a right to receive the money: his receipt is a diſcharge to the buyer, and he has a right to bring an action againſt him to compel the payment; and it would be no defence for the buyer, in that action, to ſay, that as between him and the principal, he (the buyer) ought to have that money, becauſe the principal is indebted to him in more than that ſum; for the principal himſelf can never ſay that, but where the factor has nothing due to him: there is no caſe in law, or equity, where a factor having money due to him to the amount of the debt in diſpute, was ever prevented from taking money for cloths in his hands.—That being the general rule, this caſe does not differ at all from it: the principal and factor enter into a ſpecial agreement, by which the factor undertakes, and actually pledges his credit, to raiſe money for the benefit of the principal; which money is to be worked up in cloths, and which cloths, when ſo worked up, the principal agrees to ſend to the factor: the agreement therefore is that he ſhall have a lien.—Therefore we are all moſt clearly of opinion, that *a factor has a lien on the price of goods in the hands of the buyer*; and in this caſe, though he had not the actual poſſeſſion of them, yet as he had a power of giving a diſcharge, or bringing an action, he had a right to retain the money, in conſequence of his lien, as much as a mortgagee has by the title deeds of an eſtate in his hands, though he is not in poſſeſſion. —Judgment for the defendant.

George *v.* Claget, *et al.* Tr. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 359.

If a factor, who ſells under a *del credere* commiſſion, ſells goods as his own, and the buyer knows nothing of any principal, the buyer may ſet off any demand he may have on the factor, againſt the demand for the goods made by the principal. —On the trial of this action for goods ſold, the caſe appeared to be this: The plaintiff, a clothier at Frome, employed Meſſrs. *Rich* and *Heapy* in London, Blackwell-hall factors, as his factors under a commiſſion *del credere*, who, beſides acting as factors, bought and ſold great quantities of woollen cloths on their own account, all their buſineſs being carried on at one warehouſe. On the 30th of September, 1795, a bill of exchange

change for 1198l. 16s. dated the 24th of September, payable two months after date, and accepted by *Rich* and *Heapy*, came into the hands of the defendant upon a *bonâ fide* tranſaction. On the 12th of October, 1795, the defendants bought a quantity of woollen cloths for exportation of *Rich* and *Heapy*, amounting to 1237l. 18s. 3d. at twelve months' credit; *the goods were taken out of one general maſs in* Rich *and* Heapy's *warehouſe;* Rich *and* Heapy *made out a bill of parcels for the whole in their own names, and the defendants did not know that any part of the goods belonged to the plaintiff.* Early in November, 1795, *Rich* and *Heapy* became bankrupts; and afterwards on the 20th of the ſame month, the plaintiff gave the defendants notice not to pay *Rich* and *Heapy* for certain cloths ſpecified, part of the above, amounting to 142l. 1s. 9d. they having been his property, and having been ſold on his account by *Rich* and *Heapy* on commiſſion. The queſtion was, Whether the defendants were or were not entitled to ſet off their demand againſt *Rich* and *Heapy* on the bill of exchange, on the ground that the defendants dealt with them as principals? Lord *Kenyon* was of opinion that they were, as well on principle, as on the authority of *Rabone* v. *Williams* (1), and a verdict was accordingly found for the defendants.—And the Court were afterwards, on a motion for a new trial, clearly of opinion, that the directions given by the learned judge on the trial of this cauſe were right; and that this caſe was not diſtinguiſhable from that of *Rabone* v. *Williams*.

## Falſe Pretences.

To conſtitute an offence within the ſtat. 30 *Geo.* 2. c. 24. money or goods muſt be obtained by the defendants by a falſe pretence, with an intent to defraud: and it is no objection that the pretence conſiſts in a repreſentation as of ſome tranſaction to take place at a future time.

John Young, S. Randall, W. Mullins, and J. Oſmer, *v.* The King. In Error. B. R. 3 *Ter. Rep.* 98.

Where the pretence is conveyed by words ſpoken by one

(1) *Rabone*, jun. v. *Williams*, Middleſex ſittings after Mich. 1785. Lord *Manſfield*, Ch. J. ſaid, "Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the perſon contracting with him has a right to conſider him, to all intents and purpoſes, as the principal; and though the real principal may appear and bring an action upon that contract againſt the purchaſer of the goods, yet that purchaſer may ſet off any claim he may have againſt the factor in anſwer to the demand of the principal. And he added, that this had been long ſettled."—In *Bayley* v. *Morley*, London ſittings after Mich. 1788. Lord *Kenyon* alſo recognized the law of this caſe.—The ſame point was alſo ruled by Lord *Kenyon* in *Stracey*, *Roſs*, and others, *v. Deey*, London ſittings after Mich. 1789.

defendant in the presence of others, who are acting in concert together, they may be all indicted jointly.

And it is no objection in arrest of judgment, that the indictment contains several charges of the same nature in the different counts.

An indictment was preferred at the sessions at Bristol against the defendants, on the 30 *Geo.* 2. c. 24. for obtaining money by false pretences. "The first count stated that the defendants, fraudulently intending to obtain of the honest subjects of our lord the king their monies, goods, wares, and merchandizes, by false colours and pretences, on the 23d of December, in the 28th year, &c. at, &c. unlawfully, knowingly, wilfully, and designedly, did falsely pretend to one *Thomas*, that *Young* had made a bet of 500 guineas on each side, with a colonel in the army then at Bath, that *William Lewis* would on the next day run on the high road leading from Gloucester to Bristol, ten miles in length, within one hour, and that *Young* and *Mullins* did go 200 guineas each, of, and in the said bet, and *Randal* did go the other 100 guineas (meaning that, in case such pretended bet was lost, *Young* was to contribute and pay 210l. *Mullins* the like sum, and *Randal* the remaining 105l.), and did then and there, under colour and pretence of such bet, &c. obtain from *Thomas*, as a part of such pretended bet, 20 guineas of the 500 guineas; by which said false pretences, the defendants did then and there, to wit, on, &c. at, &c. unlawfully, knowingly, and designedly, obtain from the said *Thomas* the said 20 guineas, with intent to cheat and defraud him thereof; *whereas, in truth and in fact, no such bet had been made*, &c. to the evil example, &c. against the peace, &c. and against the form of the statute, &c. The second count stated that the defendants unlawfully, knowingly, wilfully, and designedly, did falsely pretend to the said *Thomas*, that *Young* had made a bet of 500 guineas on each side with *Osmer*, that *Lewis* would, on, &c. &c. &c. There were two other counts, charging the defendants with having obtained 20 guineas from *Thomas Thomas*, by false pretences; without stating what those pretences were. The defendants were found guilty, and sentenced to be transported for seven years. And afterwards they removed the indictment, by writ of error, into this court; *and assigned for error, that the supposed false pretences, shewn in the first and second counts of the indictment, are neither contrary to the statute*, 33 H. 8. *or* 30 Geo. 2. *or any other statute.* That *neither of the counts in the indictment contained any offence against the common law; and even, if so, that the judgment thereupon is not warranted by the common law. And that neither the third or fourth count set forth any offence against the statute or common law*; concluding with the general assignment of errors.—FIVE OBJECTIONS were taken to the indictment: FIRST, That the transaction itself, supposing it was accurately stated,

was

was not the subject of a criminal prosecution. But, Secondly, If this be a proper subject of an indictment, the charge on this record was not stated with sufficient certainty and precision. No person being specified in the first count, with whom the wager was made; it being only "with a "colonel at Bath." Thirdly, The four defendants were charged jointly in the indictment; whereas, from the nature of the transaction, they should have been charged severally. Fourthly, That the second count in the indictment stated a distinct offence, not arising out of, or connected with, the charge in the first count. The charge in the first count being, that the bet was made with a colonel at Bath; and in the second, that it was with *Osmer*, another of the defendants; which should have been the subject of another indictment. Fifthly, That with respect to the 3d and 4th counts; they were bad, the pretence not being stated in either of them. Per Curiam: To make an offence indictable at common law, it must be public in its nature. And the distinction, which has been taken in the case of using false weights and measures, shews it more clearly than any other. If a person sell by false weights, though only to one person, it is an indictable offence: but if, without false weights, he sell to many persons a less quantity than he pretends to do, it is not indictable. But in this case it is necessary to consider both the stat. 33 *H.* 8. c. 1. and the 30 *Geo.* 2. c. 24. By the former of those, the offence consists in obtaining money or goods by false tokens; and unless some token be used, the case does not come within that act. Now, suppose a token had been produced in this case, and that the defendants, after telling their story to the prosecutor, had said, "If you have any doubt, "here is the colonel's gorget;" it would have fallen within the statute of 33 *Hen.* 8. If it would, then let us consider what effect the 30 *Geo.* 2. c. 24. has on the case. The legislature thought that the former statute was too limited, that all men were not equally prudent; and, therefore, to protect the weaker part of mankind, the 30 *Geo.* 2. c. 24. was passed, which enacts, that all persons who shall obtain money from others by false pretences, with intent to cheat or defraud such persons, shall be deemed offenders against the public peace. The statute therefore clearly extends to cases which were not the subject of an indictment at common law. *The ingredients of this offence are the obtaining money by false pretences, and with an intent to defraud. Barely asking another for a sum of money is not sufficient; but some pretence must be used, and that pretence false; and the intent is necessary to constitute the crime. If the intent be made out, and the false pretence used in order to effect it, it brings the case within this statute.* Very few cases on this act of parliament have been brought before this Court: but there was an indictment on this statute against

Count *Villeneuve*, tried at Cheſter in the year 1778, and which has never been doubted or contradicted. The facts were ſhortly theſe: The defendant applied to Sir *T. Broughton*, telling him that he was entruſted by the Duke *de Lauzun* to take ſome horſes from Ireland to London, and that he had been detained ſo long by contrary winds, that his money was ſpent; Sir *T. Broughton* was induced by this repreſentation to advance ſome money to him: afterwards it turned out that the priſoner never had been employed by the Duke *de Lauzun*, and his whole ſtory was a fiction. On that caſe the priſoner was convicted, and ſentenced to hard labour on the Thames. Now, that caſe goes the full length of deciding this.—As to the three other objections, they admit of very eaſy anſwers. With reſpect to the objection, that the charge is too general; in this ſtage of the proceeding, the Court muſt take it, that the repreſentation was made by the defendants in the ſame manner that it is charged in the indictment. And if that, though general, was ſufficient to anſwer the defendants' purpoſe, we cannot ſay that it was too general. We are not to ſuppoſe that the colonel's name was mentioned; and the proſecutor could not ſtate it with greater particularity than the defendants uſed. If ſuch a wager had been actually depending, it was competent to the defendants to have proved it in their defence. The third objection is, that this is not a joint offence: but, as this is the caſe of a miſdemeanor, the caſe in *Burrow*, 984. is a deciſive anſwer to it; there Lord *Mansfield* ſaid, "It is a ſtrange thing if the king cannot call a man to "account for a breach of the peace, becauſe he broke two "heads inſtead of one." The preſent was a joint offence; it was a joint repreſentation to anſwer one and the ſame purpoſe: neither is the proof ſeveral, it relates to one tranſaction. This is not like the caſe of perjury, to which it has been compared; becauſe that depends on the very words which the perſon charged individually uſes in a court of juſtice: and the words ſpoken by one, cannot poſſibly be applied to another, as falſely uttering thoſe very words. But here it is one entire act, which they were all carrying on in concert together. If, however, any authority were neceſſary, a caſe happened about a year ago, which is ſtronger than the preſent. Three perſons were indicted on the Black Act, for ſhooting at the proſecutor; they were all charged with the ſingle act, and the indictment was held by all the judges of England to be ſufficient. As to the remaining objection, the caſe in *Burrow* ſhews that it is no objection to an indictment, that it contains ſeveral charges. The caſe of felonies admits of a different conſideration; but even in ſuch caſes, it is no objection in this ſtage of the proſecution. On the face of an indictment, every count imports to be for a different offence, and is charged as at different times. And it does not appear on the record, whether the offences

offences are or are not distinct. But if it appear before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge, who tries the prisoner, does not discover it in time, he may put the prosecutor to make his election on which charge he will proceed. *Buller*, J. did it at the last sessions at the Old Bailey. But if the case has gone to the length of a verdict, it is no objection in arrest of judgment. If it were, it would overturn every indictment which contains several counts. So where the evidence affects several prisoners differently, *Buller*, J. has, as was done by Mr. *J. Yates* at Hereford, in the case of Mr. *Powell*'s murderers, selected the evidence as applicable to each, and left their cases separately to the jury. And in a case which happened before him on the last spring assizes at Exeter, where two prisoners were indicted for murder, and evidence given which pressed very hard on one prisoner, but was not admissible against the other, he thought it the soundest way of administering justice to sum up the evidence and take the verdict against each separately. But all these are mere matters of discretion only, which judges exercise in order to give a prisoner a fair trial: for when a verdict is given, they are not the subject of any objection to the record.—Judgment affirmed.

The King v. Thomas Mason, Tr. Ter. 28 Geo. 3. B R. 2 *Ter. Rep.* 581.

An indictment charging the defendant with obtaining money by false pretences is insufficient, if it do not shew what the false pretences were; and if the defendant be convicted on it, the Court will reverse the judgment, upon a writ of error. —This indictment was, That *Thomas Mason*, late of, &c. being an evil-disposed person, and not minding to gain his livelihood by truth and honest labour, but going about daily contriving to defraud the honest subjects of our lord the king of their honest monies, goods, wares, and merchandizes, for supporting his profligate way of life, on the 13th day of June, &c. with force and arms, at, &c. unlawfully, knowingly, and designedly, did obtain from one *Robert Scofield* divers sums of money, that is to say, the sum of two guineas, of the value of two pounds and two shillings of lawful money of Great Britain, of the proper monies of the said *Robert Scofield*, by false pretences, with an intent then and there to cheat and defraud the said *Robert Scofield* of the same. The second count was, that the said *Thomas Mason*, on the 21st day of July, &c. with force and arms, at, &c. unlawfully, knowingly, and designedly, did obtain from the said *Robert Scofield* the sum of four pounds fourteen shillings and six-pence of lawful money of

of Great Britain, of the proper monies of the said *Robt. Scofield*, with intent then and there to defraud the said *Robt. Scofield* of the same; concluding in the usual manner; and against the form of the statute in such case made and provided. —The defendant on his trial at the quarter-sessions was convicted, and received sentence of transportation for seven years. —He afterwards brought a writ of error, and assigned for error, *that it did not appear by the said indictment what the particular and specific false pretences were*, by which it is alleged in the first count, that he had obtained the monies; and that it does not appear by what particular pretences he did obtain the four pounds fourteen shillings and six-pence mentioned in the second count. On the argument three objections were taken to the first count: 1st, That the offence imputed to the defendant was not specified with sufficient particularity: 2dly, That the charge was repugnant, because it stated that the defendant obtained from the prosecutor *divers sums of money*, to wit, the sum of two guineas, and *that sum alone* is repugnant to divers sums: and, 3dly, That this count did not conclude either against the peace, or against the form of the statute.— Per Curiam: Several objections have been made on the part of the defendant; but the material one is, that the indictment does not state what the false pretences were. The question is not a new one; and the case of *Rex* v. *Munoz*, 1 *Strange*, 497, for obtaining a note by false tokens, entirely governs this. That was a case on the statute 33 *Hen.* 8. c. 1. which makes it an offence to obtain money or goods by false tokens. The statute 30 *Geo.* 2. c. 24. only enlarges the description of the offence in the statute of *Hen.* 8. Both statutes are made in *pari materiâ*; and whatever has been determined in the construction of one of them, is a sound rule of construction for the other. The judgment was arrested in the case in *Strange*, because the indictment did not specify the false tokens: then by the same reason an indictment on the 30 *Geo.* 2. c. 24., which speaks of false pretences, must state what the false pretences are, otherwise the indictment is bad; there is no distinction between the two cases; the same objection which held in the one, must also prevail in the other. The other objections seem to have great weight in them: but it is not necessary to consider them in this case, because we are of opinion the first objection is fatal, and the judgment must be reversed.

## Fee-Farm.

Bradbury v. Wright, Hil. Ter. 21 Geo. 3. B.R. 2 *Doug.* 624.

On a grant of a fee-farm rent, "without any deduction, defalcation, or abatement, for, or in any respect whatsoever," the

the grantee is entitled to receive the full rent, without deducting the land-tax.

Alſo diſtreſs is not incident to a fee-farm rent as ſuch, except the caſe is brought within the ſtatute of 4 *Geo.* 2. c. 28. ſ. 5.—This was an action of *replevin*. The defendant makes conuzance as the bailiff of one *Wilkinſon*, and then ſtates:—That *Eyre* and *Bretland* were ſeiſed in fee of the *locus in quo*, and that they, by indenture, dated the 20th of April, 1693, bargained and ſold, aliened, releaſed, and confirmed the ſame to *Jordan Bradbury*, his heirs and aſſigns, in FEE-FARM for ever, yielding and paying, yearly, to *Bretland*, his heirs and aſſigns for ever, by half-yearly payments, at a place, and on the times mentioned, the yearly rent of 4l. 17s. 6d. "without any deduction, defalcation, or abatement, for, or in any reſpect whatſoever;" that ſeiſin was delivered to him accordingly, and, by virtue of the ſaid premiſes, *Jordan Bradbury* became and was ſeiſed in fee of the *locus in quo*, and *Bretland* became, and was ſeiſed in fee of the *fee-farm rent* of 4l. 17s. 6d. by the ſaid indenture of feoffment ſo reſerved, and made payable to him, his heirs and aſſigns: then deduces a title to the ſaid *fee-farm rent*, to *Wilkinſon*, and alleges, that 2l. 8s. 9d. of the ſaid *fee-farm rent* for one half year was in arrear, and that the goods were taken as a diſtreſs for the ſame.—Plea in bar, as to 2s. 1¼d. part of the ſaid 2l. 8s. 9d. that, by the land-tax act of 1778, 17s. 2d. was aſſeſſed on the *locus in quo*, that a like rate for the ſaid *fee-farm rent* would, by a juſt proportion, amount to the ſaid 2s. 1¼d.; wherefore the plaintiff, according to the form of the ſaid ſtatute (1), did abate, deduct, and keep in his hands, the ſaid 2s. 1¼d; and, as to the reſidue, he pleaded a tender and refuſal, prior to the time when, &c. and that, after the tender, and before the ſaid diſtreſs was ſo made and taken as aforeſaid, no requeſt or demand was made of the ſaid reſidue.—*General demurrer*.—THE QUESTION argued upon this record was, Whether, by virtue of the words, "*without any deduction, defalcation, or abatement for, or in* "*any reſpect whatſoever*," the grantee of the rent was entitled to receive the whole, diſcharged of the land-tax?—BULLER, J. aſked, if this did not, on the pleadings, appear to be that ſort of rent for which there was no remedy by diſtreſs at common law, for he conceived that, ſince the ſtatute of *quia emptores*, a rent granted in fee could not be diſtrained for, without an expreſs clauſe making it a rent-charge; and he denied the anſwer given, viz. *that fee-farm rents were rent-charges*; obſerving that, by the definitions in all the books, the appellation of "*fee-farm*" only reſpected the proportion between the amount of the rent and the value

(1) Vide 4 *W.* and *M.* c. 1. ſ. 6. copied in all the ſubſequent land-tax acts.

of

of the land (1). *If this rent was a rent-ſeck, he ſaid the diſtreſs could not be ſupported* but on the authority of 4 *Geo.* 2. c. 28. ſ. 5. and the avowry had not ſtated (according to that ſtatute), that the rent had been duly anſwered or paid, for the ſpace of three years, within the ſpace of twenty years, before the firſt day of the ſeſſion of parliament, when the ſtatute paſſed.—On the principal point, Lord MANSFIELD ſaid, there could be no words ſtronger than thoſe in the preſent caſe; and it would not have been clearer if the deed had run, "*without any deduction, defalcation, or abatement for*

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(1) *Feodi Firma appellatur, cum quis, ex dono vel conceſſione alterius, prædia tenuerit ſibi et hæredibus ſuis, reddendo vel dimidiam vel tertiam, vel ad minus, quartam partem veri valoris. Tenens hujuſmodi ad nulla ſervitia obligatur niſi quæ in ipſa charta continentur, excepta fidelitate, quæ omnibus tenaris incumbet.* Spelm. Gloſſ. 221. col. 1. "*Cheſtun fee-farm* "*ſira entend le verave value del terre, qui eſt le cauſe n'aura ent reliefe.*" *Brooke* Abr. title Reliefe, 201. pl. 5. 8. cites 45 *Ed.* 3. 15. and old tenures.—*Blackſtone* (Comm. vol. 2. p. 43.) ſays, "A fee-farm rent is "a rent-charge in fee, iſſuing out of an eſtate in fee, of at leaſt one "fourth of the value of the land at the time of its reſervation." And he cites *Co. Littl.* 143.; which does, at firſt, ſeem to authorize his definition; for the words of Lord *Coke* are, "It (*i. e.* a rent reſerved by "deed, with a clauſe of diſtreſs) is called a rent-charge, becauſe the "land, for payment thereof, is charged with a diſtreſs;" and then he goes on immediately to ſay, "If it be to the whole value of the land, "or to the fourth part of the value, then the rent is called a fee-farm." *Blackſtone*, probably, according to the moſt natural and obvious conſtruction, underſtood the pronoun, "it," in the ſecond ſentence, to relate to the ſame thing as in the former ſentence, *viz.* to rent-charge. But it ſhould ſeem, on conſidering the authorities above referred to (though they do not expreſsly exclude the idea of diſtreſs) together with the text of *Littleton*, that, by an inverſion of language not uncommon even now, but frequently preferred, from affectation, in Lord *Coke*'s time, the relative, in the ſecond ſentence, is placed before the noun ſubſtantive, *viz.* "the rent," to which it refers, and, therefore, the ſentence ought to be underſtood as diſtinct and independent of the preceding one, and as if it had run thus: "The rent (*i. e.* a rent certain reſerved to a man and "his heirs, which is what *Littleton* is ſpeaking of), if it be to the whole "value of the land, or to the fourth part of the value, is called a fee-"farm." If this is the true conſtruction, the inference is, that the deſcription of a fee-farm, taken by itſelf, does not imply a power of diſtreſs; which ſeems to have been what *Buller*, J. hinted at. But a rent in fee, of the proportion required, would not ceaſe to be a fee-farm rent, becauſe a power of diſtreſs was ſuperadded. A fee-farm rent may either be a rent-ſeck or a rent-charge, and (till the ſtatute of *quia emptores*) might have been a rent-ſervice (* 128). But then, in pleading, in order to juſtify in replevin, it would be neceſſary, not only to ſhew that the rent was a fee-farm rent, but alſo to call it a rent-charge, or to ſtate that a power of diſtreſs was annexed to it. This, probably, could not have been done here, becauſe, in fact, no ſuch power was given by the deed. 2 *Doug.* 627. [*n.* 1.]

(* 128) Vide Mr. *Hargrave*'s edition of *Co. Littl.* p. 144. *a.* note (5), where the very learned editor is of opinion, "that the term 'fee-farm' is not properly "applicable to any rents, except rents-ſervice."

"*taxes.*"

"*taxes.*" He ſaid, he thought there were caſes in the equity books on this point, and deſired the cauſe to ſtand over till this day, that they might be looked into.—AND THE COURT now, on the principal point, declared their opinion, that the rent ſhould be paid without any deduction for the land-tax; and founded themſelves on the authority of the caſe of *Brewſter* v. *Kitchen*, 1 Ld. *Raym.* 137.; 1 *Salk.* 198.; *Carth.* 438.; and *Hoopwood* v. *Barefoot*, 11 Mod. Rep. 230.—As to the other point, they were of opinion againſt the defendant, for that the rent was, in its nature, a rent-ſeck, and the party could not diſtrain but under the ſtatute, and therefore, in his avowry, he ought to have brought his caſe within it.—But, as the merits were in the defendant's favour, it was agreed, that the demurrer ſhould be allowed, without coſts on either ſide.

## Felony.

HORSES are cattle within the Black Act.—The priſoner was capitally convicted on an indictment, "for feloniouſly, unlawfully, knowingly, wilfully, and maliciouſly ſhooting and killing one mare, of a mixed red and white colour, and one brown ſtone colt, the goods and chattels of one *Matthew Batten*," againſt the form of the ſtatute.—The Black Act, 9 *Geo.* 1. c. 22. makes it felony, without benefit of clergy, if any perſon *(inter alia)* ſhall "unlawfully and maliciouſly kill, maim, or wound any cattle."—And after conviction, it was moved in arreſt of judgment: 1ſt. That the mare and colt are not *averred*, in the indictment, to be cattle within this ſtatute. 2dly. That the word cattle does not by law neceſſarily include horſes, mares, and colts. Upon theſe objections. *Blackſtone*, J. who tried the priſoner, reſpited the judgment till the next aſſizes, and laid the caſe before all the judges at Serjeant's-Inn, who unanimouſly agreed, that, as the ſtatute 22 and 23 *Car.* 2. c. 7. had made the offence of killing horſes by night a ſingle felony, this ſtatute, 9 *Geo.* 1. was only to be conſidered as an extenſion of that ſtatute. And ſome precedents were cited of capital convictions (but none of executions) upon this branch of the ſtatute. Wherefore it was agreed, that judgment of death ſhould be given at the next aſſizes.

The King v. John Paty, Mic. Ter. 11 Geo. 3. 2 *Black. Rep.* 721.

Offences againſt the Black Act may be proſecuted in any county at the option of the proſecutor.—An indictment was found at Hicks's Hall, and brought to the Old Bailey, againſt the priſoner, for feloniouſly, &c. ſhooting at one *Thomas Parkinſon*, in the county of Hertford.—The Black Act, 9 *Geo.* 1. c. 22. ſect. 14. directs, that all offences againſt that act (of which this is one) may be enquired of, examined, tried, and

The King v. Richard Mortis, Hil. Ter. 11 Geo. 3. 2 *Black.* 723.

and determined, in any county in England, in ſuch manner and form as if the fact had been therein committed.—*Gould*, J. who ſat at the Old Bailey, doubted whether a private proſecutor had a power to proſecute in any county, at his own option; or whether a ſpecial commiſſion muſt not be granted for this purpoſe, by the king: and, therefore, poſtponed the trial.—But, on diſcourſe with the reſt of the judges, the firſt day of this term at Serjeant's-Inn, it was generally agreed, that the words of the ſtatute extend to give the proſecutor the option of chooſing his own county; and therefore that this indictment ſhould be tried at the Old Bailey.

The King *v.* Wyer, Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 77.

The defendant had been committed under the 2 *Geo.* 3. c. 28. for receiving part of a cargo belonging to a veſſel in the Thames, knowing the ſame to be ſtolen. And being now brought up by *habeas corpus*, it was moved that he might be bailed; for though he was committed as for a felony, yet under the 2 *Geo.* 3. c. 28. he ought only to have been committed as for a miſdemeanor: as the twelfth ſection of that ſtatute enacts, "that every perſon who ſhall buy or receive "any part of a cargo, &c. knowing the ſame to be ſtolen, "ſhall, being thereof convicted by due courſe of law, be "tranſported for fourteen years, according to the laws in force "for the tranſportation of felons." And it was contended, that the latter words did not conſtitute a felony, but only explained the manner and time of the puniſhment.—PER CURIAM: By the 3 and 4 *W.* and *M.* c. 9. ſ. 4. receivers of ſtolen goods may be proſecuted as felons. By the 1 *Ann.* ſt. 2. c. 9. ſ. 2. they may be puniſhed as for a miſdemeanor, where the principal felon is not convicted. Then came the ſtatute, 2 *Geo.* 3. c. 28. and though the 12th ſection ſays, he ſhall be tranſported for fourteen years; yet by the fourteenth ſection, any perſon ſtealing, or unlawfully receiving ſtolen goods, knowing the ſame to be ſtolen, ſhall, on diſcovering two other offenders, be entitled to a pardon for all ſuch felonies.—Priſoner remanded.

The King *v.* Remnant, Hil. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 169.

The defendant having been committed for that "with force and arms, he made an aſſault on the proſecutor, with intent felonioufly to ſteal, take, and carry away from the perſon, &c." was, on motion, diſcharged on bail, becauſe the commitment did not ſpecify any offence within the ſtat. 7 *Geo.* 2. c. 21. on which he was committed. PER CURIAM: That ſtatute enacts, that "if any perſon ſhall, with any offenſive weapon or inſtrument, unlawfully and maliciouſly aſſault, or ſhall by menaces, or in, or by any forcible or violent manner, demand any money, goods, or chattels of, or from any other perſon, with a felonious intent to rob, or commit robbery upon ſuch perſon; ſuch perſon ſo offending, being thereof lawfully convicted, ſhall be, and be adjudged guilty of felony." And here the defendant was neither charged with having made an aſſault

assault with an offensive weapon, or with having by menaces, or in a violent manner, demanded money, &c. of the prosecutor, which are the offences mentioned in this act; and the latter part of the commitment is also objectionable in not charging the defendant with a felonious intent to rob, but merely with an intent feloniously to *steal, take, and carry away, &c.* (1).

Rex v. Horner, et al. Ea. Ter. 23 Geo. 3. B.R. *Cald.* 295.

It was moved on behalf of *Richard Horner*, and two others, who had been removed by *habeas corpus*, that they might be admitted to bail.—The commitment stated, that the prisoners were charged "with defrauding and robbing *John Cunnett*, of "Dunsford, yeoman, at Crediton, in the county of Devon, "under divers false pretences, of the sum of nineteen "guineas in gold, and a ten-pound bank of England bill," and that they were committed by a magistrate of that county, to the county gaol, "until the next general gaol-delivery for "the said county, or until they shall be thence delivered by "due course of law." Upon the information taken before the magistrate, it appeared, that they decoyed the prosecutor into a public-house, and had there obtained the money of him, for the purpose of playing at cards; and after having prevailed upon him once to cut the cards for one of them (though he positively swore that he had not engaged in play on his own account), under pretence of his having lost the money to one of the confederates, they swept it off the table, and went away with it. It was contended, that the charge, as stated in the commitment, being short of a charge of felony, and amounting to a misdemeanor only, the prisoners were entitled to be discharged upon bail: which was opposed, on the ground, that if enough appeared upon the depositions to satisfy the Court, that a felony had been committed, they would not suffer the public to be deprived of the benefit of the example, because there might be a defect in the form of the warrant: that whether the offence charged was, or was not a felony, might be a matter of some nicety: but that cases of this nature had been often so considered—BULLER, J. Similar cases have often been ultimately so considered: but in cases of this sort, the course has always been to leave it to the jury to determine, *quo animo*, the money was obtained; and if they should think that it was obtained upon a preconcerted plan to rob the prosecutor of his money, that it would in such case be felony. Upon this principle, at the Old Bailey, a man was prosecuted for felony, who had obtained money by dropping a ring, wrapped up in a bill or receipt, purporting that the ring had cost four score pounds, when in fact it was worth little or nothing: and upon this indictment the man was convicted. The Court, in such a

(1) See the King v. Judd, *ante*, vol. I. p. 682.

case,

caſe, never form any judgment whether the facts amount to felony or not; but merely whether enough is charged to juſtify a detainer of the priſoner, and put him upon his trial.—Motion denied.

The King *v.* Jones, *alias* Thos. Thorowgood, Mic. Ter. 20 Geo. 3 B.R. 1 *Doug.* 300.

In an indictment for uttering a forged bank note, the words, '*purporting* to be a bank note,' mean, that the note, upon the face of it, appears to be a bank note, and the want of ſuch appearance cannot be ſupplied, ſo as to ſupport the indictment, by any repreſentations of the party when he diſpoſed of it.—This was an indictment for forgery, for that he, "having in his cuſtody a certain forged and counterfeited "paper-writing, purporting to be a bank note, the tenor of "which forged and counterfeited paper-writing is as follows, "viz.—*No. F.* 946. *I promiſe to pay to* John Wilſon, *Eſq. or* "*bearer, ten pounds. London, March 4th*, 1776. *For ſelf and* "*company, of my bank in England. L.* 10. *Entered*, John "Jones—feloniouſly diſpoſed of and puta way the ſaid forged "and counterfeited paper-writing, as and for a good and "true bank note, well knowing the ſame to be forged and "counterfeited, with intent to defraud *James Rayner*, againſt "the form of the ſtatute, &c."—A ſpecial verdict was found, viz. that the paper-writing, purporting to be a bank note, was not a note filled up by any of the officers of the governor and company of the bank of England, or entered in any of their books, but was forged; that the priſoner, well knowing it not to be a note of the governor, &c. but to be forged, averred it to be a good bank note, and diſpoſed of it as ſuch to *James Rayner*, with intent to defraud him, and that *Rayner* took it from the priſoner, and gave him 10l. for it, believing it to be a true bank note.—It was argued, on the part of the proſecution, that the charge and finding were ſufficient to convict the priſoner. That, if a forged note is made in the form and appearance of a bank note (which this was) it purports to be one, although not ſigned: differing in this reſpect from a forged deed, which cannot be ſaid to purport being a deed till it is ſigned, the ſignature being of the eſſence of that ſort of inſtrument. That, from the finding, it appeared, that the note purported to be a bank note to the man who received it, and that ſimilitude is not at all neceſſary to conſtitute a forgery. But it was admitted, that the finding did not ſupport the ſixth count. And Lord Mansfield, Ch. J. ſaid, that the repreſentations of the priſoner to *Rayner*, after the note was made, could not alter the purport, which is what appears on the face of the inſtrument itſelf. Though ſuch repreſentations might make the party guilty of a fraud or cheat (1).—Priſoner diſcharged.

The

(1) The priſoner had been indicted, and brought to trial, as for a fraud, before *Blackſtone*, J. at the former aſſizes, but, as he entertained a doubt

The ſtat. 18 *Geo.* 3. c. 19. which enables the Court, in certain caſes, to make an order on the treaſurer of the "*county, riding, or diviſion,*" where the offence was committed, to pay the proſecutor and his witneſſes their expences, extends to *inferior diſtricts, having juriſdiction to try felons*, and raiſing their own rates ſimilar to the county rates.—This was an indictment againſt the defendant, as treaſurer of the diviſion of Keſteven, in the county of Lincoln, for diſobedience of an order made upon the defendant, by Mr. *Baron Hotham*, for the payment of 11l. 3s. 6d. for the coſts incurred by a proſecutor and his witneſſes, in proſecuting and giving evidence before the grand jury, upon an indictment againſt *R. Macdonald*, for privately ſtealing from the perſon in the borough of Stamford, *which is locally ſituated in the diviſion of Keſteven.* The mayor and aldermen of the borough of Stamford, as juſtices of the peace for the borough, together with the recorder or his deputy, have by preſcription a juriſdiction to try perſons charged with capital and other offences committed within the borough, which juriſdiction they have heretofore exerciſed, and have yet power ſo to do. There is a diſtinct treaſurer for the borough of Stamford. They raiſe their own rates within the borough ſimilar to the county rates, and the inhabitants of that borough are not rated, nor ever contribute to the rates for the diviſion of Keſteven, or receive any relief from the rates levied within the diviſion of Keſteven. No part of the rate levied within the borough is ever applied to pay the coſts or expences of proſecutions when the priſoners are tried within the borough: but when ſuch coſts and expences are allowed by the Court, they are paid out of the eſtate of the corporation. The juſtices for the borough of Stamford have excluſive juriſdiction within the borough; and the juſtices for the diviſion of Keſteven do not interfere, nor have any juriſdiction within the borough.—THE QUESTION was, Whether under the circumſtances of this caſe, the treaſurer of the diviſion of Keſteven is liable to defray the expences of the proſecutor and witneſſes, for offences committed, or ſuppoſed to have been committed, within the borough of Stamford, and proſecuted at the aſſizes in and for the county of Lincoln?—The 27 *Geo.* 2. c. 3. ſ. 3. enacts, that when any poor perſon ſhall appear on recognizance in any court to give evidence againſt another accuſed of felony, the Court may, on conſideration of the circumſtances, order the

The King *v.* Joh. Myers, Ea. Ter. 25 Geo. 3. B. R. 6 *Ter. Rep.* 237.

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a doubt whether the offence was not rather a forgery, with intent to defraud the Bank, the priſoner was acquitted on that occaſion, and the preſent indictment preferred. Lord *Mansfield* ſaid, he thought the caſe clear at the trial, but that he had directed a ſpecial verdict on account of the doubt of *Blackſtone*, J.

treaſurer *of the county, or place* in which the offence was committed, to allow his expences. Then the 18 *Geo.* 3. c. 19. ſ. 7. in amendment of the 27 *Geo.* 2. enacts, "that the "Court before whom any perſon, &c. has been tried and "convicted of felony, or tried and acquitted of felony, in caſe "there was reaſonable ground, &c. may order *the treaſurer of* "*the county, riding, or diviſion,* in which the offence ſhall "have been committed, to pay to the proſecutor ſuch "reaſonable coſts, &c. as ſhall appear to the Court, &c." —Lord KENYON, Ch. J. When the legiſlature were laying it down as a general rule that in particular caſes the expences of bringing an offender to juſtice ſhould fall on the diſtrict where the offence was committed, and not on the individual who proſecutes, it ſeems reaſonable to ſuppoſe that they intended that thoſe expences ſhould be borne by the diſtrict, of whatever deſcription, where the offence was committed. I would not, however, rely on the reaſon and probability of the thing againſt the poſitive words of an act of parliament: but when the reaſon tends to enforce the act, it is fair to reſort to it in explanation of the words of the ſtatute. The queſtion here is, whether the words "*county, riding, or diviſion,*" in this act, are to be taken in their ſtrict technical ſenſe; or whether the word "*diviſion,*" as it is here uſed, does not apply to inferior diſtricts. Now in order to determine that, it becomes neceſſary to advert to the 27 *Geo.* 2. becauſe the ſtatute in queſtion was profeſſedly paſſed to amend that act. In the ſtatute 27 *Geo.* 2. the order is to be made on the "treaſurer of the county OR PLACE in which the offence was committed;" and there is no doubt but that the word "*place*" is ſufficiently comprehenſive to include the borough of Stamford. And the 9th ſection of the 18 *Geo.* 3. c. 19. enables the magiſtrates of "any county, riding, diviſion, *city, town corporate, franchiſe, or liberty,*" in quarter ſeſſions aſſembled, to make ſuch regulations with regard to the allowance of coſts and charges to the proſecutor as they think reaſonable, which, in my apprehenſion, leaves no doubt whatever in this caſe: thoſe magiſtrates are only to make regulations reſpecting their particular juriſdictions; for it would be highly unreaſonable that the juſtices of a particular town or franchiſe ſhould make orders to regulate the conduct of the officers of the county at large, over whom, in general, they have no juriſdiction whatever. Therefore, on the reaſon of the thing, on the conſtruction of this act of parliament, and on the other acts which were made in *pari materiâ*, I think it was the manifeſt intention of the legiſlature, that the word "diviſion" ſhould apply to all ſuch places as are mentioned in the 27 *Geo.* 2. and conſequently that this order cannot be enforced by indictment, it having been improperly made.—ASHHURST, J. of the ſame opinion.

—GROSE,

—Grose, J. agreed.—Lawrence, J. The ſtatute 18 *Geo.* 3. c. 19. was certainly intended to remedy the defects of the former laws, and to make a general proviſion for the allowance of expences in all caſes, whether the proſecutor were bound by recognizance or ſubpœna, or whether the party accuſed, were or were not convicted. Now if a poor perſon be bound by recognizance to proſecute for an offence committed in Stamford, there is no doubt but that the order under the ſtatute 27 *Geo.* 2. for allowing the expences may be made on the treaſurer of the borough of Stamford: and it is impoſſible to ſuppoſe that the legiſlature intended that if the proſecutor appeared on recognizance, his expences ſhould fall on the borough of Stamford, and if on ſubpœna, that they ſhould be borne by the county at large.—Verdict of acquittal to be entered.

# Fines and Recoveries.

## FINES.

A FINE taken in Scotland, and regular in every reſpect, except that it was not taken in the preſence of an attorney of any of the courts of Weſtminſter-Hall, was allowed by the Court on an affidavit made by *Seton*, the demandant, that there was no ſuch attorney reſident in or near the place where it was taken.—See *Say* and *Smith*, 2 *Barnes*, Sup. 31.

Seton v. Sinclair, *et al.* *Defer.* Ea. Ter. 13 Geo. 3. C.B. 2 *Black.* 880.

A fine may be acknowledged *de bene eſſe*, by a *feme covert* without her huſband, when her huſband has previouſly acknowledged it, and is abroad.—It was moved, that *Ann Moreau*, wife of —— *Moreau*, might levy a fine without her huſband. It appeared, that in 1759, the lands were ſold by the huſband, who covenanted that he and his wife, when of age, ſhould levy a fine. When the wife came of age, ſhe refuſed to join in it; but it was levied by the huſband alone, who is now gone abroad and reſides in foreign parts. The wife now conſented to levy it; but the huſband was abſent. It was ſaid, that it had been uſual in ſuch caſes for the curſitor to make out a *præcipe* to the wife, as a *feme ſole;* but no example of it was produced upon the motion.—The Court would make no rule to authenticate ſuch a fine. But it was afterwards acknowledged *de bene eſſe*, before the Lord Chief Juſtice, then in Court.

Moreau's Caſe, Ea. Ter. 18 Geo. 3. C.B. 2 *Black.* 1205.

It ſeems that a tenant in tail having committed a felony may before conviction bar the next heir in tail by a fine.—On the 23d of April, *James Coſtard* murdered his mother, who was tenant for life of the premiſes, and before he entered into the lands, by deed of the 24th of June, 1762, between himſelf of the firſt part, the leſſor of the plaintiff of the ſecond part, and *Ann Bigg*, Timothy Pearſe,

William Stevens *ex dim.* Mary Coſtard, alias Bigg v. Sarah Winning widow, Sarah Coſtard, widow, Henry Stevens eſq.

and Francis Steele, Hil. Ter. 4 Geo. 3. C.B. 2 *Wils.* 219.

*Bigg*, her mother (adminiſtratrix of *Edward Bigg*, her father), of the third part, covenanted to levy a fine *ſur conuzance*, &c. to the ſaid *Ann Bigg*, with proclamations, to the uſe of himſelf for life, remainder to the leſſor of the plaintiff for life, remainder to *J. C.* remainder to his own right heirs in fee. In Trinity term, 1762, the fine was levied accordingly, and afterwards *James Coſtard*, the conuſor, was convicted of the murder.—THE QUESTION was, Whether a tenant in tail having committed murder, can afterwards, before conviction, levy a fine, and bar the next heir in tail; and if he cannot, the judgment of the Court muſt be with the defendants.—1ſt, It was argued for the plaintiff, that the eſtate tail was extinct by the fine, as much as if tenant in tail were dead without iſſue, becauſe two fees, expectant one upon another, cannot ſubſiſt in the ſame perſon.—2dly, Becauſe by the 32 *H.* 8. c. 36. the fine is declared to be a bar, and a diſcharge of the eſtate tail.—3dly, Becauſe the ſtat. Weſtm. 2. having made eſtates tail a kind of particular eſtate, they are (the protection of the ſtatute being gone by the fine), like all other particular eſtates, ſubject to merger and extinguiſhment when united with the abſolute fee. *Symond* v. *Cudmore*, 1 *Salk.* 338. it was admitted that if tenant in tail makes a leaſe for years, and is attainted, the king ſhall avoid the leaſe where he is intereſted: but where the king is not intereſted, as here he is not, all the facts (as was ſaid) done by a felon murderer, tenant in tail, between the ſtroke and the attainder, are valid to convey.—On the other ſide for the defendants it was objected, that the operation of the fine veſted a fee in the conuſor which inſtantly became forfeited. To this it was anſwered by *Gould*, Juſtice, that the deed to lead the uſes of the fine is to be conſidered as part of the fine itſelf, and that in deeds of uſes the intention of the parties muſt always govern; that here the intention of the parties is clear, that a fee could not veſt in the conuſor, and that ſuch intention ſhall repel the preſumption of law.—THE COURT inclined to give judgment for the plaintiff, but a ſecond argument being deſired, there was an *ulterius concilium*; but the caſe was never argued again.

Roe, leſſee of Roach widow, *v.* Popham, *et al* Mic. Ter. 19 Geo. 3. B.R. 3 *Doug.* 24.

If a fine is levied by tenant for life, remainder-man in tail, and reverſioner in fee, a declaration of uſes by the tenant for life and remainder-man in tail, does not bind the reverſioner, without his privity. And when no uſes are declared, parol evidence may rebut the reſulting uſe to the conuſor in favour of the conuſee, without any written declaration of the uſes in his favour.—By marriage-articles, bearing date the 28th of February, 1734, *Lætitia Harris*, and *Poſthuma* her daughter, the one being tenant for life, and the other entitled to a remainder in tail, of a truſt eſtate, in contemplation of a marriage about to be celebrated between *Poſthuma*

*Harris*

*Harris* and *William Taylor*, covenanted to levy a fine, and to ſettle the lands in queſtion on truſtees, in ſtrict ſettlement, with a remainder in fee to *Poſthuma*. The legal eſtate of the whole, and the equitable eſtate in the reverſion in fee, expectant on *Poſthuma*'s eſtate tail, had deſcended to *Thomas Harris*, eldeſt ſon of *Lætitia*'s huſband by a former wife. He was not a party to the articles of 1734. But, in 1735, a fine was levied, in which *William Taylor*, *Thomas Harris*, *Lætitia*, and *Poſthuma*, were conuſors, and the truſtees in the marriage-ſettlement conuſees. *Thomas Harris* died without iſſue, in 1736, without having joined in any declaration of the uſes of the fine, and was ſucceeded by his full ſiſter *Elizabeth*, the leſſor of the plaintiff, who was his heir at law, and the heir at law of her father as to the reverſion. *Poſthuma* had two daughters, but ſhe died in 1739; one of her daughters in the ſame year, and the other in 1740, both without iſſue; and *Lætitia* died in 17[illegible]1. This ejectment was now brought by *Elizabeth* againſt the truſtees, on the ground, that the declaration of uſes in the marriage-articles did not operate againſt *Thomas Harris*, he not being a party to them; and that where there is no declaration of the uſes of a fine (which by the ſtatute of frauds, 29 *Car.* 2. c. 3. ſ. 7. muſt be in writing), they reſult to the conuſors.—BULLER, J. before whom the cauſe was tried, being of that opinion, directed a verdict to be found for the plaintiff, but with leave to move for a new trial without coſts. At the trial, the counſel for the leſſor of the plaintiff had objected to the reading of the marriage-articles, becauſe the reverſioner, under whom ſhe claimed, was not a party to them, and there was no evidence of his knowing that there were ſuch articles: but the judge over-ruled this objection, as they made a neceſſary part of the defendant's title, and it was clear, that it was no objection againſt reading a title-deed, that the perſon againſt whom it was produced, was not a party to it.—It was now contended, for the defendant, that the clauſe in the ſtatute of frauds, requiring that declarations of truſts and confidences (and which is held to include uſes), ſhould be made by ſome writing ſigned by the party, extends, in the caſe of fines, to third perſons only, and not to the conuſors and conuſees of the fine. That the reſulting uſe to the conuſors may be rebutted in favour of the conuſees, by parol evidence, ſhewing ſuch to have been the intention of the parties. That this doctrine is fully eſtabliſhed by the caſe of Lord *Altham* v. the Earl of *Angleſea*. E. 8 *Ann. Gilb.* Rep. 16 *Piggot* on Rec. S. C. That it being a mere queſtion of fact and intention, in whom the uſes of the fine in the preſent caſe veſted, that queſtion ought to have been left to the jury, and that there could be no purpoſe imagined for levying the fine, and making the truſtees conuſees, except to confirm

the marriage-articles.—Lord MANSFIELD: The caſe cited, is good law. There, there was evidence to rebut the reſulting uſe; but here I ſee no proof of intention on the part of the reverſioner in fee. He was not a party to the marriage-articles. If he had been, that would have been ſtrong evidence againſt any reſulting uſe to him. The form of a fine is to give a title to the conuſee; but, in truth, it is for the convenience of the conuſor; and, from the conſtant uſage, the preſumption is, that it is levied to his uſe. This indeed is liable, like all other preſumptions, to be encountered by contrary evidence; but here the reverſioner in fee has done nothing to rebut the preſumption.—Rule diſcharged.

Doe *ex dim.* Count Duroure, *v.* Jones, Tr. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 300.

When once the five years, allowed to an infant to make an entry for the purpoſe of avoiding a fine, begin, the time continues to run, notwithſtanding any ſubſequent diſability.—On a ſpecial verdict in this ejectment, it appeared [*inter alia*] (1), that in Trinity term, 1775, a *fine ſur conuzance de droit come ceo*, &c. was levied of the premiſes in queſtion, between *C. Langlois*, plaintiff, and the defendant deforciant; and the laſt proclamation of that fine was in Eaſter term, 1776. *The leſſor of the plaintiff, when the fine was levied and proclaimed, was an infant*, but attained the age of twenty-one, on the 26th of February, 1784; he was then at large in England, and continued ſo to be until the 17th of December, 1784, when he was arreſted, and impriſoned for debt, and was kept and detained in priſon, continually from that time, until the 16th of September, 1789; and on the 17th day of that month he, claiming title to the premiſes in queſtion, made an actual and perſonal entry thereon in due form of law, to avoid the fine, and ejected the defendant, &c.—ONE QUESTION was, Whether he were bound by the fine, being an infant at the time it was levied, and having been in priſon ſhortly after he came of age, ſo that five years had not elapſed ſince he came of age free from the diſability of impriſonment?—LD KENYON, CH. J. I never heard it doubted till the diſcuſſion of this caſe, whether, when any of the ſtatutes of limitations had begun to run, a ſubſequent diſability would ſtop their running. If the diſability would have ſuch an operation on the conſtruction of one of thoſe ſtatutes, it would alſo on the others. I am very clearly of opinion on the words of the ſtatute of fines, on the uniform conſtruction of all the ſtatutes of limitations down to the preſent moment, and on the generally-received opinion of the profeſſion on the ſubject, that this queſtion ought not now to be diſturbed. It would be miſchievous to refine, and to make nice diſtinctions between the caſes of voluntary and involuntary diſabilities;

(1) See the caſe ſtated at large, in vol. I p. 573.

but

but in both caſes, when the diſability is once removed, the time begins to run.—ASHHURST, J. If the diſability be once removed, the time muſt continue to run, notwithſtanding any ſubſequent diſability either voluntary or involuntary; and even if there were any diſtinction between the two kinds of diſability, the preſent is againſt the plaintiff, for the impriſonment for debt was in conſequence of his own voluntary act.—GROSE, J. I have not the leaſt doubt the words of the ſtatute are clear in themſelves; and there is a paſſage in *Shep.* Touchſt. 30. which is deciſive of the queſtion. It is there ſaid, "if they be in England at the time of levying the fine, and after go beyond the ſeas, and ſuffer the five years after the proclamations to paſs; in this caſe they ſhall have no longer time, *except they be ſent in the king's ſervice and by his commandment.*" But here I conſider the leſſor of the plaintiff as having brought this diſability on himſelf.

Dillon *v.* Leman, *et al.* Mic. Ter. 36 Geo. 3. C.B. 2 *Hen. Black.* 584.

*William Naunton*, being in his life-time ſeiſed in fee-ſimple of the lands in queſtion, died ſo ſeiſed thereof in the month of Auguſt, 1758, leaving *Mary Dillon*, mother of the ſaid plaintiff, *John Talbot Dillon*, then the wife of *Francis Dillon*, his heir. Upon the death of the ſaid *William Naunton*, *William Leman* entered into the ſaid lands, and became tortiouſly ſeiſed thereof, and being ſo ſeiſed, in Hilary term, 1765, levied a fine *ſur cognizance de droit come ceo* of the ſaid lands, whereupon proclamations were duly had, according to the form of the ſtatute in ſuch caſe provided, the ſaid *Mary Dillon*, being under coverture with the ſaid *Francis Dillon*, at the time of the levying ſuch fine. On the 20th of February, 1765, the ſaid *Mary Dillon* died under coverture of the ſaid *Francis Dillon*, as aforeſaid, leaving the ſaid *John Talbot Dillon*, then of the age of twenty-one years, of ſound mind, out of priſon, and within this realm, her ſon and heir. No entry or claim was made on, or to the ſaid lands, by, or on behalf of the ſaid *Francis Dillon*, or *Mary Dillon*, in her life-time, nor at any time afterwards by the ſaid *Francis Dillon*, nor by the ſaid *John Talbot Dillon*, until the year 1787, when he made an entry to avoid the ſaid fine. And the queſtion was, Whether on the above caſe, the ſaid *John Talbot Dillon* was barred by the ſaid fine from recovering the ſaid lands? And it was argued, that the plaintiff, *John Talbot Dillon* was not barred by the fine, being the heir of *Mary Dillon*, who was under the diſability of coverture, at the time when it was levied, and died under that diſability.—THE LORD CH. J. declared ſhortly the opinion of the Court, that the exception in the firſt branch of the ſtatute, 4 *Hen.* 7. and the proviſo at the end of it, were to be taken together; that being ſo taken, they did not amount ſo much to an exception as a ſaving, the true meaning of which was, that *the rights of thoſe perſons who were under diſabilities, and of their heirs,*

*were ſaved as long as the diſabilities continued, and five years after, but no longer, therefore that the heir not being himſelf diſabled, was barred, unleſs he purſued his right within the five years after it accrued, by the death of his anceſtor dying under a diſability;* and conſequently, that the plaintiff in this caſe was prevented by the fine from recovering the lands in queſtion.

Doe *ex dim.* Lee Compere, *v.* Hicks *et al.* Mic. Ter. 38 Geo. 3. B R. 7 *Ter. Rep.* 433

Where a tenant for life levies a fine, though it is no bar to thoſe in remainder, yet the remainder-man muſt make an entry before he can maintain an ejectment.—In ejectment for a manor, meſſuages, and land in the parish of Winchcombe, in the county of Glouceſter, the declaration contained two counts, one laying the demiſe on the 25th of March, 1794, the other on the 3d of June, 1797. A general verdict was taken for the leſſor of the plaintiff at the trial; and *a new trial was moved for, and a rule to ſhew cauſe obtained on two grounds. The ſecond*, which is only material to be noticed in this place (and which went to the firſt count only), was, that while the premiſes were in the poſſeſſion of *Anthony Compere* (brother of the deviſor), as tenant for life under the ſame will, under whom the defendants claimed, he levied a fine, and the leſſor of the plaintiff whoſe right of entry was not thereby bound, not having made an actual entry before the 2d of June laſt, could not recover upon the firſt demiſe which was antecedent to that time.—Ld Kenyon, Ch. J. ſaid, that on this point he was inclined to yield to the defendant's objection; but that it was unneceſſary to diſcuſs it in this caſe, as the plaintiff was, at all events, entitled to a verdict on the ſecond count; and if the plaintiff were entitled to the meſne profits antecedent to the day of the demiſe laid in that count, he might recover them, notwithſtanding this, by proving his title before that period (1).

Lee Compere *v.* Hicks, *et al.* Tr. Ter. 38 Geo. 3. B R. 7 *Ter. Rep.* 727

And as an actual entry is neceſſary to avoid a fine, the party ſo avoiding it cannot recover the meſne profits that accrued before ſuch entry. [Alſo if a declaration in treſpaſs contain two counts, and the defendant plead to one, and ſuffer judgment by default on another, and, on the trial of the firſt, the plaintiff only prove one act of treſpaſs, which is covered by the ſecond count, he is not entitled to a verdict on the firſt count.]—This was an action of treſpaſs for meſne profits. The firſt count in the declaration, ſtated the entry and expulſion on the 25th of March, 1794; the ſecond was exactly ſimilar to the firſt, except that it ſtated the entry and expulſion on the 3d of June, 1797. To the firſt count, the defendant pleaded the general iſſue; on the ſecond, he ſuffered judgment to go by default. The venire was awarded, as well to try the iſſue joined on the firſt count, as to aſſeſs

(1) See the other point made in this caſe, under the title Uses and Trusts.

damages

damages on the laſt. On the trial, the jury found the value of the meſne profits from the 25th of March, 1794, to the 2d of June, 1797, to be 1025l. 15s. and the value of the meſne profits, from the 2d of June to the 30th of January, 1798, to be 212l. 2s. and the coſts of the writ of poſſeſſion, 8l. 12s. And a ſpecial caſe was reſerved for the opinion of this Court. The facts were ſhortly as follows: *Anthony Compere*, who was only tenant for life of the premiſes in queſtion, levied a fine in Michaelmas term, 14 *Geo.* 2. the uſes whereof were declared to enure to the ſaid *Anthony Compere*, in fee. When this fine was levied, the premiſes ſtood limited in remainder, unto *Anthony Compere*, the father of the plaintiff, for life; remainder to truſtees, then to the firſt and other ſons in tail-male.—*Anthony Compere*, who levied the fine, and was only tenant for life, made his will, and died on the 11th of October, 1764. The defendant claimed to be entitled under his will.—*Anthony Compere*, the father of the plaintiff, died on the 19th of March, 1794, leaving the plaintiff, the ſaid *Lee Compere*, his eldeſt ſon. On the 2d of June, 1797, the plaintiff, *Lee Compere*, made an actual entry into the premiſes for the purpoſe of avoiding the fine, levied by *Anthony Compere*, in Michaelmas term, 14 *G.* 2. and immediately afterwards brought an ejectment in the court of King's Bench for recovery thereof; the declaration in ejectment contained two counts, in one of which the demiſe was laid on the 3d of June, 1797, and in the other on the 25th day of March, 1794.—On the trial of the ejectment, a verdict was given for the plaintiff, and entered on that count only in which the demiſe was laid on the 3d of June, 1797; final judgment was ſigned, and a writ of poſſeſſion executed. Whereupon this action was brought for the recovery of the meſne profits.—THE QUESTIONS intended to be ſubmitted to the Court, were, FIRST, Whether the fine levied by *Anthony Compere*, had any operation? If it had, SECONDLY, Whether the plaintiff, having made an actual entry to avoid the fine, is not entitled to the meſne profits before the actual entry made by him? And ſuppoſing him not to be ſo entitled, then, THIRDLY, Whether the value of the meſne profits from the 2d day of June, 1797, and the coſts of the writ of poſſeſſion, or either of them, can be recovered on the firſt count of the declaration, to which the defendants pleaded not guilty, or ought to be aſſeſſed as damages on the laſt count, upon which judgment was ſuffered by default?—Lord KENYON, Ch. J. On the principal queſtion in this caſe I have no doubt. It was decided (whether rightly ſo or not, I will not now enquire), early in this century, in 1703, by all the judges, except Mr. Baron *Price*, that there muſt be an actual entry to avoid a fine, and that an ejectment cannot be brought until ſuch entry has been made; and under the ſtat. 4 and 5 *An.* c. 16. ſ. 16. the

the action muſt be brought within a year after the entry is made. Now an action of treſpaſs ſtands preciſely on the ſame footing as an ejectment for this purpoſe; and the plaintiff could not treat the defendant as a treſpaſſer until he had himſelf made an entry on the land. It is ſaid, however, that it is unreaſonable that the plaintiff ſhould loſe the rents and profits of this eſtate in the interval, between the time when his right accrued, and the ſubſequent entry; and it has been contended that, becauſe a court of equity would give relief in ſuch a caſe, the plaintiff is entitled to the ſame relief in a court of law: but that concluſion by no means follows. There is a caſe in the books, in which the tenant for life having cut down timber and died, Lord Chancellor *Cowper* decreed relief againſt his executors in favour of the remainder-man, and yet the latter could not (1) have maintained an action at law againſt the executors of the tenant for life, for *actio perſonalis moritur cum perſonâ*. We cannot conſider whether or not a court of equity would give relief in ſuch a caſe as this: it is ſufficient for us, ſitting in a court of law, to ſay, that the defendant was in ſuch a ſituation, that the fine protected him, not only from an ejectment, but from every action of treſpaſs until the entry was made to avoid the fine. In the caſe of *Berrington* v. *Parkhurſt*, as reported in *Andrews*, *Andr.* 136. Lord *Hardwicke* ſaid, that in the caſe of a fine, the party has no title before an entry, not on account of the ſtat. *Hen.* 7. but on account of the puiſſance of a fine at common law. This fine did not work a diſcontinuance; it was ſo holden in *Stephens* v. *Britridge*, 1 Lev. 36. But a fine has a certain operation (which I will not attempt to deſcribe; nor diſcuſs the queſtion reſpecting the difference between a diſcontinuance and diveſting of the eſtate), which in the opinion of all the judges (except Mr. *B. Price*), makes it neceſſary that an actual entry ſhould be made to avoid it. With reſpect to the other point; as there was a judgment by default on one count, on which the plaintiff might have recovered all that he is entitled to, he ought in reaſon to bear the fruitleſs expence of the trial on the firſt count. The damages therefore, muſt be aſſeſſed on the ſecond count, and the plaintiff muſt pay the coſts of the trial that have been unneceſſarily incurred.—Ashhurst, J. It is a point very well ſettled, that an actual entry is neceſſary to avoid a fine; but the party cannot be ſaid to have been in poſſeſſion before he makes ſuch entry. Then the plaintiff not having been in poſſeſſion before entry, he cannot recover the meſne profits that accrued before.—Grose, J. and Lawrence, J. agreed on both points.—*Per Curiam:* Verdict to be entered up for the defendant on

(1) But ſee 3 *Atk.* 737.

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the firſt count; and damages to be entered upon the ſecond count for 220l. 14s.

A bill filed in Chancery is no claim to avoid a fine.—In a trial at bar in ejectment, it was inſiſted for the plaintiff, 1ſt, That both the fine and poſſeſſion of the eſtate were fraudulent, and therefore void. But of ſuch fraud there was no degree of evidence offered. 2dly, That a bill in Chancery had been filed, within the time of limitation, which was equivalent to a legal claim.—BUT BY DE GREY, Ch. J. At the common law, according to *Bracton*, a man might claim againſt a fine at any time before judgment; but *Fleta*, who wrote after 18 *Edw.* 1. refers to the year and day mentioned by the ſtatute of that year. At that time, as appears from 2 *Inſt.* 518, there were three ways of putting in a claim ſo as to avoid a fine.—1ſt, By *præcipe quod reddat*, or bringing a real action. 2dly, By entering the party's claim on the record at the foot of the fine; which leads to an obſervation that there is a miſtake in the Engliſh tranſlation of the ſtatute of 18 *Ed.* 1. ſt. 5. called *Modus levandi fines*, in the laſt ſection, "if they make "not their claim of their action within a year and a day by "the county;" as if the original had been "*ſils ne mettront* "*lour claime de lour action pur le pays*" as it is printed in 2 *Inſt.* 511. whereas, in the later editions of the ſtatute corrected by the roll, it is *ſur le pie*, upon the foot of the fine. 3dly, By an actual entry on the lands; or, if that was impracticable, then by what was eſteemed equivalent, *viz.* continual claim. The ſtatute of 34 *Ed.* 3. c. 16. took away the bar of non-claim entirely, and left the parties at liberty at any time to falſify the fine. But the ſtatute of 4 *Hen.* 7. reſtored the doctrine of non-claim, though in ſomewhat a different ſhape. There is now no ſuch thing as claiming on the foot of the fine. AS TO THE PRESENT QUESTION, *Whether a bill in Chancery be a claim under the ſtatute of Hen.* 7. (which requires it to be by way of action or lawful entry), moſt clearly it is not within the letter of it. A bill in equity is no action. Nor is the queſtion a new one; *Catlin*, Ch. J. in 16 *Eliz.* lays it down, "that a claim to avoid a fine by bill in the Chancery is not ſufficient, but it muſt be by an action." *Dalis.* 116. The true rule is, that the claim muſt be of ſuch a nature as correſponds with the eſtate. And therefore no entry by a *ceſtuy que truſt*, no claim or other legal act, is ſufficient to avoid a fine, or ſuſpend the bar by non-claim, in a fine levied of a truſt eſtate, but it muſt be by bill in Chancery, 1 *Ch. Ca.* 268, 278. 2 *Ch. Rep.* 126. Though if you ſue for relief againſt fraud in the conveyance of a legal eſtate, a fine and non-claim is a bar in the Court of Chancery, 1 *Jones*, 416.—PER TOT CUR. Nonſuit.

Glumdalclitch on the demiſe of Naunton *v.* Leman, Ea. Ter. 15 Geo. 3. C B. 2 *Black.* 993.

The return of the writ of covenant in a fine was refuſed to be amended, the deed to lead the uſes being colourable, and the fine

Lindſay *v.* Gray and Wife, Ea Ter. 15 Geo. 3. C.B. 2 *Black.* 1013.

fine taken from a dying woman.—It was moved (on behalf of a purchaſer under a fine) to amend the return of the writ of covenant, from the firſt return of Trinity term to the laſt return of Eaſter term, 1774. 14 *Geo.* 3.—On the 30th of May, being the eſſoign-day of Trinity term, the concord was carried to the Cuſtitors' office, with inſtructions to make out a writ of covenant returnable in Eaſter term. The cuſtitor accordingly teſted the writ 29th March, the day preceding the *dedimus*, but made it returnable on the morrow of the Holy Trinity, inſtead of the morrow of the aſcenſion. And it was inſiſted, that this was a miſpriſion of the officer, and amendable by virtue of the ſtatute of *Hen.* 6. *Harneſs* and *Micklethwayte*, 1 Barnes. Alſo *Cook.* 127. and *Henzell* v. *Lodge*. 3 *Wilſ.* 154. and vol. I. p. 584. *ſupra*, were cited.—But the Court, apprehending that this was an unfair proceeding upon the face of it, the deed of uſes being colourable, and the fine itſelf taken from a dying woman in prejudice of her own ſon, and in favour of her huſband, refuſed to lend it any aſſiſtance, and therefore denied a rule to ſhew cauſe.—But gave no opinion as to the propriety of ſuch an amendment in a fair caſe.

Heath *v.* Sir John Eardley Wilmot *et al.* Mic. Ter. 11 Geo 3. C.B. 2 *Black.* 778.

The term of a fine is not amendable.—It was moved to amend a fine of Trinity term, 1770, and make it as of Michaelmas term, purſuant to a deed to declare the uſes, dated the 27th of September, 1770. BUT THE COURT thought this was making a new fine, inſtead of amending the old one; as the teſte of the writ of covenant, and every ſubſequent preceding, muſt be altered: and, therefore, as no precedents could be ſhewn of altering the term of a fine, and the parties were all living, and might eaſily ſuffer another, they refuſed the motion.

Robert Dixon *v.* Lawſon, *et ux.* Ea. Ter. 12 Geo. 3. C.B. 2 *Black.* 816.

Nor will the Court amend a fine by a change of the chriſtian name of a party.—It was moved to alter the name of the plaintiff from *Robert* to *John*, on an affidavit that *John Dixon* was the party meant, who had purchaſed a part of the eſtate, and that no deed to declare the uſes of this fine had yet been executed. BUT THE COURT thought that this was equivalent to a new fine, and refuſed the motion.

## RECOVERIES.

Perkins *ex. dim.* of Vowe *v.* Sewell, Ea. Ter. 8 Geo. 3 B R. 1 *Black. Rep.* 654 reported alſo under the names of Perkins *et. al ex dimiſ* Vowle *et al. v.* Sewell

An eſtate tail with reverſion to the king in fee, muſt be clearly of the gift or proviſion of the king, to be protected by ſtat. 34 *Hen.* 8. c. 20. from being barred by a common recovery.—Upon a ſpecial verdict in ejectment from Cheſter.—As to part of the premiſes——The jury found (amongſt other things) that *William Dexter*, being ſeiſed in fee, enfeoffed *Henry* Earl of Derby, afterwards king *H.* 4. and his heirs

heirs for ever. That *H.* 4., when king, by letters patent under the ſeal of the duchy of Lancaſter (reciting that *Margaret*, the grand-daughter and heir of *William Dexter*, had repreſented "that *Dexter* was dead, and that the manor "remained in the hands of the crown," and expreſſing "that the king was willing to do that which law and equity, "good faith and good conſcience, required"), granted the manor to one *Mitton*, and the ſaid *Margaret* his wife; to hold to the ſaid *Mitton* and *Margaret* his wife, and the heirs of the ſaid *Margaret*, of the duchy of Lancaſter; and if the ſaid *Margaret* ſhould die without heirs, then to revert to the king and his heirs.—Then the ſpecial verdict deduced a long title: but it is not material to ſpecify the particulars; as the only queſtion was—"Whether the entail created by the letters "patent of *Hen.* 4. with reverſion to the king in fee, was, "under all its circumſtances, ſuch an eſtate tail as was pro-"tected from being barred by a common recovery by virtue "of the ſtatute 34 *Hen.* 8. c. 20."—It was twice very elaborately argued. AND THE COURT were of opinion, "That the grant was neither a gift nor a reward for ſervices; "but made as an act of juſtice, in execution of ſome ſecret "truſt or confidence; and therefore not within either the "preamble, or the enacting clauſes of that ſtatute."—And judgment was given for the plaintiff.—On the argument for the plaintiff it was inſiſted, That no eſtate is intended to be protected by this ſtatute, but ſuch as has been given or provided by the king, in reward of ſome ſpecial ſervices; becauſe the preamble to the act ſpeaks only of eſtates granted upon ſuch conſiderations.—To this, it was anſwered for the defendant:—1. That, if the words of an enacting clauſe are wider and more extenſive than the preamble, the preamble ſhall not narrow and confine them: That, though the principal purview of the act is to protect ſuch eſtates tail as are granted for ſervices done; yet that is not the only reaſon.—2. That an entail, which had laſted 360 years unbarred, under the protection of this ſtatute, ought not now to be ſhaken, by preſumptions and conjectures.—LORD MANSFIELD, CH. J. It is certain, that the preamble of a ſtatute cannot reſtrain the enacting part of it, where the enacting part is clearly larger than the preamble. But in this caſe, the eſtates mentioned in the enacting part clearly refer to thoſe in the preamble by the word ſuch, which runs through the whole. It muſt, therefore, be admitted, that, in order to obtain the protection of the ſtatute of *Hen.* 8. the eſtate tail muſt be of the gift or proviſion of the king, by way of reward. As for the ſervices, which are the conſideration of ſuch gift; theſe muſt, at a diſtance of time, be preſumed, and need not be proved. To take it out of the ſtatute, you muſt ſhew that it is not of the gift, or proviſion of the king. And, in the preſent caſe, it is plainly

*et al.* Ea. Ter. 8 Geo. 3. B. R. 4 *Burr.* 2223.

plainly not ſo, upon the face of it. The petition is founded upon no other conſideration, than that *Elizabeth Mitton* was couſin and heir of *Dexter*, who enfeoffed the Earl of Derby. No merits are mentioned; notwithſtanding the ſtatute of 4 *Hen.* 4. c. 4. was then recent. The king himſelf ſtates, that he was bound to make the grant by law, good faith, and conſcience. What the circumſtances of fact were, cannot now be diſcovered; whether a defeaſance, a condition, or an uſe, or any thing elſe: nor is it material to know. It is enough, that the king has recited generally, that he was bound to do it. It cannot therefore be a gift. As to the objection, that the king granted only a particular eſtate, and kept back the fee; that might be all he was bound to do. Nor can we reaſon very concluſively, from the conduct of ſuch a prince as *Henry* the Fourth. He might poſſibly do only half juſtice. Such things have happened in later times. Lord *Angleſey*, after the reſtoration, was obliged to reſtore the eſtates he had got during the rebellion in Ireland: yet many of the poor owners were glad to compound, and take leaſes for 99 years, inſtead of the fee. Upon the whole, as the eſtate was not of the king's gift, I think it not within the protection of the ſtatute, and therefore the recovery is good.—*Yates*, J. The Court will not ſtretch, to enlarge the interpretation of a ſtatute, which prohibits the natural right of alienation by tenant in tail.—*Aſton* and *Willes*, Juſtices, of the ſame opinion.

Driver *ex dim.* Edgar *v.* Edgar, Hil. Ter. 16 Geo. 3. B R. *Cowp.* 379.

The teſtator, *Devereux Edgar*, deviſed unto his daughter *Mary Edgar*, all that his farm or eſtate, called, &c. to hold the ſame from and after the death of his wife, to the ſaid *Mary* his daughter, *and to the heirs of her body*, lawfully to be begotten. But he declared that, in caſe his ſaid daughter *Mary* ſhould happen to die, or depart this life, ſingle, married, or a widow, *not leaving children or child* living at her deceaſe, lawfully begotten, that then the eſtate given her by his will *ſhould be entirely void, as to inheritance of heirs*, and of none effect: and the eſtate, ſo given her, ſhould deſcend and go to his heir male, and his heirs male.—*Mary Edgar*, the deviſee, in Hilary term, 1774, ſuffered a common recovery of the premiſes in queſtion, the uſes of which recovery were to herſelf in fee. THE QUESTION was, Whether the recovery ſuffered by *Mary Edgar* was ſufficient to bar the leſſor of the plaintiff? PER CURIAM: The validity of the recovery depends upon whether *Mary* was tenant in tail, or tenant for life only; and it is neceſſary for the plaintiff to ſupport, that at the death of the teſtator, ſhe was (during her own life) tenant for life only. Now, the eſtate is given to her and *the heirs of her body*, which is an eſtate tail: nevertheleſs, the intention of the teſtator may reſtrain that eſtate of inheritance, and confine it to an eſtate for life only: it is inſiſted, that it was the intention of the teſtator, that the eſtate of inheritance

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ſhould be reſtrained: but has the teſtator ſaid it ſhould be ſo during her life? No, he has only reſtrained it upon future contingencies. The firſt is, the event of her own death; but till that contingency happens, the inheritance is in her. The ſecond is, upon her leaving no children.—If ſhe was only tenant for life under this deviſe, there is an end of the title upon the ſecond limitation; becauſe in that caſe it is a limitation, upon a contingent remainder, which is void.—Further, ſuppoſing her tenant for life only, by ſuffering this common recovery, ſhe has committed a forfeiture: Who is to enter? The next heir male. Suppoſe ſhe had lived, and had a ſon afterwards; the next heir male muſt take place, contrary to the clear intention of the teſtator, in that caſe.—It is manifeſt that the intention of the teſtator was to prevent a common recovery being ſuffered; but where a teſtator intends that, which by law he cannot do, the law will not allow his intention to take effect: if, therefore, ſhe was tenant in tail to the hour of her death, nothing is ſo clear as that all conditions limited upon ſuch eſtate tail, are avoided by the common recovery which has been ſuffered. And we are of opinion that *Mary* had an eſtate tail.

A common recovery ſuffered by a remainder-man in tail, is not ſufficient, unleſs the life eſtate appear to have been duly ſurrendered, in order to make a perfect tenant to the *præcipe*, and ſuch ſurrender cannot be preſumed.—Upon a motion for a new trial, made on the part of the defendant, upon the foot of a miſdirection given to the jury by the judge who tried the cauſe; (upon which direction of the judge, the jury had found a verdict for the plaintiff:) the caſe appeared, upon the report of Mr. Juſt. *Noel* (the judge who tried the cauſe), to be as follows, *viz.* Sir *Thomas Bridges*, being ſeiſed in fee of the manor and demeſne lands of Keynſham in Somerſetſhire, and of ſeveral other lands in Keynſham aforeſaid, and alſo of ſeveral eſtates in various other places, made a ſettlement of all theſe eſtates, at the time of the marriage of his eldeſt ſon Mr. *Harry Bridges* with his firſt wife the Lady *Diana Hollis*; Sir *Thomas* having at that time five ſons living, *viz.* this Mr. *Harry Bridges*, *Edward Bridges*, *George Bridges*, and two younger ſons.—The ſettlement was to the uſe of Sir *Thomas* himſelf for life, as to part; with remainder to his eldeſt ſon *Harry*, for life; remainder to the heirs male of *Harry*'s body by that firſt marriage; remainder to the heirs male of his body by any other marriage; remainder to Sir *Thomas*'s ſecond ſon, *Edward Bridges*, in ſtrict ſettlement; remainder to *George Bridges*, for life; remainder to *George*, in tail male; with remainder to the right heirs of Sir *Thomas*. The reſt of the eſtate was ſettled to the ſame uſes, with this difference only, *viz.* that there was no life-eſtate to Sir *Thomas* himſelf therein; but Mr. *Harry Bridges*'s eſtate for life

Goodtitle *ex dimiſſ.* Bridges *et al. v.* Duke of Chandos, Mic. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1065.

life took place immediately. There was a power given, by this ſettlement, to Mr. *Harry Bridges*, to make a jointure upon a ſecond wife.—Mr. *Harry Bridges* had no iſſue by Lady *Diana:* but, during her life, he had an illegitimate ſon, named *James Bridges*, by another woman. After the death of Lady *Diana*, and after the birth of *James*, Mr. *Harry Bridges* (in his old age) married a young woman, (of the name of *Freeman*;) upon whom, purſuant to the power given him, he ſettled about 280l. *per annum* (being part of the demeſne lands of Keynſham,) for her life: and ſhe ſurvived him, and lived til 1759.—Mr. *Harry Bridges* having no iſſue by this laſt wife, nor by his former, and being reverſioner or remainder-man in fee (as before mentioned) of the whole family-eſtate; and his brother *Edward*, and his two youngeſt brothers, being all dead without iſſue; and his nephew *George Rodney Bridges* (the only ſon of his brother *George*), having no child by his lady; the ſaid Mr. *Harry Bridges* did, in his life-time, by bargain and ſale enrolled, grant this his reverſion of the whole ſettled eſtate, to his natural ſon *James Bridges*, the leſſor of the plaintiff.—But after the death of *Harry*, and *during the life* of his widow (who was tenant for life of this 280l. *per ann.* part of the demeſne lands of Keynſham), the ſaid *George Rodney Bridges* (the only ſon of *George* then deceaſed) being tenant in tail in poſſeſſion of all the *reſt* of the eſtate, except that part which was ſettled upon the widow (who was then living, and in poſſeſſion of that part); but being tenant in tail in *remainder* only, of *that* part whereof the ſaid widow was in poſſeſſion as tenant for life; ſuffered a recovery, in the year 1728, of the whole ſettled eſtate; uſing (at leaſt) ſuch deſcriptions as might be ſufficient to include *all* the eſtate that lay in Keynſham, under the general deſcription of that part of the eſtate: after the ſuffering of which recovery, he ſettled the whole eſtate included in the recovery upon the Duke of *Chandos*; and then died. The duke, upon the death of the ſaid Mr. *George Rodney Bridges*, came into immediate poſſeſſion of all the reſt of the eſtate, except that part which the widow of *Harry* was in poſſeſſion of for her life as aforeſaid: and, upon her death, in 1759, he took poſſeſſion of that part alſo.—Whereupon, Mr. *James Bridges*, the bargainee of the reverſion in fee, which was granted to him by his father *Harry* as aforeſaid, brought this ejectment againſt the duke, for that part of the Keynſham-eſtate which *Harry*'s widow died in poſſeſſion of; ſuppoſing that Mr. *George Rodney Bridges* could have no power to ſettle *that* part upon the duke, whatever power he might have over the reſt of the eſtate (of which he was tenant in tail in poſſeſſion, when he ſuffered the recovery).—The duke, at the trial, would have defended his title, by ſetting up this common recovery ſuffered *G. R. B.* the remainder-man in tail; which

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he produced and proved; but the duke being unable to give any ſort of evidence of an actual *ſurrender* of the widow's life-eſtate (which the plaintiff urged to be neceſſary, in order to enable the tenant in tail in remainder to make a good tenant to the *præcipe*), the counſel for the defendant (the Duke of *Chandos*) inſiſted at the trial, "That a ſurrender of "the life-eſtate ought, after ſo long a time, to be *preſumed*; "even although they ſhould give no evidence whatſoever re- "lating to any ſuch ſurrender."—BUT MR. JUSTICE NOEL was of opinion, "That a ſurrender by the tenant for life "could *not* be preſumed; when no evidence at all had been "given to render it in the leaſt probable; and when the poſ- "ſeſſion had not gone along with the recovery, but continued "in the tenant for life till the time of bringing the eject- "ment." And accordingly, he directed the jury to find for the plaintiff: which they did.—Upon this miſdirection, as the duke's counſel called it, they moved for a new trial, and obtained a rule to ſhew cauſe. And the point was very fully argued in this court.—LORD MANSFIELD, Ch. J. There are two ſorts of preſumptions: one, a preſumption of law, not to be contradicted; the other, a ſpecies of evidence; which (latter) muſt have a ground to ſtand upon, ſomething from whence it is to ariſe.—It is now fully ſettled and eſtabliſhed, that a tenant in tail may, if he pleaſes, either turn his eſtate tail into a fee, or alienate it for his own benefit, by duly ſuffering a common recovery.—But he muſt have a *ſufficient* eſtate and power, to qualify him to ſuffer ſuch recovery.—He muſt either be the tenant in tail in poſſeſſion; or he muſt have the concurrence of the freeholder who claims under the ſame ſettlements.—This principle is adhered to, by the ſtatute of 14 *G.* 2. c. 20.—The tenant for life, whoſe conſent is neceſſary to the tenant in tail in remainder, to enable him to cut off the entail, is not the leſſee of the land under a beneficial leaſe; but the original tenant for life claiming under the family-ſettlement, and having a life-eſtate ſettled upon him, prior (in order of ſucceſſion) to the other's remainder in tail.—Where a perſon has power to ſuffer a recovery and thereby bar the eſtate tail, *omnia præſumuntur ritè et ſolemniter acta*, until the contrary appears: and it is reaſonable that it ſhould be ſo. But if the contrary ſhall appear, there is an end of the preſumption. This was the caſe of the Earl of *Suffolk*'s recovery, upon a trial at bar in this court in Eaſter term, 1747 (1). There, the contrary did appear: and the preſumption was thereby deſtroyed. There were blundering deeds actually

(1) *Keene, ex dimiſſ.* Lady *Portſmouth*, Mr. *Whitwell*, and Lord *Hervey*, v. Earl of *Effingham*, 20 May, 1747.

produced, which appeared clearly to be wrong; and it was manifeſt, upon the evidence diſcloſed, that there was *no* good tenant to the *præcipe*. It was therefore impoſſible for the Court, in that caſe, to preſume, "that there was one."—But if a man has power to ſuffer a recovery, that is a ſolid and reaſonable ground for preſuming, "that all was done rightly "and regularly;" unleſs ſomething to the contrary ſhall appear.—So, where the freeholder is a truſtee for the tenant in tail himſelf, and *under his power and direction*. It is a reaſonable and juſt cauſe for preſuming, "that every thing was re-"gularly tranſacted."—So, where the perſon or perſons intereſted to object againſt the validity of a recovery, have had opportunity to make objections to it, but inſtead of doing ſo, have acquieſced under it, and not at all diſputed its validity; this is a preſumption; "that all was right and regular," foraſmuch as they never did object to it.—But there can be no preſumption of the nature of evidence, in any caſe, without ſomething from whence to make it; ſome ground to found the preſumption upon. Whereas here is abſolutely nothing from whence to preſume; no ſort of ground to build any preſumption upon. The ſingle pretence to any the leaſt ground of preſumption in the preſent caſe, can be only this, "that no "tenant in tail in remainder would ſuffer a recovery, without "firſt getting a ſurrender of the life-eſtate, in order to make "it valid and effectual."—But even that ground (ſlight as it is) will not hold in the caſe now before us: for it does not at all appear, upon the report of the judge, that Mr. *George Bridges* (who ſuffered the recovery in queſtion) had the leaſt intention whatſoever to include thoſe *particular* lands, in the recovery which he ſuffered, and had a full power in himſelf alone, to ſuffer, of all the reſt of the eſtate, whereof he was at that time tenant in tail in poſſeſſion. He was then in poſſeſſion of the manor of Keynſham, and of *other* lands in Keynſham ſufficient to anſwer the general deſcriptions uſed in the recovery, relating to ſuch part of the recovered eſtate as lay in Keynſham. He muſt probably know, or have been informed by his counſel or agents, that he could have no ſuch power over the ſettled part, without obtaining a ſurrender of the life-eſtate. He might perhaps be ſatisfied, that he could not obtain a ſurrender of the life-eſtate in theſe ſettled lands: or, he might have attempted to obtain it, and failed in ſuch attempt.—If the mere ſingle fact of the remainder-man in tail ſuffering a recovery, was alone ſufficient to ground a preſumption of a ſurrender of the life-eſtate, it would be in the power of every remainder-man in tail, to bar the eſtate tail, notwithſtanding that the tenant for life ſhould abſolutely refuſe to join with him in ſuffering a recovery. Therefore it is neceſſary that there ſhould be facts and circumſtances to ground a preſumption of ſuch a ſurrender upon.—Whereas, in the

preſent

preſent caſe, it is ſo far from being reaſonable to preſume, "that there was ſuch a ſurrender from the jointreſs, in order "to bar the eſtate tail in remainder, and give the power of "diſpoſal to *George* in prejudice to *James Bridges*;" that there are, on the contrary, many reaſons to induce a ſuſpicion, "that there was not ſuch a ſurrender." She might have more regard for *James* than for *George*; ſhe might have a friendſhip for *James*, and a diſlike to *George*; ſhe might think it wrong or unkind to hurt the reverſioner; or even whim and peeviſhneſs might prevent her from interfering: there is no defining the various reaſons ſhe might have, to hinder her from ſurrendering her life-eſtate for ſuch a purpoſe.—Mr. *George Bridges* being only tenant in tail in remainder, and the life-eſtate under the ſame ſettlement ſtill ſubſiſting, at the time of his ſuffering the recovery; it is clear that he had *no power* to alien or to bar: and there is nothing from whence to preſume a ſurrender of the life-eſtate, to enable him to do ſo.—If he had a power to bar or alien, then indeed no preſumption could have been too large; in order to prevent ſlips in legal forms and methods of conveyance, and effectuate the intention of a perſon who had a legal right to do ſuch an act.—The act of 14 *G.* 2. c. 20. means to preſerve the ſame negative to perſons claiming under the family-ſettlement, as they had before.—And no argument can be drawn, in the preſent caſe, from length of time; becauſe the jointreſs died but in 1759; and the ejectment was inſtantly brought.—Upon the whole, there is no colour for objecting to the judge's direction.—Denison and Wilmot, Juſtices, concurred: and Mr. Juſt. Wilmot added, That he had no notion of a preſumption, without ſome facts or circumſtances to found it upon. This would be inferring ſomething ſeen, from ſomething not ſeen.—Length of time *alone* is nothing: the preſumption muſt ariſe from ſome facts or circumſtances ariſing within that time. —Per Curiam: Rule diſcharged.

At the ſitting of the Court the next morning, Lord Mansfield, Ch. J. mentioned this caſe again. He ſaid he had looked into his own notes of the caſe of *Warren*, on the demiſe of *Webb*, againſt *Greenville*, reported in 2 *Strange*, 1129. where the recovery was of 40 years ſtanding: and the Court did lay it down, in that caſe, "That after a recovery of 40 years ſtanding, "they would, without any other circumſtances, preſume a "conditional ſurrender to have been made by the tenant for "life;" and they relied upon 1 *Ventr.* 257. and Mr. *Pigott*'s book, pa. 41. But his Lordſhip obſerved, that there are other circumſtances, in the caſe in *Ventris*; and there is nothing in *Pigott*, to juſtify this general poſition. And he added, that in the caſe then at the bar, the Court did (as he had taken it down) admit as evidence the entry in an attorney's bill-book,

(1) 2 *Burr.* 1072.

where there was an expreſs charge *for drawing and engroſſing the ſurrender*, which was poſitive proof of an actual ſurrender (1).—He ſaid, he was rather more ſtrongly of opinion than he was yeſterday, "That in the preſent caſe, there is no "ground for a preſumption that there was any ſurrender by "the tenant for life." Here are two particular reaſons againſt making any ſuch preſumption. One is, that there does not appear to have been any intention in the remainder-man in tail, to ſuffer a recovery of theſe particular lands: the other is, that here was no poſſeſſion at all, under this recovery; but, on the contrary, the ejectment was brought, and the validity of the recovery put into litigation, immediately after the death of the tenant for life.—If the eldeſt ſon, who has a remainder in tail under a family-ſettlement, ſhould privately ſuffer a common recovery, and his father live many years afterwards; it might as well be argued, "that length of time from the date "of the recovery ſhould induce a preſumption that the father "ſurrendered his eſtate for life."—And his Lordſhip declared himſelf as clear, that if there had been a long poſſeſſion by the tenant in tail after the death of the tenant for life; though ſuch a poſſeſſion might be aſcribed to the entail; the preſumption ought to have been made, upon the ground of acquieſcence under it, and the probability ariſing therefrom, "that the parties *knew* that the recovery was not defective."—Rules of property ought (his Lordſhip ſaid) to be generally known, and not to be left upon looſe notes, which rather ſerve to confound principles, than to confirm them. He therefore propoſed to have a conference with all the judges upon this caſe: which propoſal did not ariſe, he ſaid, from any doubt about the matter; (for he was more confirmed in his opinion than he was yeſterday); but for the ſake of having ſo conſiderable a rule of property ſettled, and of rendering it notorious and public. For which purpoſe, he (at firſt) ordered it to ſtand over till next term: but afterwards, upon its being agreed by all the parties, that in Mr. *Greenville*'s caſe, there was a great number of years during which the tenant in tail had been in poſſeſſion after the death of the tenant for life: and upon the now defendant's counſel candidly declaring, "that they themſelves were fully ſatisfied with the preſent "opinion of the Court; he retracted his propoſal, and ſaid he would not trouble the judges with it, ſince the counſel were ſo candid as to acquieſce entirely in the opinion that the Court had already intimated.—His Lordſhip further added, That he would have it underſtood, that *poſſeſſion* of the tenant in tail, after the death of the tenant for life, does leave a ground of preſumption "that there was a ſurrender." But in the preſent caſe, here is *no* poſſeſſion after the death of the tenant for life: the ejectment was brought immediately.—Rule diſcharged.

(1) 2 *Bur.* 1072.

A ſecret

A ſecret feoffment under a naked poſſeſſion is not ſufficient to ſupport a common recovery by tenant in tail in remainder.—A ſpecial verdict in ejectment, ſtated, "That Sir Robert Atkyns, the elder, was on the 8th of June, 1669, ſeiſed in fee of the premiſes in queſtion, and being ſo ſeiſed on the 12th of June, 1669, made and executed three ſeveral indentures, by one of which, called the LESSER DEED, dated the 12th of June, 1669, made between Sir *Edward Atkyns*, Sir *Robert Atkyns* (ſon of Sir *Edward Atkyns*), and dame *Mary*, his wife, of the one part; and Sir *Edward Carteret* and *John Lowe*, Gent. of the other part: *it was witneſſed*, that *in conſideration of dame* Mary *releaſing a former jointure, and of a new proviſion to be made for her*, Sir *Robert* covenanted that he, Sir *Edward*, and dame *Mary*, would before the end of Michaelmas term then next enſuing, levy a fine of the premiſes TO THE USE of Sir *Robert* for life; remainder to the uſe of dame *Mary* for life for her jointure; remainder to Sir *Robert Atkyns*, ſon of Sir *Robert Atkyns* in tail male; remainder to the right heirs of Sir *Robert Atkyns*, the father, for ever.—The two other deeds were a leaſe and releaſe, dated the 11th and 12th of June, 1669, reſpectively; by the releaſe (called THE GREATER DEED) made between Sir *Edward Atkyns*, Sir *Robert Atkyns*, the father, and dame *Mary* his wife, *Phillip Sheppard*, Eſq. Sir *Clement Farnham*, and *Edward Atkyns*, of the firſt part; Sir *George Carteret*, Sir *Edward Carteret*, *John Lowe*, Lord *Hinchenbrooke*, Sir *Philip Carteret*, and *Edward Swift*, Eſq. of the ſecond part; Sir *Robert Atkyns*, the ſon, and *Lovis Carteret*, daughter of Sir *George Carteret*, of the third part: *it was witneſſed* that, in conſideration of a marriage thentofore had between Sir *Robert Atkyns*, the father, and dame *Mary*, his wife, and alſo of a marriage intended to be had between Sir *Robert Atkyns*, the ſon, and *Lovis Carteret*, &c. &c. Sir *Edward Atkyns*, and Sir *Robert*, the father, *releaſed* THE PREMISES IN QUESTION to Sir *Edward Carteret* and *John Lowe*, TO THE USES OF THE LESSER DEED, with a proviſo that Sir *Robert Atkyns*, the father, Sir *Robert Atkyns*, the ſon, and *Lovis Carteret*, reſpectively, when in poſſeſſion of the freehold, might make leaſes for three lives, or 21 years, reſerving the uſual rents; with a further proviſo, that Sir *Robert Atkyns*, the father, might appoint the manor of L. S. U. S. and S. W. as a jointure for any future wife; with a like power to Sir *Robert*, the ſon, in reſpect of the lands ſettled in jointure upon *Lovis Carteret*: and Sir *Robert*, the father, covenant to levy a fine to the uſes before mentioned.—That in Trinity term, 1669, a fine was levied of *the premiſes in queſtion*.—That on the 6th of July, 1669, Sir *Robert*, the ſon, married *Lovis Carteret*.—That dame *Mary* died on the 2d of March, 1680.—That afterwards Sir *Robert Atkyns*, the father, on the 26th of April, 1781, in conſideration

Doe, *ex dim.* Atkyns, *v.* Horde, *et al.* Mic. Ter. 18 Geo. 3. B. R. Cowp. 689.

of a marriage then intended to be had between him and Mrs. *Ann Dacres*, by indenture of that date, *aſſigned the premiſes in queſtion, in purſuance of his power*, to *Ann Dacres* for life, for her jointure, and married her on the 28th of April, 1681.—That by indenture of the 27th of April, 1681, between *Ann Dacres*, of the firſt part, Sir *Robert Atkyns*, the father, of the ſecond part, and Sir *Edward Atkyns*, reciting the indenture of the 26th of April, 1681, and the aſſignment of the premiſes therein mentioned; but, that *nevertheleſs it was agreed that only part of the ſaid premiſes was to be ſettled* on the ſaid *Ann* for her jointure, and the other part was to be reconveyed: it was witneſſed and declared, that the ſaid other part ſhould be, and was reconveyed to ſuch uſes as Sir *Robert* ſhould appoint.—On the 27th of May, 1708, Sir *Robert Atkyns*, *the father*, *made his will, and thereby deviſed the reverſion of the premiſes, after the eſtate tail created by the deed of the 12th of June*, 1669, to *John Tracy* (taking the name of *Atkyns*), in tail, and if he died without iſſue, then to *Ferdinando Tracy*, *the next younger ſon of John Tracy*, in tail, and ſo on to other younger ſons, with an ultimate reverſion to *Richard Atkyns*, eldeſt ſon of Sir *Edward Atkyns*; and on the 9th of Feb. 1709, died, ſeiſed of the premiſes in queſtion; whereupon dame *Ann*, his widow, entered on the ſame, claiming them for her jointure, and *was in poſſeſſion thereof*.—That by indenture of the 16th of May, 1770, Sir *Richard Atkyns* aſſigned the ſeveral terms in the deed of the 12th of June, 1699, to *Joſeph Walker*, in truſt for Sir *Robert Atkyns*, the ſon, and the heirs male of his body, by dame *Lovis*, his wife.—That dame *Ann being in poſſeſſion of the premiſes*, in Trinity term, 1710, *an ejectment was brought againſt her*, on the demiſes of Sir *Robert Atkyns*, the ſon, and *Joſeph Walker*, when a general verdict was found for the plaintiff, and judgment entered up for *Phillips*.—That *Sir Robert, the ſon, in purſuance of the ſaid judgment, entered into, and was in poſſeſſion of the premiſes*.—That *Phillips*, on the 1ſt of January, 1710, *ſurrendered the two terms*, mentioned in the declaration in ejectment to be demiſed to him, *to Sir* Robert Atkyns, *the ſon, then in poſſeſſion*.—That *on the 17th of January*, 1710, *Sir* Robert Atkyns, *the ſon, being ſo in poſſeſſion, and during the life-time of dame* Ann, *the widow, made a feoffment of the premiſes to* James Earle, *in fee*, which feoffment was declared to be *for docking, barring, and deſtroying*, ALL ESTATES TAIL, *uſes, reverſions, and remainders in the premiſes*, and for veſting the fee in Sir *Robert*, the ſon; to hold to *Earle*, to the intent and purpoſe that he might become perfect tenant of the freehold, in order to ſuffer a recovery, the uſe of the ſaid recovery to be to Sir *Robert Atkyns*, in fee.—That the livery of ſeiſin was on the 20th of January, 1710, given to *Earle*.—In Hiliary term, 9 *Ann*. 1710, a recovery was accordingly ſuffered, Sir *Robert Atkyns*, the ſon, and

*Lovis*

*Lewis*, his wife, being vouchees.—That on the 9th of November, 1711, Sir *Robert Atkyns*, the ſon, died without iſſue.—That in Hilary term, 10 *Ann.* an ejectment was brought againſt *Robert Atkyns*, Eſq. heir at law of Sir *Robert Atkyns*, the father, and of Sir *Robert Atkyns*, the ſon, on the ſeveral demiſes of dame *Ann*, and *Thomas Dacres*; and in Eaſter term, 1712, a general verdict was given for the plaintiff on both demiſes, and judgment entered up.—That immediately after dame *Ann* entered upon the premiſes, and continued in poſſeſſion thereof till the 9th of October, 1712, when ſhe died.—That *Robert Atkyns*, Eſq. then entered, and was poſſeſſed till the 16th of March, 1753, when he died *without male iſſue*, leaving *Ann*, the wife of *Thomas Horde*, and *Elizabeth*, the wife of *Edmond Chamberlayne* (the defendants), his only children and co-heirs at law.—Having in his life-time, by leaſe and releaſe of 30th and 31ſt of October, 1713, ſettled the premiſes upon himſelf, during the joint lives of himſelf and *Elizabeth*, his wife, with remainder to his firſt, and every other ſon in tail male; with remainder to all and every his daughter and daughters in tail male; reverſion in fee to himſelf.—*Elizabeth*, the wife of the ſaid *Robert Atkyns*, died the 8th of October, 1739.—That in Eaſter term, 2 *Geo.* 2. 1729, *Edmund Chamberlayne*, and *Elizabeth* his wife, levied a fine of a moiety of the premiſes in queſtion; and in Eaſter term, 24 *Geo.* 2. 1752, *Thomas Horde*, and his wife, levied a fine of the other moiety.—That *Ferdinando Tracy*, the third ſon of *John Tracy*, of Stanway, died on the 3d day of May, 1729, under age, and without iſſue male. *William*, a ſixth ſon, died on the 15th of May, 1729, without iſſue male. *Anthony*, a fourth ſon, died on the 29th of May, 1767. That *Robert*, the eldeſt ſon, died on the 28th of September, 1767, without iſſue male, in the life-time of *John Tracy*, the ſecond ſon, whereby the ſaid *John* became heir to his father. That on the 24th of June, 1770, *Thomas*, the fifth ſon, died without iſſue male, he being, at the death of *Robert*, the only younger ſon of his father. That on the 23d of July, 1773, *John* died without iſſue male. That *Richard Atkyns*, nephew of Sir *Robert Atkyns*, the elder, AND DEVISEE under his will, died in September, 1717, leaving *E. K. Atkyns*, his heir at law, who died on the 4th of July, 1743, leaving *Edward Atkyns*, his heir at law, who died on the 22d of February, 1765, leaving *Edward Atkyns*, the leſſor of the plaintiff, his heir at law. The jury then find that *Edward Atkyns*, the leſſor of the plaintiff, after the death of *Thomas*, the fifth ſon, entered on the premiſes, in the 2d count, and was ſeiſed; and being ſo ſeiſed, made the demiſe to the plaintiff, of the 2d of July, 1770, they then find his entry on the premiſes, in the fourth count, on the 11th of April, 1774, after the death of *John Atkyns*, the ſecond ſon, and the demiſe to the plaintiff, on the

13th of April, 1774, who entered on the ſame day, and was ejected by the defendants.

This caſe was twice argued. Theleſſor of the plaintiff's title aroſe under the will of Sir *Robert Atkyns*, the elder, *as deviſee of the ultimate reverſion in fee*, after the limitation of an eſtate in tail male, which determined in the year 1711, upon the death of Sir *Robert Atkyns*, the younger, without iſſue male. The defendants claimed as lineal deſcendants and heirs at law of Sir *Robert Atkyns*, the elder. AND THE QUESTION was, WHETHER THE COMMON RECOVERY SUFFERED IN THE YEAR 1710, BY SIR ROBERT ATKYNS, THE YOUNGER, IS A GOOD RECOVERY? If it was, it barred the leſſor of the plaintiff's right: but that depended upon theſe points, FIRST, Whether Sir *Robert Atkyns*, the younger, was, at the time of the recovery ſuffered, tenant in tail in poſſeſſion, or tenant in tail in remainder: AND SECONDLY, If he was tenant in tail in remainder only, whether there was a good tenant to the *præcipe?* As to the firſt queſtion, it was inſiſted, "That dame *Ann Atkyns*, "ſecond wife of Sir *Robert Atkyns*, the elder, had an eſtate for "life, under the deed of the 26th of April, 1681, purſuant "to the power contained in the great deed of the 12th of "June, 1669, and that ſhe did not join in any conveyance of "the freehold, ſo that there was no good tenant to the "*præcipe*:" in anſwer to this, it was ſaid, "That ſhe had no "eſtate for life, for that the deed called *the leſſer deed*, bearing "date likewiſe on the 12th of June, 1669, was executed "after *the greater deed* of the ſame date, and that therein "there is no mention made of ſuch power; and that the "power given to Sir *Robert Atkyns*, the father, in the "greater deed, was extinguiſhed by the fine in 1669."

ASTON, J. DELIVERED THE OPINION OF THE COURT. The priority of theſe deeds of the ſame date not being found, the Court muſt judge of that priority from all the circumſtances of the caſe, the nature of the tranſaction, and the internal evidence of the inſtruments themſelves: the little deed is declared to be made *in conſideration of dame* Mary *releaſing and acquitting a former jointure, and for the purpoſe of making a new proviſion for her, according to the covenants ſpecified in that deed*; what that former jointure was, does not appear; but the intention of the parties in this deed is manifeſt, that it was in order to facilitate the new family ſettlement. By dame *Mary*'s having thus releaſed and acquitted her former jointure, theſe lands were liable to the ſettlement that was to be made by the great deed, upon conſideration of the new marriage there ſpecified: the great deed makes no recital of this releaſe and acquittal by dame *Mary*, but it executes the covenant of the new jointure to be made to her, that is, by ſettling the very ſame premiſes on her as were ſettled by the little deed. It was therefore plainly a tranſaction of convenience and accommodation

commodation between the parties, for their mutual benefit. And it would be harſh, indeed, to conſtrue the little deed as made ſubſequent to the great deed, when the great deed carries the proviſions of the leſs into execution: but, by the contrary conſtruction, both deeds have their effect; and a conſtruction of that ſort ought to take place in all caſes, for the intent could never be, *uno flatu*, to create a proviſion by one deed, and to deſtroy it by the other. The fine levied compriſes all the premiſes in the greater deed; they are *partes ejuſdem negotii*, diſtinctly executed, and moſt probably for the convenience of the jointreſs, dame *Mary*; for ſhe had the cuſtody of one, and when ſhe died, it was placed amongſt the family writings. In addition to this, the ſubſequent acts done by Sir *Robert*, the father, ſtrongly prove that he conſidered the powers as ſubſiſting. WE *are therefore of opinion*, that the *little* deed muſt be conſtrued to have been firſt executed; that the power of jointuring under the great deed did ſubſiſt, and was well executed; and that dame *Ann* had an eſtate for life, in the premiſes under the deed in 1681: and it is found by the verdict, that ſhe entered and was in poſſeſſion. *If there was an eſtate for life in dame* Ann, *Sir* Robert Atkyns, *the younger, could only be tenant in tail in remainder, expectant upon the determination of her eſtate for life.*

THE NEXT QUESTION is, Whether there was a good tenant to the *præcipe?* The facts relative to this particular are, "That Sir *Robert Atkyns*, the younger, in purſuance of a "judgment in ejectment brought againſt dame *Ann Atkyns*, "and the tenant in poſſeſſion of the premiſes, Trin. term, "9 *Ann.* by *John Phillips*, upon the ſeveral demiſes of the "ſaid Sir *Robert* and *Joſeph Walker*, entered upon thoſe "premiſes." Upon the 1ſt of January, 1710, *John Phillips* ſurrendered both theſe terms to Sir *Robert Atkyns*, the younger; but it muſt be remembered that theſe were only fictitious terms; one of them granted by Sir *Robert Atkyns* himſelf; and therefore the recovery in ejectment, could not change the nature of Sir *Robert Atkyns*'s poſſeſſion. Sir *Robert Atkyns*, the ſon, being ſo in poſſeſſion, *makes a feoffment with the livery of ſeiſin to* James Earle *in fee, for the declared purpoſe and intent of making him a tenant to the præcipe.* In Hil. term, 9 *Ann.* a recovery was ſuffered of the premiſes, wherein, *John Holmden* was demandant; *James Earle*, tenant; and Sir *Robert Atkyns*, the younger, and *Lovis*, his wife, the vouchees. The validity of this recovery depends upon conſidering the effect of the judgment and poſſeſſion under the ejectment, and the nature of the ſubſequent feoffment to *James Earle*: it is ſaid that, if Sir *Robert*, the ſon, entered by wrong, he is a diſſeiſor: that *poſſeſſion only will ſupport* a feoffment; (to which point there are many authorities cited in 1 *Burr.* 92, 94.); and that the poſſeſſion itſelf, in this caſe, under

under the judgment in ejectment, was a diſſeiſin. SECONDLY, it is ſaid, if he came in by right, he would be in according to his title; that the poſſeſſion and title would then unite, and together would give him a power to ſuffer a recovery. TO THIS IT HAS BEEN ANSWERED, and we are of opinion, 1ſt, That the taking poſſeſſion under the judgment in ejectment, can never amount to a diſſeiſin of the freehold: for the definition of a diſſeiſin laid down by *Lit. Sec.* 279. is, *where a man entereth into any lands or tenements, where his entrance is not congeable, and ouſteth him who has the freehold.* So that every entry is not a diſſeiſin, unleſs there be likewiſe an *ouſter* of the freehold. *Littleton*, therefore, connects theſe two circumſtances together. So *Coke*, in his Commentary upon *Lit.* 153. ſays, "a diſſeiſin is the putting a man *out of ſeiſin*, "and ever implieth a wrong." But diſpoſſeſſion, or ejectment, is a putting out of poſſeſſion: and may be by right or by wrong; and again, "diſſeiſin is a perſonal treſpaſs, or "*tortious ouſter* of the ſeiſin."—Now we obſerve, that it is not in fact found, "that dame *Atkyns* was ever ouſted of the "freehold; or that Sir *Robert Atkyns*, the younger, was ever "ſeiſed of it:" the judgment in ejectment was a recovery of the poſſeſſion only, without prejudice to the right of thoſe in whom it might afterwards appear to be; that poſſeſſion, therefore, gave no more right to Sir *Robert Atkyns* than he had before, and he might have been turned out by any ſubſequent ejectment. He did not take a tortious fee under the judgment, nor could the ſheriff deliver it; for the words of the writ are only *habere facias poſſeſſionem*.—Sir *Robert Atkyns* had no right, at the time of the entry, to an eſtate tail in poſſeſſion; for the jointreſs had then an eſtate of freehold. The ejectment could recover nothing but the poſſeſſion. Verdict and judgment could give him no more; no freehold was recovered under it, but only the term; though, *if he really had a right of freehold in poſſeſſion, in tail, or in fee, the poſſeſſion under the ejectment would have recovered according to the right.*—An argument has been drawn from the power of the true owner to make his election, whether he will conſider it a diſſeiſin or not: but here, the true owner could not elect to make him a diſſeiſor, the entry not being *injuſte et ſine judicio*; and Sir *Robert* would not have been liable to a fine as anciently every diſſeiſor was: a true owner may enter upon an actual diſſeiſor; but here the entry could not have been admitted; nor did Lady *Ann* elect to make Sir *Robert* a diſſeiſor; for ſhe afterwards brought her ejectment [for the doctrine of elective diſſeiſin, ſee 1 *Burr.* 110, 111, 112.] The ground, therefore, of our opinion is founded in this; that here, *there was no actual nor conſtructive diſſeiſin.* Sir *Robert Atkyns* gained no freehold by it; he had only a naked poſſeſſion; there was no ouſter of the true owner; but the freehold remained, not diſplaced,

diſplaced, with dame *Ann*, remainder in tail to Sir *Robert Atkyns*.

THE NEXT QUESTION is, Whether the feoffment made a good tenant to the præcipe, without the concurrence of the jointreſs? Sir *Robert Atkyns* not being tenant in tail in poſſeſſion, bargain, and ſale, or fine, would not do. Feoffment would not make a diſcontinuance; 1 *Rol. Abr. tit. diſcon.* 634. pl. 5. Would it make a diſſeiſin? If it were taken to be a diſſeiſin, it muſt be at the election of the right owner, according to the doctrine laid down in 2 *Inſt.* 412, 413. for the ſake of the remedy. Sir *Robert Atkyns*, the ſon, had not the freehold in fact, for there was no expulſion of the true owner; it was a feoffment, with livery *in form only*; there was no tranſmutation of poſſeſſion to the feoffee. No eſtate, not even an intereſt, paſſed to *Earle* for his own uſe; it being made for the avowed purpoſe only of making him a tenant to the præcipe. Sir *Robert Atkyns* continued in poſſeſſion; the feoffment was no more than a part of that common aſſurance called a common recovery; and there was no thought of a diſſeiſin at the time: for on the facts found, it is clear that Sir *Robert Atkyns* did conſider himſelf *as tenant in tail in poſſeſſion, under the judgment in ejectment.* That the little deed was poſterior to, and corrected the great one, and that NO *freehold ſubſiſted, or ſtood out againſt the tenant in tail:* but it turns out, that all this was grounded on a miſtake of Sir *Robert Atkyns*, and that dame *Ann* had an eſtate for life for her jointure. The true meaning, therefore, of this feoffment was, to make a tenant to the præcipe. Sir *Robert Atkyns* conſidering himſelf as being tenant in tail in poſſeſſion, without any idea or *intention* of its working a diſſeiſin, and that thought was an after-thought.—But as it is not every entry, ſo neither is it every *livery* that will make a diſſeiſin. Living is of the very eſſence of a feoffment: but where the books ſpeak of feoffments in fee by tenant for years, and that the fee ſimple paſſes thereby, it is to be underſtood of thoſe feoffments of old, attended with livery and actual tranſmutation of the poſſeſſion from one man to another. *Bracton.* book 2. c. 18. b. 4. 161. b. Year-book, 11 *Hen.* 4. 33. pl. 61. a. *Broke Abr.* tit. Feoffments de terres, pl. 10. *Weſt* Symb. ſec. 251. and many other authorities cited in the report by Sir *James Burrow*.—There was a privity and confidence between the particular tenant and the reverſioner. Tenant for years forfeited his eſtate by altering the poſſeſſion: and on account of ſuch poſſeſſion, and the notoriouſneſs of the act of inveſtures, the feoffee ouſted the reverſioner: it was a tranſlation of the feud from one man to another. But there was no idea of ſuch a change being worked by a private, ſecret contract of the parties; becauſe that would make it difficult for the lord to know with whom the eſtate was lodged, and for ſtrangers to bring their action.

Such

Such was the practice before men were acquainted with letters; when lands paſſed by parol; and livery was neceſſary to be made on the land, that the other tenants, who were called to the Lords' court, might be witneſſes. This was formerly neceſſary to be done, for this reaſon; becauſe the *pares curiæ*, and the vaſſals of the lord, being bound by their oath of fealty, would take care that no fraud ſhould be committed, which ſtrangers not held by the ſame tie might connive at. In *Wright*'s Law of Tenures, p. 141. he ſays, "a feoffment, "whether conſtituting or transferring a fee, retains, *even* "*at this day*, the form of a gift, it is perfected and ratified by "the ſame ſolemnity of *livery and ſeiſin*, or inveſture, as a "pure feudal donation." Though afterwards the ocular atteſtation of the *pares* was held unneceſſary; and livery might be made before any credible witneſſes; yet the trial has ſtill been reſerved to the *pares*, or jury of the country; but the particular requiſites of this form of conveyance have dwindled away: they have, from having been the only conveyance of land for a long ſeries of years, languiſhed into a mere form, and are nothing more than a common conveyance: their grandeur and efficacy is loſt; and without an actual transforming of the eſtate from one man to another, they mix with the community of all other aſſurances.—In 3 *Atk.* 140. *Smith* ex dim. *Dormer* v. *Parkhurſt*; *Willes*, Ld Ch. Jus. treats feoffments in the ſame light, when he ſays, "they materially differ from "a fine; for in notoriety of facts, a feoffment is ſuppoſed to "be made *openly upon the land*, and the feoffee is immediately "put into poſſeſſion, not a formal, but an actual poſſeſſion." —The general notion of their being a ſecurity againſt ſecrecy and fraud, was a ſubſtantial reaſon which gave ſo much conſequence to the feoffments of old. The caſes of *Hunt* v. *Bourne*, *Salk.* 339. *Read* and *Morpeth* v. *Errington*, *Cro. Eliz.* 321. and the caſes cited from 2 *Vezey*, 475, 6. to prove the ſuperiority of feoffments over fines, we conſider to mean ſuch feoffments of old; for they are mere *dicta*. The name of theſe feoffments, and the remembrance of them, remains and ſurvives them, however imperfectly, after the practice of making them, and the conſequence of their ſolemnity is quite at an end. But the preſent feoffment is of a different ſort; it is *ſecret*, and by a wrong door; and the feoffee a mere inſtrument; for it is ſolely for the purpoſe of making him a tenant to the præcipe: in law, therefore, he is a mere inſtrument, and ſo conſidered in 2 *Rol. Rep.* 245. *Cro. Jac.* 643. 1 Mod. 107. *Fountain* v. *Cooke*.—It is not here ſaid, to be *for his own uſe*; nor need it be ſo, when it is merely for the purpoſe of making a tenant to the præcipe; but then the party muſt have a right to ſuffer the recovery; if it is carried any further, it is fraudulent; and ſhall not be carried into execution by artificial reaſoning to the prejudice of thoſe who

have

have the right. As to this point, therefore, we concur with the authority of *Fermor*'s caſe, 3 Co. 87.—No aid can be given to this recovery from the ſtat. 14 *Geo.* 2. c. 22. becauſe it requires the concurrence of the firſt eſtate for life expreſsly. WE THINK THE RECOVERY, THEREFORE, IN THE PRESENT CASE, BAD: *firſt*, becauſe there is no diſſeiſin at all of dame *Ann*; *ſecondly*, no ouſter of her freehold; *thirdly*, that the feoffment was made really under an idea of having a right to ſuffer a recovery, and not with any intention to conſtitute a diſſeiſin; *fourthly*, if it were done with that intention, we think it amounts to a feoffment in form only, and is not ſuch a feoffment as was in uſe of old: no tranſmutation of the poſſeſſion poſſeſſed by it, but its object was ſecret and illuſive, and, therefore, it ought not to work a conſtructive diſſeiſin; *laſtly*, that Sir *Robert Atkyns*, by his entry under the judgment in ejectment, gained no freehold; and by that feoffment conveyed no eſtate to the prejudice of dame *Ann*'s freehold.—Judgment for the plaintiff.

*A.* tenant for years, remainder to *B.* for life, remainder to the firſt and other ſons of *B.* in tail, remainder to the heirs of *B.* in tail; *A.* and *B.* join in a leaſe and releaſe to make a tenant to the præcipe, and ſuffer a recovery; held that the eſtate-tail limited to the ſons of *B.* is not deveſted by the recovery, nor is there any forfeiture of the reſpective eſtates of *A.* and *B.*—On the trial of an ejectment, a verdict was found for the plaintiff, ſubject to the opinion of the Court on the following caſe: "*John Richards* by his will, dated the 30th of June, 1753, "deviſed all his lands, &c. in Normanton, or elſewhere, either "in poſſeſſion, reverſion, or remainder, to *Thomas Richards*, "*Thomas Lee* the elder, and *Thomas Lee* the younger, *to the uſe* "*of the teſtator's nephew*, John Richards, *for life*;—remainder "to the firſt and other ſons of *John Richards* in tail;—re-"mainder to the heirs of the body of his ſaid nephew *John* "*Richards*;—remainder to truſtees in truſt, to ſell the ſame, "and divide the money ariſing therefrom among the teſtator's "four ſiſters, and his niece therein named." On the 30th of May, 1754, the teſtator, by a codicil to his ſaid will, declared the ſaid deviſe, as far as related to his nephew, to be null and void, and directed that he ſhould only have ſo much of the ſaid premiſes as ſhould amount to the yearly value of 20l. with certain limitations over.—By indentures of leaſe and releaſe, dated the 4th and 5th of April, 1764, between *Thomas Lee*, the ſurviving truſtee in the will, of the firſt part, *John Richards*, the teſtator's nephew, of the ſecond part, *John Glyfford*, the defendant, of the third part, and *Thomas Dalby* and *William Dixwell* of the 4th part, reciting the will and codicil, and alſo an indenture, dated the 18th of November, 1760, between the ſaid *J. Richards*, the teſtator's nephew, of the one part, and the defendant of the other part, by which *Richards*,

Smith *ex dim.* Richards *v.* Clyfford, Ea. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 738.

*Richards*, in conſideration of 300l. granted to the defendant all the eſtate, &c. deviſed to him by the teſtator, which ſhould be allotted to him by his truſtees, for ninety-nine years, if *Richards* ſhould ſo long live; and alſo reciting a decree in chancery, whereby it was decreed, that the will and codicil of *Richards* ſhould be eſtabliſhed, and the truſts thereof performed, and that *Richards* (party to the indenture) was entitled to have ſo much of the deviſed premiſes as ſhould amount to the yearly value of 20l. and that *Lee*, the ſurviving truſtee, ſhould ſet out a part of the premiſes of ſuch yearly value. *Lee*, in obedience to that decree, by and with the approbation and appointment of the preſent defendant, and *Richards* (party thereto) bargained, ſold, releaſed, allotted, confirmed, and appointed, unto *Dalby* and *Dixwell*, and their heirs, all the premiſes in the releaſe and appointment mentioned, *to the uſe of the preſent defendant, his executors, &c. for ninety-nine years*, if *Richards* (party therto) ſhould ſo long live;—*remainder to Richards* for life;—remainder to the firſt and other ſons of *Richards* ſucceſſively in tail;—remainder to the heirs of *Richards* (party thereto) in tail;—remainder to the uſe of *Lee* and his heirs, upon the truſts in the ſaid will and codicil appointed.—By indentures of leaſe and releaſe of three parts, of the 21ſt and 22d of June, 1765, between the preſent defendant and *Richards* of the firſt part, *F. Gregg* of the ſecond part, and *John Kirkland* of the third part, *for docking and barring all eſtates tail, and all reverſions*, &c. of the premiſes in queſtion, the defendant and *Richards* granted, &c. to *Gregg*, to make him tenant to the præcipe, that a recovery might be ſuffered of Trinity term then next, that *Kirkland* ſhould be ſeiſed to the uſe of the defendant for the term of ninety-nine years, created by the deed of November, 1760, determinable on the deceaſe of *Richards*, remainder to *Richards* and the defendant, and the heirs of *Richards* for ever. In Michaelmas term, 1765, a recovery of the premiſes was ſuffered, in which *Kirkland* was demandant, *Gregg* was the defendant, and the preſent defendant and *Richards* were vouchees. The defendant confeſſed leaſe, entry, and ouſter, but no evidence was given of an actual entry upon the land made by the leſſor of the plaintiff before the ejectment brought. *John Richards*, the nephew of the teſtator, and father of the leſſor of the plaintiff, is now living. *John Richards*, the leſſor of the plaintiff, is the eldeſt ſon, and firſt tenant in tail under the will of the teſtator. At the time of ſuffering the recovery, the leſſor of the plaintiff was an infant under twenty-one, and is now of the age of thirty years. *Thomas Lee* the younger was the ſurviving truſtee named in the teſtator's will at the time of the execution of the deed of 1764.—THE QUESTION was, Whether the leſſor of the plaintiff was entitled to recover? AND IT WAS contended for the leſſor of the plaintiff, FIRST, that the recovery ſuffered by *Clyfford*, the tenant for years, and *Richards*,

*Richards*, the tenant for life, was a forfeiture of their reſpective eſtates in the premiſes. AND SECONDLY, that the leſſor of the plaintiff was entitled to recover, notwithſtanding no actual entry was proved. *Doug.* 468. *Bull. N.P.* 103.—But as to this ſecond point, THE COURT ſtopped the counſel, it being clearly eſtabliſhed that actual entry was not neceſſary.—After the caſe had been fully argued upon the firſt point, ASHHURST, J. DELIVERED THE OPINION OF THE COURT. The only queſtion that has been made is, Whether the recovery that has been ſuffered by *Clyfford*, the tenant for years, and *Richards*, the tenant for life; or the acts which were done preparatory to it, will amount to a forfeiture of their reſpective eſtates? Now, as to *Clyfford*, the tenant for years, it will be totally nugatory to conſider whether he has done any act to forfeit his eſtate, unleſs the tenant for life has likewiſe forfeited his; for if he has not, he is the only perſon who can take advantage of the forfeiture of the eſtate for years; ſo that I ſhall lay the queſtion relative to the tenant for years entirely out of the caſe. In regard to *Richards*, the tenant for life, it is inſiſted that, by ſuffering a recovery, he has forfeited his eſtate for life; for which was cited *Co. Lit.* 356. *a.* The paſſage is, "Here "note, that albeit the action be falſe and feigned, yet is the "recovery ſo much reſpected in law, as it worketh a diſcon-"tinuance. But if tenant for life ſuffer a common recovery, "or any other recovery, by covin and conſent between the "tenant for life and the recoveror, this is a forfeiture of his "eſtate, and he in the reverſion may preſently enter for the "forfeiture." Lord *Coke* then obſerves, that "ſince *Littleton* "wrote, the ſtatute of 14 *Eliz.* c. 8. was made, concerning "this matter, which hath been well conſtrued and expounded, "and needs not to be repeated." But we all of us think that this paſſage can only be underſtood of a *bare tenant for life*, who takes upon himſelf to do an act inconſiſtent with the nature of his eſtate; and which, before the ſtatute of *Elizabeth*, would have diſplaced the remainders ſubſequent, and turned them to a right. The forfeiture of his eſtate was, therefore, a proper puniſhment upon him for attempting to do an act inconſiſtent with his tenure, and calculated to injure him in the reverſion. But the law will never puniſh a man for doing that which is not inconſiſtent with the nature of his eſtate, and which may have a legal operation. Such is the caſe here; for *Richards* ſtood in two ſeveral characters; that of tenant for life, with a remainder in tail ſubſequent to that limited to his firſt and other ſons. This remainder in tail is all that he ſought to bar; and the law ſays, that having the immediate freehold, and an eſtate tail in remainder in him, he has a right to bar it. Upon what principles then is it that a forfeiture ſhould be incurred? Has he taken upon him to do any act inconſiſtent with the nature of his eſtate? The tenant to the præcipe is made by leaſe and releaſe; this is a *lawful* con-

*conveyance*, as it is called, and paſſes no more than a man lawfully may. Had it been done by feoffment, that perhaps, in reſpect of the manner of doing it, might have admitted of ſome argument; but here it was perfectly legal. The next thing then is, Whether the recovery itſelf will operate ſo as to ſubject him to a forfeiture? And, as to this, we are all clearly of opinion, that it does not; becauſe there was a legal ſubject for it to work upon, namely, his remainder in tail. *Richards* is vouched, and enters into the warranty, not in reſpect of his tenancy for life, but of his remainder in tail; and the recompence in value is ſuppoſed to go to thoſe who would have been entitled to his eſtate tail, and thoſe who ſtood ſubſequent to them; and paſſes over his firſt and other ſons, who have the firſt eſtate tail in them. And as they receive no recompence, their eſtate is not diſplaced, nor in any manner affected by the recovery. It ſeems plain, from the words of the ſtatute of *Elizabeth*, what kind of recoveries the legiſlature conſidered as fraudulent, and meant to prohibit; for it ſays, "that all ſuch "recoveries hereafter to be had or proſecuted by agreement "of the parties or by covin, as is aforeſaid, againſt ſuch par- "ticular tenant of any lands, &c. whereof the ſame particular "tenant is, or hereafter ſhall be, ſeiſed of any ſuch particular "eſtate as is aforeſaid, or againſt any other, with voucher "over of any ſuch particular tenant, &c. ſhall, as againſt "thoſe in remainder, or reverſion, be void, and of none "effect." Then comes a proviſo, "that nothing therein "contained ſhall extend, or be prejudicial, to any perſon that "ſhall hereafter, by good title, recover any lands, &c. with- "out any fraud or covin, by reaſon of any former right or "title, but that all ſuch be in like force as before the making "of the act." Therefore a recovery, ſuffered under the circumſtances which exiſt in the preſent caſe, is expreſsly ſaved. And we are all of opinion, that there muſt be judgment for the defendant.—Poſtea to the defendant.

Roe *ex d'm.* Crow *v.* J. Baldwere and Elizabeth his wife, and J. Ancell Bellamy, Hil. Ter. 33 Geo 3. B.R. 5 *Ter. Rep.* 104.

If a tenant in tail by purchaſe under a ſettlement made by his anceſtor *ex parte maternâ* ſuffer a recovery, and declare the uſes to himſelf in fee, he takes the fee as a purchaſer, deſcendible to his paternal heirs. And if tenant in tail by deſcent from the maternal anceſtor ſuffer a recovery, and declare the uſes to himſelf in fee, the eſtate will deſcend to the heirs *ex parte maternâ*; whether it be copyhold or freehold.—A ſpecial caſe was reſerved on the trial of this ejectment, and it appeared, "that *John Younger*, being ſeiſed in fee of all the premiſes in queſtion, deviſed *(inter alia)* eighteen acres parcel thereof, and of which ſeven are freehold and eleven copyhold, to *S. Atkinſon* in fee:—and certain other premiſes, partly freehold and partly copyhold, to *S. Atkinſon for life*;—remainder to *E. Waterfield*, the deviſor's ſiſter *in tail*.—The deviſor died in 1737, leaving *S. Atkinſon* and *E. Waterfield*; whereupon *S. Atkinſon* entered and was ſeiſed according to the

t'e deviſes aforeſaid, and on September 29th, 1748, by her will duly executed, deviſed all the lands, &c. given to her in fee by *J. Younger*'s will to truſtees, for the uſe of *E. Crow*, daughter of *E. Waterfield*, for life;—remainder to truſtees to preſerve, &c.—remainder to the firſt and other ſons of *E. Crow*, in tail;—remainder to the daughters in tail;—remainder to the right heirs of *J. Younger*. In 1750, *S. Atkinſon* died; *E. Waterfield* being likewiſe then dead, and having left two daughters, the aforeſaid *E. Crow*, and *A. Read*, of whom the former, *E. Crow*, died before *S. Atkinſon*, leaving one child, *Catherine*, the wife of *W. Bowker*; the latter (*Ann Read*) ſurvived *S. Atkinſon*. Upon the death of *S. Atkinſon*, *C. Bowker* entered upon a moiety of the lands deviſed to *E. Waterfield* in tail, as above mentioned, and alſo upon the eighteen acres deviſed by *S. Atkinſon*'s will. In 1762, *C. Bowker*, with her huſband, *William Bowker*, duly ſuffered common recoveries both of the freehold and copyhold premiſes, as well of the moiety which ſhe took under the will of *J. Younger*, as co-heir (with *Ann Read*) of *E. Waterfield*, as of the eighteen acres which ſhe took under the will of *S. Atkinſon*, as daughter of *E. Crow*; and as to the freehold parts of the eſtate, the uſes of the recovery were declared to *W. Bowker*, and *C.* his wife, for their lives, and the life of the ſurvivor; remainder to *Catherine* in fee; and as to the copyhold, *C. Bowker* was admitted in fee on the ſurrender of the recoveror; and afterwards at the ſame court, *W. Bowker*, and *C.* his wife, duly ſurrendered the premiſes to themſelves for their lives, and the life of the ſurvivor, with remainder to the right heirs of *Catherine*; and *W. Bowker*, and his wife, were admitted accordingly. *C. Bowker* and her huſband are dead without iſſue. *J. Crow*, the leſſor of the plaintiff, is the heir *ex parte paternâ* of *C. Bowker*. The defendants are her heirs *ex parte maternâ*. THE QUESTIONS reſerved were, FIRST, Whether the plaintiff were entitled to recover the freehold and copyhold premiſes, or either of them, which paſſed to *C. Bowker*, under the will of *J. Younger*? AND, SECONDLY, the like, as to the premiſes which paſſed to *C. Bowker* under the will of *S. Atkinſon*. THE PLAINTIFF RELIED on the caſe of *Martin d. Tregonwell* v. *Strachan*, 1 *Wilſ.* 2. 66; 2 *Strange*, 4. and *Bro. Parl. Caſ.* 486. as deciſive of the ſecond queſtion ſtated; that caſe having determined that where a tenant in tail by purchaſe, with a reverſion in fee by deſcent, both *ex parte maternâ*, ſuffers a common recovery, the old uſe is gone, and it deſcends to the paternal heirs (1).—Lord KENYON, Ch. J. The operation

(1) Ld KENYON, CH. J. in delivering the opinion of the Court, read his own note of the above caſe of *Martin* v. *Strachan*, which he

operation of a fine and a recovery on queſtions of this kind is extremely different. If a tenant in tail, with a reverſion in fee

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ſaid was inaccurately reported in *Strange*. It contains a conſiderable degree of uſeful learning on the nature and operation of fines and recoveries, and is to the following effect: "*Martin* on the demiſe of *Tregonwell*, eſq. v. *Strachan* and others. Hil. 16 *Geo.* 2. *Jacob Banks being tenant in tail by purchaſe* under a marriage ſettlement made by his anceſtors, with remainder in tail to *Rook* and *Aſh* his relations, *ex parte maternâ, with remainder in fee to himſelf by deſcent from his mother*, makes a tenant to the *præcipe* by leaſe and releaſe, and then ſuffers a common recovery; and by the ſame deed declares the uſe to himſelf and his heirs; and afterwards dies ſeiſed inteſtate, and without iſſue. THE QUESTION was, Whether the eſtate, of which *Jacob Banks* died ſeiſed in fee, deſcended to the leſſor of the plaintiff, as heir to *Jacob Banks ex parte maternâ?* LEE, CH. J. The rule of deſcent is known, and will be agreed. *If a man ſeiſed as heir on the ſide of the mother make a feoffment in fee to the uſe of himſelf and his heirs, the uſe being a thing in truſt and confidence ſhall enſue the nature of the lands, and ſhall deſcend to the heir on the part of the mother. Co. Lit.* 13. *a.* 3 *Lev.* 406. *Godbold* v. *Freeſtone. And it will be the ſame, if the limitation be by fine and recovery*; it is ſtill the ancient uſe; and there is no difference whether upon the conveyance of an eſtate any part of the uſe reſult by implication of law, or whether it be reſerved by expreſs declaration to the party from whom the eſtate moved; and ſo is the caſe of *Abbot* v. *Burton*, *Salk.* 590. *But this rule holds only where lands come by deſcent, and not where a perſon takes by purchaſe.* And, therefore, if "a man have iſſue a ſon and dieth, and the wife alſo dieth, lands are letten for life, remainder to the heirs of the wife, the ſon dieth without iſſue; the heirs on the part of the father ſhall inherit, and not the heirs on the part of the mother; becauſe it veſts in the ſon as a purchaſer." 1 *Inſt.* 13. *a.* The queſtion is, Whether *Jacob Banks*, who took as a purchaſer under a ſettlement by his maternal anceſtor *an eſtate-tail precedent to the remainders in tail, and alſo precedent to his own reverſion in fee, and ſuffered a common recovery*, and thereby made himſelf tenant in fee, is not to be conſidered in the ſame manner as to any deſcendible quality as if he had originally taken by purchaſe an abſolute fee ſimple under a ſettlement made *ex parte maternâ*. And in order to determine this, it will be proper to conſider, 1ſt, How conditional fees ſtood at the common law? 2dly, What alterations were made by the ſtatute *de donis?* and, laſtly, What is the effect and operation of a common recovery? AND FIRST; *at common law all inheritances were fee-ſimple abſolute, fee-ſimple conditional, or qualified fee.* The donor had only a poſſibility of having the lands again; for the tenant of lands intailed before the ſtatute had only a fee ſimple conditional. If, before iſſue had, he had made a feoffment in fee, the donor ſhould not have entered for the forfeiture: but this feoffment had barred the future iſſue; and after iſſue had, the condition was performed to this purpoſe that he might have aliened, and thereby have barred the donor and his heirs from all poſſibility of reverſion for default of iſſue: and as to the heirs of his body, he might have barred them as well before iſſue had as after. By having iſſue, the condition was performed for three purpoſes; to alien, to forfeit, and to charge: but the courſe of deſcent was not altered by having iſſue. As to the alteration made by the ſtatute; this power of aliening was diſliked at the time of making the ſtatute *de donis*, and, therefore, the ſtatute only took away that power: but the eſtate was left to deſcend as before; and that the donee might have

fee to himſelf, levy a fine, the effect of that on the eſtate tail is creating a baſe fee; and that becomes merged in the other

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have no power to alien, the judges held the donee ſhou'd not have a fee-ſimple, and ſo made divided eſtates, and created a particular eſtate in the donee, and the reverſion in the donor: ſo as where the donee had a fee-ſimple before, he had by this act but an eſtate tail; and where the donor had but a poſſibility before, now, by conſtruction of this act, the donor had a fee-ſimple expectant upon the eſtate-tail, which we call a reverſion. So, by this diviſion of the eſtates, the donee before iſſue had, or after iſſue, could not bar or charge his iſſue, nor for default of iſſue the donor or his heirs: and this learning appears in *Co. Litt.* 19. and 2 *Inſt.* 334; by which means a perpetuity was created: and then when this great inconvenience was diſcovered, the judges found it abſolutely neceſſary to give tenants in tail a power of aliening by recovery. Thus common recoveries were introduced, and they were afterwards taken notice of by ſeveral acts of parliament, as by the act of 7 *H.* 8. c. 4; to enable recoverors to avow, &c. 21 *H.* 8. c. 19. And in *Mary Portington*'s caſe, 10 *Co.* 38, as Lord *Coke* ſays, that the judgment in 12 *Ed.* 1. was no new invention, but approved of by the reſolutions of the ſages of the law; who "perceiving what contentions and miſchiefs had crept in to the diſquiet of the law by theſe fettered inheritances, upon conſideration of the ſaid act, and of the former expoſition of it by the ſages of the law always after the ſaid act, gave judgment that in ſuch caſe (viz.) of a common recovery, where there is a judgment againſt the tenant in tail, and another judgment againſt the vouchee to have in value, the eſtate-tail ſhould be be barred;" and ſays my Lord *Coke*, *fo.* 38, *b*; ſo that where the act of *W.* 2. "*Quod finis ipſo jure ſit nullus*," we may ſay, "*quod quoad communem recuperationem, &c. actus ipſe ipſo jure ſit nullus.*" And in truth that is the caſe; for now the donee in tail, by ſuffering a common recovery, is enabled to paſs an eſtate to another, and his heirs, that is, an abſolute fee-ſimple. This leads me to conſider the effect and operation of a common recovery. And this is well ſtated in the caſe of *Hunt* v. *Gateley*, *Moor.* 155, 6. There it appears that remainders by the common law, and before the ſtatute *de donis*, were but poſſibilities of reverter, and after the ſtatute remained of ſo baſe account, that the remainder-man ſhould not be received, nor compel the tenant to attorn. That entails, being the common grievances of the realm, occaſioned the making of the ſtatute of Fines to bar the iſſue, and the invention of recoveries to bar the remainders; and the reaſon of a common recovery barring the remainder is becauſe he in remainder is enabled to enjoy the recompence. And this reaſon has had allowance always by the judges ſince the firſt commencement: and the iſſue who is inheritable to the recompence ſhall be barred thereby, but not the leſſees, grantees of rent, or conuſees of ſtatutes, or parties to other incumbrances of the tenant in tail himſelf, who ſuffers the common recovery; for they may falſify; but the grantees of the remainder cannot falſify the recovery ſuffered by the tenant of the freehold; yet they ſhall be barred by his recovery, becauſe they claim under the remainder-man who is entitled to the recompence. So that a common recovery may be conſidered in ſeveral reſpects, as to a tenant in tail, and as to the remainder-man. As to the tenant in tail, it is a conveyance by conſent; as to the remainder, it is a bar involuntary. As to tenant in tail, it is a grant in the *per*; as to the remainder, it has the credit of a recovery upon title; and therefore tenant in tail alone limits all the uſes upon ſuch recovery, and he in remainder *nolens volens* is bound; and if a common recovery is ſuffered without conſideration, this, in judgment of law, without other proof, is to the uſe of him

other fee, and lets in all the incumbrances of the anceſtor, which has frequently happened in practice from ſuch a perſon being

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who ſuffered the recovery, if nothing is proved to the contrary, as appears in 9 *Co.* 11. *Doxman*'s caſe. This, I think, does fully explain the nature of a common recovery; and ſhews that the recoveror has an eſtate in fee, diſcharged of all incumbrances made by the remainder-man. And when the tenant in tail ſuffers a common recovery, and dies without iſſue, a rent-charge granted by the remainder-man is gone by the recovery, although the eſtate-tail was expired; becauſe he, who is in, is in under the intail; and ſo it appears in *Dyer.* 5, 6. But it was urged at the bar (and here I think the ſtreſs of the caſe lies for the plaintiff) that the eſtate-tail and fee being in the ſame perſon in the preſent caſe, the recovery will operate as a bar and extinguiſhment of the eſtate-tail, and conſequently as a revival or giving life to the reverſion in fee. And to warrant this, was cited the caſe of *Symmonds* v. *Cudmore*, 1 *Salk.* 339. *Carth.* 258. *Skin.* 339. 1 *Show.* 370. 4 *Mod.* 1. which caſe is thus: tenant in tail, remainder to himſelf in fee, levied a fine with proclamations; in which caſe it was reſolved, that the fine with proclamations was only barred, but extinguiſhed the eſtate-tail as much, to all intents, as if tenant in tail had died without iſſue; for otherwiſe the conuſee muſt have two diſtinct eſtates in fee, *viz.* a baſe fee, determinable upon the death of tenant in tail without iſſue, and alſo an abſolute fee; which is very abſurd; and therefore the greater fee, which is the abſolute, ſhall ſwallow up the baſe fee, and ſhall be conſolidated into one entire eſtate. Now here it is to be obſerved, that the tenant in tail as ſuch paſſed a fee to the conuſee in that caſe by the fine, as the Court there held, without any regard to the reverſion in fee; but this was a baſe fee or a qualified fee, determinable upon the death of the tenant in tail without iſſue; and what that baſe or qualified fee is, is well explained by Lord *Holt* in the caſe of *Machel* v. *Clarke*, *Salk.* 619. where he ſays, that "if a tenant in tail covenant to ſtand ſeiſed, or by leaſe and releaſe, or bargain and ſale, convey to another and his heirs, it is a baſe fee, not determined nor determinable till the entry of the iſſue. For before the ſtatute *de donis* he had a fee ſimple; and the ſtatute does not alter the nature of the eſtate, but reſtrains the power of alienation: and therefore, as he might before the ſtatute, ſo he may ſince. The ſtatute only makes it voidable." He ſays further, that "he has the whole eſtate in him, and therefore muſt be able to diveſt it; and ſo (he ſaid) was *Symnor*'s caſe, 10 *Co.* 96." The difference then between the caſe of *Symonds* v. *Cudmore*, and this preſent caſe, ariſes from the *different operation of a fine and a common recovery*. *A fine operates as an extinguiſhment of the eſtate-tail, and paſſes a baſe or a qualified fee.* And that fine in the caſe of *Symmonds* v. *Cudmore*, was in the nature of a merger or conſolidation of the two fees; the reverſion in fee being there let in and taking place, and was the ſame, and was there ſo conſidered, as if tenant in tail had been dead without iſſue. *But a common recovery does not operate in that manner; for a common recovery paſſes not a baſe fee, but a full abſolute unlimited and rightful fee, and is to be conſidered as the proper conveyance of a tenant in tail, and paſſes the fee in the ſame manner as the fee is paſſed by a feoffment of tenant in fee.* And ſo was the opinion of Mr. Juſtice *Tracy*, as he delivered it at the delegates in Lord *Derwentwater*'s caſe. And the act for forfeiture of eſtates-tail in caſe of treaſon, ſeems to conſider the matter in the ſame light; for by the ſtatute 26 *H.* 8. c. 13. tenants in tail forfeit the whole fee; ſo that the parliament has conſidered tenant in tail as owner of the whole fee. 1 *H. H. P. C.* 240. And to ſay that the eſtate-tail is extended and enlarged

being ill adviſed to levy a fine inſtead of ſuffering a recovery. Generally ſpeaking, when two eſtates unite in the ſame perſon in the ſame right, the ſmaller one is merged in the other, ex-

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larged by a common recovery ſuffered by tenant in tail, is an inaccurate way of ſpeaking; and ſo it was treated by Mr. J. *Treby*, in the caſe of Lord *Derwentwater*; for what is called an eſtate-tail is ſtill a fee-conditional, as before the act, and the ſame eſtate in the eye of the law hath continued. And that it is conſidered in the nature of a fee, is proved from hence, that ſuch tenant may exchange with tenant in fee. *Salk.* 620. 1 *Rol. Abr.* 813. p. 7. 10, 11. is to the ſame purpoſe. So that the true legal ſenſe of this matter is, that by the ſtatute *de donis* the *poteſtas alienandi* is taken away, which gave the judges occaſion to call the limitations after the eſtates tail, by the names of remainders and reverſions, which were before only poſſibilities: but ſuch *poteſtas alienandi* was reſtored to the tenant in tail by the common recoveries; for the protection of the ſtatute *de donis* was thereby taken off, and the remainders and reverſions were afterwards more than poſſibilities again; and what were called poſſibilities were of little or no conſideration, and were not ſo much as aſſets in the hands of the heir. So that what paſſes by the recovery does not come out of the remainder or reverſion, but out of the eſtate-tail. In common recoveries the recoveror can have the eſtate only as he that ſuffered the recovery had it; and ſo long as any comes in by that recovery, he comes in in continuance of the eſtate tail, and coming in ſo he is liable to all the charges of tenant in tail. And the reaſon why a rent granted by a remainder-man ſhall be barred by the tenant in tail's recovery is, becauſe the recoveror comes in in the continuance of that eſtate, that is not ſubject to that rent, but is above all theſe charges. At common law upon an eſtate tail (which was a fee-ſimple conditional) a remainder could not be limited over, becauſe but a poſſibility: but the ſtatute *de donis* makes an eſtate tail, and a recovery is an inherent privilege in that eſtate, which was never taken away by the ſtatute. The law takes it as a conveyance excepted out of the ſtatute, as if he were abſolutely ſeiſed in fee: and this is by conſtruction of law; and ſo it is expreſsly declared by Lord *Hale*, in 1 *Mod.* 110. and ſo is *Popl.* 6. which ſhews that common recoveries are conſidered as conveyances by tenant in tail; for if they were conſidered as real recoveries, and not as conveyances, all charges and incumbrances made by tenant in tail would be gone; whereas, without queſtion, the land is ſubject to the leaſes, recognizances and charges of the tenant in tail in poſſeſſion who ſuffers a recovery: but it is not ſubject to the charges of him in remainder or reverſion; which ſhews that nothing paſſes from the remainder or reverſion by ſuch recovery *. It appears then that an abſolute, unfettered, pure, fee-ſimple paſſes by the common recovery which is made ſo by the removal of all limitations on it, and then there can no other fee paſs; for there can be but one fee that paſſes, there cannot be an abſolute and qualified fee in one and the ſame perſon. Therefore it is this uſe of the fee-ſimple that paſſes to the recoveror from the tenant in tail, and which reſults to him and his heirs if no uſe is declared. It is the eſtate-tail, that old eſtate-tail conſidered as a fee, that *Jacob Banks* had as a purchaſer, which muſt deſcend to his heir at law; and not the reverſion in fee *ex parte materna*, for that reverſion is entirely gone and extinct. Therefore we think that the plaintiff's title is not good, as he only claims as heir to *Jacob Banks ex parte materna*

* *Popl.* 7. and 1 *Co.* 61. *Capell's* caſe.

cept in the caſe of an eſtate tail and a reverſion in fee, which may exiſt together; in ſuch a caſe, by the operation of the ſtatute *de donis*, the eſtate tail is kept alive, not merged by the reverſion in fee. Whether the recovery extend the eſtate tail, or, as more accurately ſtated by *Tracey*, J. in Lord *Derwentwater*'s caſe, it be a conveyance excepted out of the ſtatute *de donis*, it is immaterial to conſider; though I obſerve that in *Martin* v. *Strachan*, 2 *Wils.* 66. 2 *Strange*, 4 *Bro.* Par. Caſ. 486.—Lord Ch. J. *Lee*, adopted the latter expreſſion; and by the recovery, the tenant in tail may diſpoſe of the fee. *The facts of this caſe are ſhortly theſe:* J. Younger, *being ſeiſed in fee, deviſed certain parts of his eſtates to* S. Atkinſon *in fee, and other parts to* S. Atkinſon *for life, with the remainder to* E. Waterfield *in tail.—Theſe two eſtates afterwards came to* C. Bowker *in tail; one of which ſhe took by purchaſe under the limitation to the daughters of* E. Crow *:—the other by deſcent under the eſtate tail originally limited to* E. Waterfield;—*ſhe, being ſo ſeiſed in tail of the different parts of theſe eſtates in different rights, ſuffered (together with her huſband) a common recovery of the whole, and the queſtion ariſes on the effect of that recovery as to the reſpective parts of the eſtate.* It ſeems to have been admitted that the caſe of *Martin* v. *Strachan* decides this caſe as far as it goes; and, indeed, it ought to put the queſtion into a ſtate of repoſe, becauſe that caſe was very ably diſcuſſed here, and the judgment of this Court was afterwards confirmed in the Houſe of Lords. According to that caſe, it ſtands thus; *the common recovery puts an end to the eſtate tail; the eſtate immediately afterwards becomes an eſtate in fee; and the party, whoſe eſtate is converted into a fee, if he took the eſtate tail as a purchaſer, muſt take the fee as a purchaſer; or, if he took the eſtate tail by deſcent, muſt take the fee alſo by deſcent as from the ſame anceſtor.* A diſtinction, however, has been taken by the plaintiff's counſel, *between the operation of a common recovery reſpecting copyholds and freeholds.* But it would lead to perplexity if different rules were applied to different ſorts of eſtates. Copyhold eſtates are neither within the ſtatute *de donis*, or that of uſes; neither indeed are they the ſubject of entails, unleſs there be a cuſtom in the manor to warrant it, (which was admitted in this caſe). It was in conformity to the rule reſpecting real eſtates, and to prevent any eſtate being unalienable, that the ſame rule was adopted in the caſe of copyholds as a mean of unfettering eſtates and to prevent perpetuities. And I know of no authority which makes any diſtinction in this reſpect between copyholds and freeholds. In all other points, where the lord of the manor is not prejudiced, the ſame rules of deſcent apply equally to both. But this caſe has been ingeniouſly argued on the forms of a recovery, and it has been compared, as to the copyholds, to

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the case of a feoffment and re-feoffment. But this is by no means like the case of a feoffment and re-feoffment; and we cannot enter into these forms; they are, perhaps, inexplicable; but they must be taken as a mere mode of conveyance by a tenant in tail, and ought so to be considered in all respects; it was so considered by the court in *Martin* v. *Strachan*. And we are bound to adopt the authority of that case here, and to apply it to both these species of property. Therefore, that part of the estate which the person, who suffered the common recovery, took *by purchase*, must go to the heir *ex parte paternâ*; and that which she took *by descent* from the maternal ancestor to the heirs *ex parte maternâ*.—*Per Curiam:* Postea to the plaintiff.

A tenant in tail may by lease and release, or by bargain and sale, pass a base fee; a defeazible estate to the releasee or bargainee, voidable by the issue in tail.—On the trial of this ejectment, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:—"*John Shilson*, the father of the defendant, *Nicholas Shilson*, being seised *to him and the heirs male of his body, of the premises in question, the remainder to his own right heirs*, by lease and release, dated the 24th and 25th of October, 1742, previous to his marriage with *Susannah Smerdon*, conveyed the same to trustees, to the use of himself for life; remainder to the trustees to preserve contingent remainders; remainder to the use of the said *Susannah*, for her life; remainder to his first and other sons, by the said *Susannah*, in tail male.—The marriage took effect; and they had issue, *Nicholas Shilson*, the defendant, their only son.—In Trinity term, 1761, the said *John Shilson suffered a common recovery*; and by deed, dated the 24th of June, 1761, he declared the uses of the said recovery to be, to —— *Lucas*, his heirs and assigns; in trust to sell the said premises, and out of the money arising therefrom to pay and discharge certain debts mentioned in the said deed; and to pay the residue of the purchase-money, or re-convey such parts of the premises as should remain unsold, to the said *John Shilson*, his heirs or assigns."—The said —— *Lucas*, by lease and release, dated the 27th and 28th of October, 1763, in pursuance of the trusts of the said deed last mentioned; conveyed the said premises to *Elizabeth Tyrrel*, the lessor of the plaintiff, and her heirs. *John* and *Susannah Shilson* were both dead.—The question was, "Whether, upon the facts stated, the plaintiff was entitled to recover the said premises?" And, for the lessor of the plaintiff, it was insisted, that the purchaser took a good title under this recovery, on the following grounds:—1st, The law does not suffer an estate limited by a tenant in tail, to commence after his death, to take effect.—2dly, The limitations under the settlement in 1742 are

Goodright *ex dim.* Tyrrel, vid. *v.* Mead and Shilson, Tr. Ter. 5 Geo. 3. B. R. 3 *Burr.* 1703.

ineffectual, wrongful, and void.—3dly, If the uſes are void in their creation, they cannot be made good by the common recovery.—WILMOT, J. It is now fully ſettled, "That a re-"leaſe or bargain and ſale by a tenant in tail, will convey a "baſe fee, a defeaſible eſtate, to the releaſee or bargainee:" though it muſt be allowed, that the old notion was, and even in Lord *Coke*'s time, "That a tenant in tail could not con-"vey an eſtate longer than for his own life." But that notion is now over-ruled; and the contrary ſettled.—Lord MANSFIELD, Ch. J. It is now ſettled, "That a releaſe, or "bargain and ſale by a tenant in tail, gives a baſe fee voidable "by the iſſue in tail."—This is the principle of *Machil* v. *Clark*; V. *Salk.* 619; *Comyns* 120, *S. C.* 7. *Mod.* 18. *S. C.* 11 *Mod.* 19. *S. C.* and many ſubſequent caſes have been grounded upon it; particularly that of *Stapilton* v. *Stapilton*, in chancery.—See 1 *Atkyns*, 2.—Beſides, the common recovery has made good this defeaſible eſtate. Either ground makes an end of this queſtion. The recovery takes off the fetters of the ſtatute *de donis*.—WILMOT, J. concurred. The tenant in tail had a fee originally: and a common recovery leaves him a fee again, by removing the bar and fetters impoſed by the ſtatute. When the bar and fetters are removed, it then becomes juſt the ſame caſe as if he had been tenant in tail *ab initio*. And though formerly it was doubted "Whether "a tenant in tail could, any otherwiſe than by a *feoffment*, "grant any thing more than for his own life;" yet it is now ſettled, by the caſe of *Machil* v. *Clark*, "That he may, by "bargain and ſale, or by leaſe and releaſe, paſs a baſe fee." And if ſo, it is in his power to limit the remainder, as he pleaſes. And it makes no difference, whether it is limited to the uſe of the bargainee or the releaſee, or to a ſtranger, or to himſelf for life with remainders over: for the baſe fee feeds all the uſes that are limited upon it, till avoided by the entry of the iſſue in tail.—YATES, J. A leaſe and releaſe, or a bargain and ſale by the tenant in tail, is not abſolutely void; but conveys a baſe fee, defeaſible by the entry of the iſſue in tail. This is now ſettled by the caſe of *Machil* v. *Clark*, and many determinations and conveyances are founded upon it.—ASTON concurred.—THE COURT were, therefore, unanimouſly of opinion, "That the recovery *enured* to the uſes of "the ſettlement, and that the plaintiff had no title."—JUDGMENT for the DEFENDANT.

Goodright *ex dim.* of Burton *v.* Rigby, in error, Eaſter 33 Geo. 3. B.R. 5 *Ter. Rep.* 177.

Though the deeds to make a tenant to the *præcipe* be not executed till after the execution of the writ of *ſeiſin*, ſtill the recovery will be good by the 14 *G.* 2. c. 20. if the deeds be executed in the term in which the recovery is ſuffered.—In this ejectment, the leſſor of the plaintiff claimed as next in remainder after a tenant in tail *(Sarah Williams)*, who had ſuffered a recovery in her life-time; and the only queſtion

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was on the validity of that recovery; as to which the facts in the ſpecial verdict were ſhortly theſe; that *on the 19th and 20th of November, 1778, the deeds, making the tenant to the præcipe, were dated*; that *the recovery was ſuffered in Michaelmas term in the ſame year*; and that *the writ of ſeiſin was awarded, teſted the 6th of November*, to which the ſheriff returned that he had delivered *ſeiſin* on the 10th of November, 1778. The court of Common Pleas, where this action was brought, gave judgment for the defendant; to reverſe which, a writ of error was brought.—The plaintiff in error objected to the validity of the recovery, becauſe the writ of ſeiſin was executed before the deeds making the tenant to the præcipe, as it appeared on the ſheriff's return to that writ (1).—Lord KENYON, Ch. J. Lord *Derby*'s caſe, 2 *Strange*, 1185. which has been cited, has always been conſidered as a ſtrange caſe; and the judges of ſucceeding times have been aſtoniſhed that no application was made to the court of Common Pleas to rectify the defect in that recovery, according to the uſual practice of that court. There the objection was that there was no writ of ſeiſin, which (it is well known) is never in fact executed. But to remedy ſome inconveniences attending the omiſſions of forms in ſuffering common recoveries, the

(1) In the court of Common Pleas, it was argued, that it appeared on the record, that ſeiſin was given by the ſheriff ten days before the date of the conveyance to the tenant of the freehold, when in fact *Sarah Williams* was in poſſeſſion of the lands; that this was repugnant, and vitiated the whole proceeding; that a recovery is not complete before execution; being a conveyance to uſes, the nature of the eſtate is not altered, nor does there ariſe any new uſe to the recoveror, till the writ of ſeiſin is properly executed. *Pigot* on Recov. 153. *Moore*, 141. Sir *W. Jones*, 10. Neither is this caſe within the ſtat. 14 *Geo.* 2. c. 20. ſ. 5. which aroſe from the fictitious relation to the firſt day of the term, and was made for a different purpoſe, viz. to prevent recoveries from being ſet aſide, where the tenant to the *præcipe* is created by deed executed after the award of the writ of ſeiſin. *Pigot* 58. *Wilſon* on Fines, 348. The words of the ſixth ſection of the act are; "executed after the time of the judgment given, and the award of the writ of ſeiſin." But there is a material difference between the award and the execution of the writ; and the 7th and 8th ſections expreſsly provide, that the act ſhall not be extended beyond its ſtrict limits. *The counſel on the other ſide were ſtopped* BY THE COURT, WHO SAID, that though there might have been ſome doubt, if it had been found as a fact, that ſeiſin was actually given on the 10th of November, yet the day named in the return was immaterial; for it was not neceſſary to name any particular day, and the return would have been good without it. All that was neceſſary was, that ſeiſin ſhould be delivered after the judgment, and before the return of the writ, and that the proceedings ſhould all be in the ſame term. That thoſe requiſites were complied with in the preſent caſe which was directly within the ſtatute 14 *Geo.* II. ſ. 5 and 6. As, therefore, the day mentioned in the ſheriff's return was repugnant to the reſt of the proceedings, it was to be rejected.—Judgment for the defendant.—*Goodright* v. *Rigby*, Tr. Ter. 32 *Geo.* III. C.B. 2 *Hen. Black.* 62, 63.

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ſtatute 14 *Geo.* 2. c. 20. was paſſed. And, after reading the clauſes of that act, it ſeems extremely difficult even to conceive a doubt; for it enacts, that "every recovery already ſuffered, or hereafter to be ſuffered (operating with a retroſpect as well as proſpectively), ſhall be deemed good and valid to all intents and purpoſes, *notwithſtanding the fine, or deed, making the tenant to ſuch writ ſhall be levied or executed after the time of the judgment given in ſuch recovery, and the award of the writ of ſeiſin as aforeſaid, provided the ſame appear to be levied or executed before the end of the term, in which ſuch recovery was ſuffered.*" The ſenſe of that clauſe is, that the recovery ſhall be valid, provided the deed making the tenant to the præcipe be executed before the end of the term in which the recovery is ſuffered; and it appears on this verdict, that the deeds making the tenant to the præcipe were executed within that term. And though the ſtatute, in enumerating ſome of the defects for which a remedy was to be applied, does not mention this particular defect, it has always been underſtood that the act was intended to remedy every defect of this kind, provided that, which is there made a condition, be complied with, namely, the making of the tenant to the præcipe before the end of the term in which the recovery is ſuffered; and I think we ſhould not ſatisfy the words of the ſtatute by any other conſtruction.—ASHHURST, J. The ſtatute of the 14 *Geo.* 2. c. 20. muſt be conſidered as a remedial law, and therefore it ought to receive the moſt liberal conſtruction. The words at the end of the clauſe, "provided the deed be executed before the end of the term, in which ſuch recovery is ſuffered," ſhew that the legiſlature meant that no advantage ſhould be taken of the execution of the deed, to make the tenant to the præcipe, being ſubſequent to any part of the proceedings, provided it were executed before the end of the ſame term. It has been contended, however, that thoſe words are not to be taken in their general ſenſe, but muſt be reſtrained ſo as to operate only on thoſe two caſes, the inconveniences of which are recited in the former ſection, and that, becauſe the ſtatute only mentions two particular caſes, the remedy ſhall not be extended to others not particularly enumerated: but, as this is a remedial law, the general words, giving the remedy, muſt not be reſtrained by the words of the preamble, but ought to be extended to all caſes where the inconvenience is the ſame.—BULLER, J. agreed.—GROSE, J. alſo agreed.—Judgment affirmed.

Maſſey *v.* Rice, *et al.* Mic. Ter. 16 Geo. 3. B.R. *Cowp.* 346.

On a writ of error from a judgment on *ſcire facias*, in the court of King's Bench in Ireland, brought to reverſe four common recoveries in the court of Common Pleas there, viz. two of lands in THE COUNTY of *Limerick*, and two of lands in the CITY of *Limerick*, and which recoveries had been affirmed,

affirmed, it was objected for the plaintiff in error, that the ſeveral deſcriptions in all the four recoveries were bad, and the principal objections were as follows: FIRST, as to the premiſes in the *County*, becauſe ſome were demanded thus: "All thoſe, the *Caſtle Town*, and *lands* of, &c. containing by eſtimation, ſo many acres," without ſetting out the *quality* of the *lands*, as meadow, *paſture*, *wood*, and ſo forth; that a recovery would not lie of a town, and that ſo many acres by eſtimation was uncertain.—OBJECTION 2d, That others were deſcribed thus, "all that part of the town and lands, &c. now or late, in the tenure of ſuch and ſuch a perſon," which was vague and uncertain.—OBJECTION 3d, That two parcels were deſcribed as "containing a plough-land," which was alſo vague and uncertain. In reſpect of the premiſes in the city, it was objected, that they were all demanded by the deſcription of "meſſuage or tenement," which was uncertain, and alſo as being ſaid to be "now or late in the tenure, &c." Lord MANSFIELD, Ch. J. (the other judges concurring): The conſequences of theſe objections are ſo great; they are ſo void of the leaſt glimmering of reaſon and common ſenſe; and it would be attended with ſuch vaſt inconveniences to the public in many caſes, without a poſſibility of doing good in any, if in common recoveries, which are a ſpecies of conveyance and common aſſurance, ſuch nice exceptions were to prevail; that the ſtricteſt proof of their being founded in law, is neceſſary to induce the Court to overturn a recovery on ſuch grounds. By the ſettled law of the land, men, by deeds, may fetter their eſtates: but tenant in tail, when of age, may unfetter them, obſerving a certain form: in this caſe, there can be no doubt of the meaning of the tenant in tail, or of his power to unfetter this eſtate; the only queſtion is, Whether he has done it agreeably to the proper form? that is, whether he has deſcribed the premiſes with ſufficient certainty. Now the deſcription which he has uſed, is the identical deſcription in the deed which created the fettering; and the objection which is made is not ſo much, that that deſcription is uncertain; as that ſix or ſeven hundred years ago in an *adverſe* action, there was a doubt whether ſuch an objection would not have lain: and therefore the defendant would make the ſame objection, and raiſe the ſame doubt now. But a *common recovery is not an adverſe action*. It is ſaid that "all "that meſſuage or tenement, with the appurtenances ſituate in "the lane between the two abbey gates, now, or late in the "occupation of *J. C.* his under-tenants, or aſſigns, in the "county of the city of Limerick," is too vague and uncertain: but one muſt look with a microſcopic eye, to diſcover that a *meſſuage* or *tenement* is ſo uncertain a deſcription, as that the ſheriff, or any other, perſon could not know how to find the premiſes by it: and the objection can only be made

made by a perſon who pores over the ſyllables of the words. The objections are of two ſorts, and I have no doubt as to either; FIRST, that the premiſes in the county are demanded thus, "all thoſe, *the caſtles*, *towns*, and *land*, containing by "eſtimation, &c." which it is argued, is uncertain, both in reſpect of quality and quantity. As to that it is admitted, that *Caſtle* is a good deſcription in England. *Town* was determined to be a good deſcription in *Cottingham* v. *King*, 1 *Burr.* 623. and *Land* means arable land. The next objection is, that the premiſes in the city are deſcribed thus, "all that *meſſuage* or *tenement*, with a garden or meadow thereto belonging, ſituate, &c. and *now or late* in the occupation of, &c. &c." which it has been contended, would be a bad deſcription in ejectment. There are many caſes in ejectment, which have gone very far indeed; and therefore the doctrine of thoſe caſes ought not to be extended: as to the authority in 3 *Wilſ.* 23. (*ante*, p. 303.) which would have great weight on account of its being ſo recent; the judges, in that caſe, decided againſt their own private opinion and inclination, becauſe they held themſelves bound by authority; but there the words were only "meſſuage or tenement," without any other deſcription; here there are other words, "with the appurtenances and a garden, &c." which ſhew that "meſſuage or tenement" are two words for the ſame thing: and that both mean a dwelling-houſe. But this is not my fundamental ground of determination in the preſent caſe: what I ground my opinion upon is, the principles laid down in *Dormer's* caſe, 5 *Co.* 40. b. reported alſo in *Popham*, 23, and the diſtinction the Court there take, between adverſe actions and common recoveries; which at that time were become a common aſſurance and conveyance of lands, &c. and which the Court ſay, "being alſo made by aſſent between the "parties ſhall, and always have had, a different expoſition "from what is given to a recovery by *pretence* of title, or to "the proceeding in any other real action, to which they "are not to be compared: therefore, a common recovery may "be ſuffered of an advowſon, common in groſs, warren and "the like, and the intent of the parties ſhall be obſerved." Now the objection in this caſe, is an objection to the very ſame deſcription as is uſed by the anceſtor in the deed which created the entail. The ſole object of the recovery is to unfetter the premiſes ſo entailed; and, therefore, I will not depart from this anciently eſtabliſhed principle, to do ſuch cruel injuſtice, both againſt the intention of the parties, and againſt public convenience: not one precedent has been cited where ſuch an objection has been held good in the caſe of a common recovery: but a caſe of a fine has been cited, where it was allowed (1 *Leon* 188), and from thence it has been argued by analogy, that it is bad in a common recovery; but the

the argument does not hold. A case in 2 *Ventris*, 31. is very material, and is shortly thus: "In ejectment, a special "verdict found that there was a *parish* of Ribton, and a *vill* "of Ribton, but the latter not coextensive with the former; "and that the tenant in tail of lands in the *parish*, but out of "the *vill*, bargained and sold the lands in the parish of "Ribton, with covenant to levy a fine, and suffer a re-"covery to the uses of the deed: but the fine and recovery "were only of the lands in Ribton. The question was, "Whether this recovery was good for the lands in the parish "of Ribton?" It was argued, "that the common law knows "no such division of the kingdom as parishes, but only the "division of vills, and therefore, where a place is named in a "record of the law, and no more said, it is always intended a "vill: consequently that the recovery, if it passed any lands "at all, could only pass those in the vill:" but the Court in favour of common recoveries held "that this recovery should "extend to the lands in the *parish* of Ribton: and the rather, "because it being found by the verdict that the tenant in "tail had no lands in the vill, the recovery must necessarily "be void, unless it were extended to the lands in the parish." This decision is an instance of liberality that would not have been adopted or followed in an adverse *præcipe*; so in many other instances, as an *advowson* for which no adverse action will lie, but common recovery will: therefore, as the distinction between amicable and adverse suits exists; as the inconveniences of avoiding the recovery would be great; as no precedent in point is produced, and there is no possibility of doubt about the intent of the parties.—The judgment of B.R. in Ireland ought to be affirmed.

On reading the deed to lead the uses, and a fine levied in consequence of the same, the common recovery suffered in this case was amended by changing *Ann*, the wife of *Henry Goodwin*, to *Elizabeth*.—Mic. Ter. 19 *Geo.* 3. C.B. 2 *Black.* 1230. Mayre, *Demand.* Couldhard, *Ten.* Goodwin, *et al. Vouchees.*

Also, a recovery was in this case amended by a more accurate description of the vill and county from the deed to lead the uses.—It was moved to amend a recovery of lands, &c. "in the town of Kingston-on-Hull," by inserting the words in Myton, and the words, and county; thereby making the description of the lands to be "in Myton, in the town and county of Kingston-upon-Hull." The deed to lead the uses describing the parcels to be situate "in the lordship of "Myton, in the county of York, or in the town and county "of Hull, lately purchased of *Thomas Yates*." The Court directed notice to be given to Mr. *Cox*, the tenant.—And, Mr. *Cox* consenting, the rule was made absolute. Watson, *Demandant*, v. Cox, *Tenant*, Cowle and Wife, *Vouchees*, Ea. Ter. 16 Geo. 3. C.B. 2 *Black.* 1065.

It is no objection to the passing a common recovery, that the order of the names of the vouchees in the præcipe at bar and the *dedimus* varies. Nor that the warrants of attorney of Lang, *Demandant*, Lee, *Tenant*, and Woodhouse, *et al. Vouchees*,

Ea. Ter. 37 Geo. 3. C.B. 1 *Pul. et Bof.* 31.

of the ſeveral vouchees, are on ſeparate pieces of parchment.—The opinion of the Court was deſired on two objections, ſuggeſted by one of the officers, to the paſſing a common recovery. The firſt objection was, that at the foot of the præcipe at bar, it was ſtated that, "the tenant in perſon "voucheth to warrant *John Chappel Woodhouſe*, clerk; *Ann* "*Monpeſſon*, ſpinſter, and *Mary Woodhouſe*, widow," whereas the *dedimus* was, "the tenant in perſon voucheth to warrant "*Mary Woodhouſe*, widow; *John Chappel Woodhouſe*, clerk, "and *Ann Monpeſſon*, ſpinſter:" tranſpoſing the names. The ſecond and more material objection, originated in the warrants of attorney, taken by virtue of the commiſſion. For there being three vouchees, two of them had given one joint warrant of attorney, and the other had given his on a ſeparate piece of parchment, when in ſtrictneſs the warrant ought to have been joint: that is, all on one piece of parchment. The Court (*abſente Eyre*, Ch. J.) thought that there was nothing material in either of the objections.—And *Heath*, J. ſaid, that the warrants would be good even in a real ſuit.

John Norman Croſs, *Demandant*, William Grey, *Tenant*, and Anne Pead, *et al. Vouchees*, Mic. Ter. 38 Geo. 3. C.B. 1 *Pul. et Bof.* 137.

The Court will give leave to amend a miſtake in the writ of entry in a common recovery.—It was moved to amend the writ of entry, *mittimus*, tranſcript, and recovery, in this caſe. The premiſes, as deſcribed in the deed to lead the uſes, amounted, on being added together, to one hundred and ſixty-eight acres two roods fifteen poles. In the recovery the parcels were deſcribed to be two meſſuages, thirty acres of land, thirty acres of meadow, and thirty acres of paſture, whereas the recovery was intended to be ſuffered of two meſſuages, fifty acres of land, fifty acres of meadow, and fifty acres of paſture: the miſtake was ſuppoſed to have originated with the clerk in the country, writing the figures 30 inſtead of 50: the parties were all alive. It was urged that no inconvenience would ariſe from this amendment, provided that the increaſed fine for alienation were duly paid.—THE COURT directed the parties to apply, in the firſt inſtance, to the Alienation Office, and mention the matter again when that was done.—It being moved again: EYRE, Ch. J. I heſitate about granting this motion, becauſe I find a caſe in the Houſe of Lords, where, on a reference to Lord *Holt* and the judges, it was determined that a miſtake in a writ of entry could not be amended either by common law or by ſtatute. It is the caſe of Lord *Pembroke*, 1 *Salk.* 52. The practice I underſtand to be in favour of the amendment. My only difficulty ariſes from the caſe I have mentioned; but if my brothers are ſatisfied, I ſhall not oppoſe the amendment.—HEATH, J. By *Gage*'s caſe (1), 5 Rep. 45. and

(1) In 1 *Salk.* 53. and *Forteſcue*, 188. *Gage*'s caſe is ſaid to be miſreported, and not law.

ſeveral

ſeveral caſes to be found at the end of *Piggott* (1), amendments of common recoveries are warranted; and during twenty-two years that I have ſat here, it has been the conſtant practice to amend them by the deed to lead the uſes.—ROOKE, J. By the 8 *H.* 6. c. 12. original writs may be amended as to miſtakes of the clerks. There is a caſe in *Blackſtone* (2) alſo, where it was held that if a clerk miſtake his inſtructions, the *præcipe* ſhall be amended.—Leave was given to amend (3).

But no amendment can be allowed of a recovery, where the recovery, as it ſtands, has lands of the vouchee to operate upon.—It was moved to amend a recovery ſuffered *M.* 8 *Geo.* 2. 1734, by ſtriking out the city of Litchfield, and inſerting the county of Stafford, with other conſequential amendments, wherever the names of the county and ſheriff occur, and alſo by inſerting Longden (the name of a vill) after Abnall, another vill named in the ſaid recovery. The deeds to lead the uſes were produced: whereby it appeared, that the greater part of the premiſes (to the amount of 300l. a year) lay in the county of Stafford (as was ſtated by affidavit), and about 12l. only in the county of the city of Litchfield, the pariſhes lying partly within the city of Litchfield, and partly within the county of Stafford. And there was only one recovery ſuffered, and that was in the county of the city of Litchfield.—PER CURIAM: This is a groſs miſtake in the attorney concerned, in ſuing out only one recovery inſtead of two, and we would willingly give the parties all the aſſiſtance we legally can, to effectuate their evident intent; but we fear it is beyond our power. In 5 Rep. 44. where Kent was ſubſtituted for Suſſex, and 2 *Barnes*, where the county of York was altered to the city; and others of the ſame kind, the party had no eſtate in the vill or county ſtruck out; therefore, *quoad hoc*, the recovery had no operation. But this application is to annul a valid recovery in the city of Litchfield, which has operated upon lands therein for near forty years, and to ſubſtitute in its ſtead, a recovery in the county of Stafford.

Aſton *et al.* *Demandants*, *v.* Baldwin, *et al.* *Tenants*, Henry Sprott, *Vouchee*, Hil. Ter. 13 Geo. 3. C.B. 2 *Black.* 874.

If the return of a writ of ſummons in a common recovery be on Sunday, and the vouchee dies on that day, the recovery is had.—This came before the Court, upon a writ of error from the court of Common Pleas, upon a common recovery

Swann *v.* Broome, Mic. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1595. 1 *Black. Rep.* 496. 526.

(1) *Drake* and another v. *Biddulph*, p. 222. *Skinner* and others v. *Land*, p. 228.

(2) Vid. *Henzel* v. *Lodge*, 2 *Bl.* 747. and 1065. alſo 3 *Wilſ.* 154. (*ante*, vol. I. 584.)

(3) Vid. 2 *Barnes*, 24. and 216. and *Jenkinſon* v. *Staples*, *Cruiſe*, vol. II. p. 183. where the *præcipe* and writ of entry in a common recovery were amended. Alſo, *Arthur Blackamoor's* caſe, 8 Co. 156. 163.

ſuffered

ſuffered there. By conſent, the error aſſigned was in this: "That the day of the return of the writ of ſummons was on "Sunday, the 13th of May, 1750; on which ſaid 13th day "of May, *Edward Swann* the younger, tenant in tail male, "and vouchee in the common recovery, died without iſſue "male of his body." THE QUESTIONS were, FIRST, "Whether the judgment could relate to the eſſoin-day of "the term; or to any day prior to the 13th of May, the "eſſoin-day of the return?"---SECONDLY, "Whether, by "law, a valid judgment could poſſibly be given on the day "of the return, being Sunday?"—Lord MANSFIELD, Ch. J. delivered the reſolution of the Court, "That the recovery "was bad; becauſe no judgment could be ſuppoſed to be "given before the death of the tenant in tail. That this "judgment could not relate to the firſt day of the term; "becauſe it could not be given before the return of the writ "of ſummons, which appears by the record to be in the term. "That it could relate only to the eſſoin-day of the writ of "ſummons, which was upon a Sunday; on which Sunday, "the tenant in tail died."

THE REASONS UPON WHICH THIS OPINION WAS GROUNDED, WERE THE FOLLOWING:

This is a writ of error upon a judgment in the court of Common Pleas in a common recovery. The fact, as it appears upon the record, is, "That the writ of ſummons was "returnable at a return-day within the term: and the tenant "in tail died upon the eſſoin-day of that return; which "eſſoin-day happened on a Sunday." This is all that is neceſſary to be ſtated.—Though common recoveries are now conſidered as common aſſurances, yet they muſt be conducted and completed according to certain ceremonies and ſolemnities which bear analogy to the proceedings in real actions: and the want of ſuch neceſſary ceremonies and ſolemnities invalidates a common recovery, as much as the want of a third witneſs invalidates a will of lands. A judgment relates to the eſſoin-day of the term, unleſs any thing appears upon the record to the contrary, ſhewing, "that the "judgment cannot have that relation." If the tenant in tail was alive when the judgment was given, or may be ſuppoſed to have been given, ſuch judgment is good: if not, then it is a bad judgment, becauſe given after the death of the tenant in tail.—Where it appears upon the face of the record, that the relation could not be to the eſſoin-day of the term, but to a ſubſequent day, the preſumption of ſuch relation muſt ceaſe; becauſe it cannot poſſibly be ſuppoſed, or intended, "that it "was given upon that day," when it appears upon the face of the record impoſſible that it could be ſo.—Where any ſuch matter

matter is apparent upon the face of the record, the judgment then relates only so far back, as it may, consistently with the record, be intended or supposed to relate. If the essoin-day of this writ of summons had been upon a week-day, the judgment would, by relation, have been a good one; because it might then have been intended or supposed "that it was really given upon the day to which it related." But this essoin-day of the writ of summons is upon a Sunday: and from thence the objection arises; it being insisted, on the part of the plaintiff in error, "that judgment could not be "given upon a Sunday." It is clear, that if the Court could not sit on a Sunday, it would be impossible for this judgment to have been given before the death of the tenant in tail: for he died upon that Sunday. The single question therefore is, "Whether the Court can sit on a Sunday, and give a valid "judgment?"—No express direct authority has been cited in proof of the affirmative side of this question. Those authorities that have been urged in support of it have been only argumentative; from whence such a conclusion might, as it is said, be drawn. But the history of the law and usage, as to courts of justice sitting on Sundays, makes an end of the question. Anciently the courts of justice did sit on Sundays. The fact of this, and the reasons of it, appear in Sir *Henry Spelman*'s Original of the Terms. It appears, by what he says, that the ancient christians practised this. In his chapter of law-days among the first christians, using all times alike, c. 3. p. 7. he says, "The christians, at first, "used all days alike for hearing of causes; not sparing (as it "seemeth) the Sunday itself." They had two reasons for it: one was, in opposition to the heathens; who were superstitious about the observation of days and times: conceiving some to be ominous and unlucky, and others to be lucky: and therefore the christians laid aside all observance of days. A second reason they also had, which was, by keeping their own courts always open; to prevent christian suitors from resorting to the heathen courts. But in the year 517 a canon was made, "Quod nullus episcopus vel infra positus "die dominico causas judicare præsumat." And this canon (for exempting Sundays) was ratified in the time of *Theodosius*; who fortified it with an imperial constitution: "Solis "die (quem dominicum rectè dixere majores), omnium "omnino litium et negotiorum quiescat intentio." The whole canon is also decreed verbatim, in the capitulars of the emperors *Carolus* and *Ludovicus*. There are, likewise, several other canons taken notice of in *Spelman*'s Original of the Terms. One of them was made in the council of *Tribury*, about the year 895: "Nullus comes, nullusque "omnino secularis, diebus dominicis, vel sanctorum in festis, "seu quadragesimæ, aut jejuniorum, placitum habere, sed

" nec populum illo præſumat cohercere." Another of them was made in the council of Erpfurd, in the year 932; and afterwards became general, upon being taken into the body of the canon law by *Gratian*: and Sir *Henry Spelman* takes it, he ſays, to be one of the foundation-ſtones to our terms, " Placita ſecularia dominicis vel alijs feſtis diebus, ſeu etiam " in quibus legitima jejunia celebrantur ſecundum canonicam " inſtitutionem minime fieri volumus." It goes on and appoints vacations. But theſe vacations were enlarged by the council of St. Medard: " Decrevit ſancta ſynodus, ut à " quadrageſima uſque ad octavam Paſchæ, et ab adventu " Domini uſque ad octavam Epiphaniæ, necnon in jejunijs " quatuor temporum, et in litanijs majoribus et in diebus " dominicis, et in diebus rogationum (niſi de concordia et " pacificatione) nullus ſupra ſacra evangelia jurare præſumat." By which expreſſion is meant, that no cauſes ſhould be tried, or pleas holden, on thoſe days. Theſe canons were received and adopted by our Saxon kings. And *Edward* the Confeſſor made the following conſtitution (1): " Ab adventu " Domini uſque ad octabas Epiphaniæ, pax Dei et ſanctæ " eccleſiæ per omne regnum; ſimiliter, à ſeptuageſima uſque " ad octabas Paſchæ; item, ab aſcenſione Domini uſque ad " octabas Pentecoſtes; item, omnibus diebus quatuor tem- " porum; item, omnibus Sabbatis ab hora nona, ET TOTA " DIE SEQUENTI USQUE AD DIEM LUNÆ; item, vigiljs, " &c."—Theſe canons and conſtitutions were all confirmed by *William* the Conqueror, and *Henry* the Second; and ſo became part of the common law of England. Afterwards, in ſucceeding times, there happened ſeveral alterations and relaxations. The ſtatute of Weſtminſter the firſt, 3 *Ed.* 1. c. 51. and other ſtatutes, were made to this purpoſe; and uſage, or perhaps poſitive laws not now extant, diſpenſed with other days that were formerly unjuridical. The Mirrour of Juſtices, c. 5. ſ. 1. artic. 111. ſays, " Abuſion eſt que tient " pleas per dimenches, ou per auters jours defendus, ou de- " vant ſe ſoleil levie, ou noctantre, ou in diſhoneſt lieu." Lord *Coke*, in his 2d Inſtitute, p. 264. commenting upon *W.* 1. c. 51. ſays, " In the common law, there be *dies juridici*, " and *dies non juridici*. *Dies non juridici ſunt dies domi-* " *nici*, the Lord's days, throughout the whole year." In *Dyer*, 168. pl. 17. upon a judgment given in the Common Pleas, in a *ſcire facias* upon a recognizance, error was aſſigned in that the teſte of the *ſcire facias* was upon a Sunday, which is not *dies juridicus* in banco; the teſte being the 28th of November, which happening that year on Sunday, the term did not end till the 29th. In Sir *William Jones*, 156. *Beelee* v. *Alpe*, upon an information in the Exchequer, for

(1) V. *Leg. Ed. Conf.* c. 9.

engroſſing

engroſſing butter and cheeſe contrary to the ſtatute of 5. 6 *E.* 6. and a verdict and judgment againſt the defendant, and a writ of error brought by him in the Exchequer Chamber to reverſe it, and a reference of it by the Court to *Hutton* and *Jones*; the firſt error aſſigned was, "That the information "was exhibited in court on the 13th of October, which in "that year (20 *Jac.* 1.) was a Sunday, and therefore not "*dies juridicus*. But it was reſolved by *Hutton* and *Jones*, "that it was good: for, although it was not *dies juridicus* "for the award of any judicial proceſs, or to make an entry "of any judgment on record, yet it was good for accepting "an information upon a ſpecial law;" (of which kind of informations many precedents were ſhewn). And upon *Hutton*'s delivering his own and *Jones*'s opinion to the Court, they affirmed the firſt judgment, notwithſtanding the errors. But at the ſame time that theſe two judges held it good for accepting an information upon a ſpecial law, they ſaid, "That Sunday was not a *dies juridicus* for the awarding of "any judicial proceſs, nor for entering any judgment of "record." The awarding of proceſs, and the giving of judgment, are judicial acts; and therefore cannot be ſuppoſed to be done, but whilſt the Court is actually ſitting.—As to writs being returnable on Sundays—Writs were formed in thoſe times when the courts of juſtice might ſit on Sundays; and theſe ancient returns, which were not improper when the writs were firſt formed, have continued ever ſince without being altered in ſucceeding times. The canons did not at all interfere, ſo as to make any alteration in them: for the canons extend their prohibition no further than againſt awarding proceſs and giving judgment, and ſuch-like acts of court, on Sundays. So that the writs have continued in their primitive form: but no buſineſs can be done by the Court till Monday. The day of their being actually returned is, therefore, as certainly known as if the writs were made returnable on Monday. *Fitz-Herbert*, in his Natura Brevium, under the writ *de warrantia diei*, old edition, p. 17. new edition, p. 36. (to excuſe the default of appearance in court at the day aſſigned, on account of being in the king's ſervice on that day), ſpecifies one of thoſe writs in theſe words—"Rex, &c. ſciatis quod A. fuit in ſervitio noſtro die lunæ "in craſtino quinden' Paſchæ proxim' præterit'; ita quod "eo die intereſſe non potuit loquelæ quæ eſt inter, &c." In 12 *Edw.* 4. 8. b. pl. 22. upon a demurrer, in an action of treſpaſs brought by the prior of Lantony, *Pigott* ſaid, "If the "day of a return, *ſcilicet* the *quarto die*, falls in *die domi-*"*nico*, no court ſhall be holden, but on the day following." As to the practice of giving notice "to appear on the "Sunday"—The anſwer is, that whilſt the courts did ſit upon Sundays, the notice muſt follow the practice then in

uſe; and muſt of conſequence be given for appearing on the Sunday: but now that old practice "of their actually "ſitting upon Sundays" being altered and at an end, theſe notices muſt neceſſarily relate to the Monday, when the courts do ſit, and before which day they cannot ſit; and therefore the defendant cannot be miſled by having notice given him "to appear on the Sunday."—As to the obſervation, "That the courts of juſtice have never been reſtrained by "act of parliament, from ſitting on Sundays; and that the "29th of *C.* 2. c. 7. does not extend to giving judgments"—It was needleſs to reſtrain them from it by act of parliament. They could not do it, by the canons anciently received, and made a part of the law of the land: and therefore the reſtraining them from it by act of parliament would have been merely nugatory. But fairs, markets, ſports and paſtimes, were not unlawful to be holden and uſed on Sundays, at common law: and therefore, it was requiſite to enact particular ſtatutes, to prohibit the uſes and exerciſe of them upon Sundays, as there was nothing elſe that could hinder their being continued in uſe. In *Maccalley*'s caſe, in 9 *Co.* 66. b. it was objected, that Sunday "is not *dies juridicus*; and therefore, "no arreſt can be made in it: and every one ought to abſtain "from ſecular affairs upon that day." But it was anſwered and reſolved, "That no judicial act ought to be done in that "day: but miniſterial acts may be lawfully executed in the "Sunday." It has been ſaid, "That a mere ideal relation "to Sunday could not come within the notion of a profanation "of the day; as it is only a fiction of law, not founded upon "an actual fact of the Court's really ſitting and giving judg"ment upon that day."—But the anſwer to this is, that if it be impoſſible for the Court to ſit on a Sunday, there can be no ſuch relation: for an abſolute impoſſibility cannot be ſuppoſed. It has been ſaid, "That the tenant in tail had "done all that was eſſential for him to do: the reſt was "only form." The anſwer is—*The law requires, as eſſentially neceſſary to validate a common recovery, certain forms, ſolemnities, or ceremonies, that have analogy to real ſuits; it makes theſe requiſites abſolutely and eſſentially neceſſary to the completion of it. And till it is completed, it is no recovery, no conveyance: the tenant in tail has not regularly and properly executed the conveyance by which he would cut off the intail, defeat his own iſſue, and bar the remainders.* A conveyance not properly executed is the ſame as no conveyance at all. Here, he died before the return of the writ of ſummons, and before he either did or could appear to it: for though the writ is in words made returnable on the Sunday; yet, as the Court could not ſit on Sunday, he could not poſſibly appear to it before Monday. On the face of this record, it is manifeſt, that the tenant in tail could not have appeared till Monday; and

and no judgment could be given againſt him till he had appeared. It is impoſſible, therefore, that this judgment could be given before Monday; but he died on Sunday. Conſequently, the judgment appears to have been in fact given after the death of the tenant in tail. We are very ſorry to find ourſelves obliged to reverſe a common recovery, upon ſuch an objection to it: and we have ſtruggled hard, to try if it could, by any legal means, be ſupported. But, notwithſtanding our inclinations to ſupport it, we cannot help declaring our opinion, "That, in point of law, this judgment "is erroneous, and ought to be reverſed."—*Judgment reverſed.*

A writ of error was afterwards brought in parliament upon this judgment: and after hearing it upon the 2d of May, 1706: upon a queſtion put by the lords to the judges; "Whether the recovery is good or erroneous; the return-"day of the writ of ſummons being on Sunday, the 13th day "of May; on which day *Edward Swann* the younger "died?"—The LORD CHIEF BARON delivered the unanimous opinion of the judges, "That the recovery is erro-"neous."—Whereupon, the judgment of the court of King's Bench was affirmed, and the record remitted; to the end ſuch proceeding might be had thereupon, as if no ſuch writ of error had been brought.

The Court will not enlarge the return of a writ of ſummons in a common recovery, ſo as to make a term intervene between the teſte and the return.—It was moved that the writ of ſummons in five common recoveries, in Middleſex, Herts, Canterbury, Kent, and Weſtmorland, might be teſted in laſt Michaelmas, and be made returnable in the preſent Eaſter term: inſtead of the uſual courſe (authorized by the ſtatute of the 24 *Geo.* 2. c. 48.) that it ſhall be teſted the fourth day incluſive from the return of the writ of entry, and be returnable the fourth return after the return of the writ of entry; the conſequence of which is, that it muſt be returnable either in the ſame term, in which it is teſted, or at fartheſt in the very next term.—The occaſion of the preſent application was, that Earl *Cowper*, the vouchee, had acknowledged the warrants of attorney to appear to the ſummons, before commiſſioners appointed by *Dedimus* (which recited the ſummons as returnable laſt Hilary term), at Florence, on the 13th of December, 1777; but they did not arrive in England till after the end of Hilary term; and as the return is uſually of the ſame term wherein the recovery is in fact arraigned at bar, and the teſte muſt precede the actual acknowlegement of the warrant of attorney by the vouchee, this proceeding could not be made regular, without ſuing out a writ of ſummons with a much longer return than the courſe of practice will at preſent allow. The like inconve-

Barnard, *Dem.* v. Woodcock and Greenland, *Tenants.* Earl Cowper, *Vouchee*, Ea. Ter. 18 Geo. 3. C. B. 2 *Black.* 1201.

nience must occur, whenever the vouchee dwells in any distant country, as the East or West Indies:—but that objection had been used to be cured in a very unwarrantable manner, by altering the date of the caption after it arrived in England, so as to suit the term in which the recovery was arraigned; till the late rule of Court in Hil. 14 *Geo.* 3. (which directs, *inter alia*, an affidavit to be made of the true time of taking the caption) put a stop to this, among other gross irregularities, in the practice of suffering recoveries.—THE COURT conceived, that they had not power to make such a rule; or, at least, as they could not foresee all its consequences, it would be highly imprudent to authorize such a proceeding by a previous direction from the bench. But intimated that no blame should fall on the officer who should make out the process, as prayed for; but the same to be at the hazard of the parties, and without prejudice to any future question that might arise on the validity of such recoveries.

Gibbons *Demandant*, *v.* Stevenson *Tenant*, and Stevenson *Vouchee*, Mic. Ter. 19 Geo. 3. C.B. 2 *Black.* 1223.

The like motion was made to enlarge the return of the writ of summons, as in the last case of *Barnard* and *Woodcock*, and received the same denial from the Court.—The facts here were, that the *dedimus* was tested the 26th of February, 1777, and recited a writ of summons returnable the 1st day of Easter term, 1777. The warrant of attorney was taken at Bombay the 17th of December, 1777. So that properly the summons should have been returnable, and the recovery had, in Hilary, 1778, which the distance rendered impossible.—Therefore, on application to the master of the rolls, he ordered the cursitor to make out a writ of entry returnable in Michaelmas term, 1777, 18 *Geo.* 3. upon which the officers made out a summons returnable in Hilary, 1778; of which term the tenant's appearance was entered. And then they imparled from Hilary to Easter, from Easter to Trinity, and from Trinity to the present term, when the recovery was arraigned: and if the vouchee be now living, it was apprehended such recovery would be valid, but if dead it will be erroneous (1).

The King *v.* Hadlow, Mic. Ter. 18 Geo. 3. C.B. 2 *Black.* 1170.

In case in nature of deceit, to reverse a recovery of lands in ancient demesne, all the parties to the recovery must be before the Court.—In an action on the case in nature of deceit, *Grose* moved for leave to enter judgment, to set aside a recovery in this Court, of lands within the manor of Havening-atte-Bower, in Essex, which were alleged to be ancient demesne. The recovery was had by *Jonathan Black*, the elder, demandant, against *Jonathan Black*, the younger, tenant, and *Mary Hadlow*, vouchee. And this action was brought in the king's name, as lord of the manor, against the vouchee, averring that the recovery was had to her use, which she in her plea confessed: and the Attorney-general, for the king, con-

(1) Irregularity, how otherwise cured. See 1 *Sid.* 213. *Raym.* 70. 96. 1 *Lev.* 130.

sented

ſented to enter a *noli proſequi* for the damages, and this was alleged to be according to the precedents of the *King* v. *Mead*, Mic. 28 *Geo.* 2. the *King* v. *Grove*, Mic. 9 *Geo.* 3. and the *King* v. *Durnford*, Ea. 9 *Geo.* 3. BUT THE COURT concurred, that they were not bound by theſe precedents; which had probably paſt *ſub ſilentio*, eſpecially as it ſeemed neceſſary to them that the defendant and tenant ought to be before the Court, and not merely the vouchee, who did not appear to be *ceſtui que uſe*, otherwiſe than by his own acknowledgment, elſe judgment might be given to reverſe a recovery of land in frank fee, and ſo turn it into ancient demeſne, by colluſion between the lord of the manor and the vouchee, without hearing the principal parties, demandant and tenant (ſee *Lutw.* 711. 750.); whereupon it was agreed to diſcontinue this action, and bring a new writ againſt the demandant, tenant, and vouchee.

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A fine cannot be amended by increaſing the number of acres, the deed of uſes being general, and the intent only proved by affidavit.—It was on behalf of *Thomas Peach*, appointee of *Elizabeth*, his late wife, deceaſed, moved to amend a fine levied in Trinity term, 30 *Geo.* 2. A. D. 1757, by *Thomas Peach* and *Elizabeth*, his wife, ſince dead; and *Thomas Dix* and *Mary* his wife, of two undivided third parts of "two meſ- "ſuages, two barns, two ſtables, two gardens, forty acres of "land, twenty acres of meadow, and ten acres of paſture, in "Moſely, in the county of Worceſter, by extending the ſame "to ſixty-ſeven acres, three roods, and eight poles of land, "and ſixteen acres of paſture."—The deeds to lead the uſes comprized all the "two meſſuages with the appurtenances, "and all and every the lands, paſtures, &c. to the ſame be- "longing, ſituate in Moſely, in the occupation of *G. S.* and "*J. P.*"—And it was ſworn by the attorney who ſolicited the fine, &c. that Mrs. *Peach*'s full and whole intereſt was intended to paſs.—DE GREY, Ch. J. Amendments anciently were only of errors in the proceſs of fines, or miſtake in the deſcription of the premiſes; 5 *Co.* 46. and theſe were amended by other parts of the ſame record. 5 *Co.* 43. But the amendment now requeſted, varies the extent of the premiſes from fifty to eighty-four acres. This indeed might be done, upon principle, provided it was intended by the parties. But what is the evidence of that intent? The deed cannot be legal evidence of the wife's intention, becauſe ſhe cannot be examined to the deed, as ſhe is to the fine. And, if ſo, we have nothing to amend by.—GOULD, J. concurred.—BLACKSTONE, J. thought the deed of uſes ſufficient evidence of the intention of the parties, and that it has always been allowed as ſuch, even in the caſe of feme coverts. *Loggins* and *Rawlins*, *P.* 24 *Geo.* 2. 4to. *Barn* 21. *Craghill* and *Pattinſon* M. 29 *Geo.* 2. *ibid.* 24. But in this caſe, what does the deed of

Powel *et al.* plaintiffs, *v.* Peach, *et. al.* deforciants, Ea. Ter. 18 Geo. 3. C.B. 2 *Black.* 1202.

uſes ſay? It deſcribes no number of acres. That is now to be proved by ſubſequent *vivâ voce* evidence, which is too dangerous. I can find no precedent where the quantity or number of acres has been increaſed, much leſs nearly doubled, as in the preſent caſe; and am not for making a precedent, which would give ſuch an inlet to fraud.—NARES, J. concurred, principally upon the novelty of the motion. Parties ſhould be careful to inſert ſufficient quantities in their parcels. —Rule diſcharged.

## Fiſh.

Rex *v.* Uriah Corden, Hil. Ter. 9 Geo. 3. B.R. 4 *Burr.* 2279.

A CONVICTION on ſtat. 5 *Geo.* 3. c. 14. for preſervation of fiſh was quaſhed, becauſe it did not appear thereon, that the fiſhing was without the conſent of the owner.—This was a conviction by a juſtice of peace, upon the third ſection of the act of 5 *Geo.* 3. c. 14. "for the more effectual preſervation of fiſh "in fiſhponds and other waters."—*Upon the oath* of one *Martha Buxton*, that the defendant did fiſh in a brook, called Schoo Brook, and the conviction ſtated, that it appeared upon the *information* of one *John Chatterton*, that *Richard Hayne* was the owner of the brook. Three exceptions were taken. *1ſt exception.* It don't appear that this conviction was made upon the complaint of the *owner*, or by authority from the owner; or even that this was a fiſhing without the *conſent* of the owner. Whereas it appears clearly, upon conſidering this whole act of parliament, and comparing one part of it with another, that the complaint of the owner is eſſentially neceſſary to the juriſdiction given to the juſtice of peace by this third clauſe of it.—*2d exception.* There is no proof, upon oath, that Mr. *Hayne* was the owner; or who elſe was ſo. *John Chatterton*'s information is not upon oath: and it is confined to the time of giving it; but ſays nothing about who was owner at the time of the fiſhing.—*3d exception.* The adjudication is "that the defendant hath forfeited the ſum of "five pounds, to be paid as the ſtatute aforeſaid doth direct." Whereas it ought to have particularly ſpecified and directed to whom it ſhould be paid.—It was anſwered to theſe exceptions: 1ſt. There are no expreſſions in this act of 5 *Geo.* 3. c. 14. which require the complaint to the juſtice to be made by the owner. The words are general: the juriſdiction is given to the juſtice, "upon complaint made to him upon "oath.—2d. The defendant has confeſſed the whole charge: and part of it is, "that Mr. *Hayne* was the owner."—3d. The act itſelf directs "that the party convicted ſhall immediately "after conviction pay the penalty of five pounds to ſuch "juſtice or juſtices before whom he ſhall be convicted, for "the uſe of ſuch perſon or perſons as the ſame is thereby ap-"pointed to be forfeited and paid unto." It is enough, to ſay "*convictus eſt, et ſolvat faciet* the ſum of money *juxta for-*"*mam ſtatuti.*" 1 *Salk.* 383. *Regina* v. *Barret.* 2 *Str.* 1 *Sir J. Strange*,

*Strange*, 858. *Rex* v. *Hawks*.—THE COURT all concurred in holding this conviction to be a bad one. They thought that a tight hand ought to be holden over these ſummary convictions; and it ought to appear to the Court, that the juſtice has juriſdiction in the caſe: they ought to be kept to a proper degree of ſtrictneſs; and not to be made arbitrarily and without authority. In the preſent caſe, they held that the juſtice does not appear to have juriſdiction. Here is no complaint from the owner; nor does it even appear to have been without his conſent. It ought, at leaſt, to appear that it was without his conſent. This is plainly implied in the act of parliament: the giving the penalty to the owner ſhews it. Here, it does not ſufficiently appear that this was private property; or who was the owner. The witneſs who gives the juſtice to underſtand "that Mr. *Hayne* is the owner," was not upon oath; and was therefore no witneſs. The ownerſhip is not ſufficiently charged: neither is it confeſſed. The confeſſion goes no further than the matters charged. The words in the conviction, "not having any juſt right or claim to take, kill, "or carry away any ſuch fiſh," are the words and opinion of the witneſs, not of the juſtice of peace who has made the conviction: and they are too general. The proviſo from whence they are taken, means to except ſuch perſons as have a ſpecial right to fiſh in the fiſhery of another. The offence intended in this conviction is fiſhing in the fiſhery of Mr. *Hayne*, being private property. But all this might be done, for aught that appears upon this conviction, with the conſent of the owner. The fact ought to appear ſo that the Court may be able to judge whether the conviction be agreeable to law. If the owner had been the complainer, that would have ſhewn his diſſent: but this conviction is upon the complaint of *Martha Buxton*; and it does not appear that the defendant has been guilty of fiſhing in any water being private property, without conſent of the owner.—Conviction quaſhed.

## Foreign Laws.

WHETHER an action can be ſupported in England, on a contract which is void by the law of England, but valid by the law of the country where the matter was tranſacted, is a great queſtion, and has not yet been determined. But *per Wilmot*, J. I cannot help thinking that where a perſon appeals to the law of England, he muſt take his remedy according to the law of England, to which he has appealed. The law of the place where the thing happens, does not always prevail. In many countries, a contract may be maintained by a courtezan for the price of her proſtitution; but ſuppoſe an action to be brought here, upon ſuch a contract which aroſe in ſuch a country, it would never be allowed in this country. Therefore the *lex loci*

Robinſon v. Bland, Mic. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1083. 2 *Black.* 256.

*loci* cannot in all cases govern and direct. The sentences of foreign Courts have always some degree of regard paid to them by the Courts of justice here, and it is very right that an attention should be paid to them, as far as they ought to have weight in the case depending. But if a man originally appeals to the law of England for redress, he must take his redress according to that law to which he has appealed for such redress. Therefore if the rule of determination be different by the law of another country, from our rule here, yet I should incline, though I give no opinion at all on the point, that the law of England where the action is brought should prevail against the law of that other country, if they really did clash as to each other; because the party seeking redress has chosen to apply here.

Mostyn *v.* Fabrigas, Mic. Ter. 15 Geo. 3. B.R. *Cowp.* 174.

The way of knowing foreign laws is, by admitting them to be *proved as facts*, and the Court must assist the jury in ascertaining what the law is. For instance, if there is a French settlement, the construction of which depends upon the customs of Paris, witnesses must be received to explain what the custom is, as evidence is received of customs in respect of trade. So in the supreme resort before the king in council, the privy-council determine all cases that arise in the plantations, in Gibraltar or Minorca, in Jersey or Guernsey, and they inform themselves by having the law stated to them.

Holman *v.* Johnson, Tr. Ter. 15 Geo. 3. B.R. *Cowp.* 343.

And every action tried here, upon a contract made abroad, must be tried by the law of England; but the law of England says, that in a variety of instances, with regard to contracts legally made abroad, the laws of the country where the cause of action arise shall govern. There are a great many cases which every country says shall be determined by the laws of the foreign countries where they arise: but no country ever takes notice of the revenue lands of another. Per Lord *Mansfield*.

## Fraudulent Conveyance.

Goodright *ex dim.* Humphreys *et al. v.* Moses, Tr. Ter. 15 Geo. 3. C.B. 2 *Black.* 1019.

A SETTLEMENT by tenant in fee for the maintenance of herself and children for life, to raise portions for younger children, and the surplus to her heir at law, she having then many sons and daughters, is a voluntary settlement, and void against purchasers, under 27 *Eliz.* And a lessee at rack-rent is a purchasor for a valuable consideration.—On the 2d of December, 1709, *Dorothy Curlew*, widow, in consideration of an intended marriage between herself and *Joshua Reade*, settled the premises in question, from and after the said marriage, to the use of herself for ninety-nine years, if she so long lived, without impeachment of waste, remainder to trustees to preserve contingent remainders;—remainder to herself for life;—remainder to the said *Joshua Reade* for life;—remainder to their first

firſt and other ſons, ſucceſſively in tail;—remainder to their daughters in tail;—remainder to ſuch perſon as the ſaid *Dorothy*, whether covert or ſole, ſhould by deed or will appoint;—remainder to the ſaid *Dorothy* in tail;—remainder to her right heirs.—The marriage took effect, and the ſaid *Dorothy* died, leaving her huſband, *Joſhua Reade*, and one only child, ſurviving, *viz. Elizabeth*, afterwards the wife of *Thomas Harris*.—On the 2d of January, 1747, the ſaid *Joſhua Reade*, *Thomas Harris*, and *Elizabeth* his wife, covenanted to levy a fine (which was duly levied, Hil. 21 *Geo.* 2.) and declared the uſes to *Walter Grant* and *Joſeph Humphreys*, and their heirs, in truſt, as to the rents and profits to and for the ſaid *Joſhua Reade* for life; and after his deceaſe, "in order that the ſame "rents and profits may and ſhall be applied for the ſupport "and maintenance of the ſaid *Thomas Harris*, and *Elizabeth* "his wife, and their children, during the life of the ſaid "*Thomas Harris*;—and after his deceaſe, for the maintenance "of the ſaid *Elizabeth Harris* and her ſaid children, during "the life of the ſaid *Elizabeth*. And after their ſeveral de-"ceaſes, that the truſtees ſhould, by ſale or mortgage, raiſe a "ſum not exceeding 700l. for the younger children of the "ſaid *Thomas* and *Elizabeth Harris* (excluſive of the right "heirs of the ſaid *Elizabeth*, by reaſon of the ſubſequent "limitation of the ſurplus to their uſe), payable as therein is "mentioned. And after raiſing the ſame, in truſt, to convey "the reſidue and remainder of the premiſes to the right heirs "of the ſaid *Elizabeth* for ever."—The deed did not contain any leaſing power.—*Thomas Harris* ſurvived *Joſhua Reade*, and *Elizabeth* ſurvived her ſaid huſband, *Thomas Harris*.—On the 12th of July, 1750, *Elizabeth Harris* demiſed the premiſes to the defendant, *Thomas Moſes*, for twenty-one years from Michaelmas then next, at the rent of 55l. *per annum* (but without any covenant for quiet enjoyment), and he entered accordingly, and is now in poſſeſſion, and has laid out 100l. in improving the premiſes.—On the 10th of December, 1771, *Elizabeth Harris* died.—On the 13th of May, 1772, *Joſeph Humphreys*, the ſurviving truſtee, *Thomas Harris*, eldeſt ſon and heir of the ſaid *Elizabeth Harris*, and all the younger children of the ſaid *Elizabeth*, in conſideration of 2130l. conveyed all the premiſes in queſtion to *James Blake*, and his heirs, who had notice from the ſaid *Moſes* of the ſaid leaſe, before he completed his purchaſe.—Queſtion, Whether under theſe circumſtances the plaintiff can recover?—For the plaintiff it was inſiſted, that under the deed of 1747, the heir was a purchaſor, for that the right heirs of *Elizabeth* could only mean her eldeſt ſon; and that the leaſe was void againſt him, who had the remainder in fee, no power of leaſing being reſerved.—For the defendant it was argued, that the deed of 1747 was only a voluntary conveyance, and not good againſt a purchaſor for valuable conſideration; which the leſſee is, by his

rent

rent and covenants. 2 *Bac. Abr.* 608. tit. *Fraud. Cr. Jac.* 158. *Colville* and *Parker.* 2 *Ch. Caſ.* 133. And the only conſideration which could be ſet up, as paſſing to the wife by the deed of 1747, was only the certainty of maintenance for herſelf and children during the life of her huſband, which is not a legal, but only a moral, conſideration. 6 *Co.* 72. *Burrel*'s caſe ſhews how watchful the law is to prevent frauds againſt purchaſers.—*De Grey*, Ch. J. delivered the opinion of the Court; 1. That the deed of 1747 was only a voluntary conveyance within the true meaning of the ſtatute 27 *Eliz.* being founded only upon a good, and not upon a valuable conſideration, and therefore cannot be ſet up againſt a *bonâ fide* purchaſor. 2dly, That the defendant, being a leſſee at rack-rent, was a *bonâ fide* purchaſor of his term for a valuable conſideration. 9 *Mod.* 59. 2 *Vern.* 327. and has beſides laid out a conſiderable ſum of his own money in improving the farm upon the faith of his twenty-one years' leaſe. —Judgment for the defendant.—*See caſes on Leaſing Powers, in vol. IV. p.* 40.

Roe *ex dim.* Hamerton *v.* Mitton *et al.* Mic. Ter. 8 Geo. 3. C B. 2 *Wil.* 356.

What ſhall be a good conſideration to ſupport a ſettlement by way of remainders to the younger brothers of the intended huſband, eldeſt ſon of that parent.—The caſe was ſingly this: *John Hamerton*, in 1706, being ſeiſed in fee of the lands in queſtion, and at the ſame time having a mother living, who had an annuity of 50l. iſſuing out of the whole lands, and *John* having two brothers, *Thomas* and *Vavaſor*, *John* being about to be married to *Mary Kelly*; his mother, previous to the marriage, conſents to part with her ſecurity upon the whole lands for her annuity, and to take, inſtead thereof, a ſecurity for the ſame upon part of the lands; and accordingly ſhe and her ſaid ſon *John* (the intended huſband) join in a fine to deliver the whole lands from the ſaid annuity; and in conſideration of the marriage, and a portion of 1300l. and of the ſaid grant and releaſe of the ſaid annuity, *John Hamerton* conveys to truſtees, that they ſhould pay 50l. *per ann.* to the mother, out of part of the lands for her life, then as to the whole of the lands to the uſe of *John Hamerton* for life;—remainder to truſtees to preſerve contingent remainders;—remainder to the firſt, and every other ſon in tail male;—remainders to *Thomas Hamerton* and *Vavaſor Hamerton*, ſeverally, one after the other in tail male, in ſtrict ſettlement;—remainder to the daughter and daughters of the marriage of *John Hamerton* and *Mary Kelly*;—remainder to *John Hamerton*, in fee.—There was no iſſue of the marriage; afterwards *John Hamerton* mortgaged the eſtate to *Monkton*, and acknowledged a fine to him *ſur conceſſit*, then *Monkton* purchaſed of *John Hamerton* for a valuable conſideration in fee, and took a fine from him *ſur conuzance de droit come ceo, &c.* and *John Hamerton* died without iſſue, but *Thomas Hamerton*, his brother, has left a ſon, *Vavaſor Hamerton*, the

leſſor

leſſor of the plaintiff, a very poor man (who it is ſaid was, or is, a common ſoldier).—THE SINGLE QUESTION was, Whether there was a good and valuable conſideration to ſupport the limitation in the ſettlement to *Thomas Hamerton*, the late father of the leſſor of the plaintiff? or, Whether that limitation is merely voluntary under the ſtat. of 27 *Eliz.* cap. 6. and bad againſt a purchaſer for a valuable conſideration?—WILMOT, Lord Ch. J. This ſettlement is fair and honourable, and there is a good and valuable conſideration to ſupport the limitation therein to *Thomas Hamerton*, the late father of the leſſor of the plaintiff, and it is quite out of the ſtat. 27 *Eliz.* c. 6. which was only made againſt covinous and fraudulent conveyances, and which makes the parties avowing ſuch fraudulent conveyances criminal; whether the purchaſer for a valuable conſideration had notice of this ſettlement or not, is not material (I think) in this caſe; but if he had notice, I am clearly of opinion that the purchaſe is fraudulent.—The whole of this queſtion turns upon the mother's joining in the ſettlement; the friends and relations of *Mary Kelly*, the intended wife of the marriage (muſt be ſuppoſed to ſay), to the mother of *John*, the intended huſband, "*Mary* "ſhall not marry your ſon unleſs you will give up, or take "off, your annuity from the whole of the lands, and let it be "charged upon a part thereof; the mother anſwers, if you "want my aſſiſtance you ſhall pay for it, that is to ſay, you "ſhall limit the eſtate to my younger ſons, in preference and "priority to the daughters of the marriage, in failure of iſſue "male;" this is a good conſideration to *John*, the ſon (and the *quantum* is not at all material), he purchaſes his wife by his mother's concurrence.—But it was objected that *John* was ſeiſed, and could have made the ſettlement without the mother and that in truth no real or good conſideration moved from her at all, for that ſhe ſtill had her annuity charged upon part of the lands; in anſwer to this, the applying to the mother ſhews that *John Hamerton* could not have made a ſettlement agreeable to the lady's friends without the mother; and I am of opinion that any conſideration given by the mother, would have made her a purchaſor for her younger ſons: by the limitation to the daughters of the marriage after that to the two brothers of *John Hamerton*, it is plain the mother intended her ſons ſhould be preferred to the daughters of the marriage; and this is as plain to me as if I had heard the mother ſay, "I will not part with my annuity ſecured upon "the whole lands, and take a ſecurity for it upon part of the "lands, unleſs you will prefer my ſons to your daughters;" the ſettlement can have no other meaning, and any conſideration moving from a parent to a child is good. The whole Court were of the ſame opinion, and judgment was given for the plaintiff.

If

Eſtwick v. Gailliaud, Mic. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 420.

If a perſon, having ſeveral creditors, convey by deed the legal intereſt in part of his real and perſonal property to a truſtee, in truſt (after deducting the expences reſpecting the truſt) out of the rents and profits to pay half the ſurplus to the grantor for his own uſe, and the reſidue among certain creditors named in a ſchedule, without any intention of fraudulently delaying the creditors not named in the ſchedule in obtaining their demands, the deed is good in law.—To treſpaſs for breaking and entering the plaintiff's cloſe, and taking his goods, the defendant juſtified under a *fieri facias* iſſued at the ſuit of *Townſend* againſt Lord *Abingdon*, and directed to the defendant as ſheriff of Oxfordſhire. The plaintiff claimed under a deed, dated the 19th of May, 1784, between Lord *Abingdon* of the firſt part, *Barbara Harvey* of the ſecond part, and the plaintiff of the third part; by which (after reciting that Lord *Abingdon* was indebted to *B. Harvey* in 2194l. 6s. which was ſecured by a bond and a judgment entered up in Michaelmas term, 1782, and that he was alſo indebted to certain other perſons enumerated in a ſchedule thereto annexed), Lord *Abingdon* (who was tenant for life, but not ſo ſtated in the deed) granted and demiſed, for 99 years, if Lord *Abingdon* ſhould ſo long live, and *B. Harvey* confirmed, the manſion-houſe at Rycot, park, and pleaſure grounds, together with the deer and the cattle, and the dead ſtock, &c. to the plaintiff in truſt, to receive the rents and profits; and with the money, firſt, to pay the expences of the truſt; ſecondly, to pay from time to time, to Lord *Abingdon*, one moiety of the entire ſurplus for his own uſe and benefit; and thirdly, to pay the other moiety to *B. Harvey*, and the other creditors mentioned in the ſchedule. The plaintiff took poſſeſſion of the whole, and received the rents and profits, with which he paid Lord *Abingdon* one moiety, &c. and Miſs *Harvey*'s debt, and ſome of the other ſcheduled creditors. Five years after this deed was executed, the plaintiff re-demiſed the manſion-houſe to Lord *Abingdon* at an annual rent. Lord *Abingdon* ſometimes made preſents of ſome of the deer; and when any of the horſes (comprized in the deed) were ſold by auction, or were to run at Newmarket, they were entered as the property of Lord *Abingdon*, which (it was proved) was done in order to give them a name, and was with the plaintiff's conſent, who received the produce of thoſe that were ſold, and a certain ſum for thoſe which were entered at Newmarket. Lord *Abingdon*'s name alſo remained on ſome of the carts, but they were never uſed after the execution of the deed. *Townſend*'s demand aroſe from his father's having built a houſe for Lord *Abingdon* about the year 1770; and it did not appear that he ever demanded this debt in his life-time from Lord *Abingdon*: ſome time before the deed was executed, Lord *Abingdon* offered

*Townſend*

*Townſend* (the executor to his father) the materials of another houſe by way of ſatisfying this debt, and a treaty for this purpoſe ſubſiſted ſome time, but was at length broken off. But it did not appear that *Townſend* ever threatened to ſue Lord *Abingdon* for this debt before the deed in queſtion was executed; nor did it appear that Miſs *Harvey*, or the other ſcheduled creditors, knew of *Townſend*'s debt before. At the trial, *Groſe*, J. left it to the jury to conſider, 1ſt, *Whether the deed were made for the purpoſe of ſecuring the rents and profits, and the goods, &c. for the benefit of Lord* Abingdon, *and to deceive his creditors?* 2dly, *Whether this were a fraudulent tranſaction between Lord* Abingdon, *Miſs* Harvey, *and the ſcheduled creditors, with intent to defraud or delay the other creditors of Lord* Abingdon *in general, or* Townſend *in particular, or whether it were a fair tranſaction between them, without meaning to defraud thoſe other creditors?* The jury found a verdict for the plaintiff, and gave him 650l. damages. It was moved, either that the verdict for the plaintiff ſhould be ſet aſide, and a verdict entered for the defendant, on the ground that the deed was void in itſelf by the ſtat. 13 *Eliz.* c. 5. (1), or that a new trial ſhould be granted on account of the miſ-direction of the judge, for that it ſhould have been left for the conſideration of the jury, not whether it were a fraudulent contrivance between Lord *Abingdon*, Miſs *Harvey*, and the ſcheduled creditors, but whether it were fraudulent on the part of Lord *Abingdon*, with reſpect to his other creditors.—PER CURIAM: On an application for a new trial, the only queſtion is, Whether, under all the circumſtances of the caſe, the verdict be or be not according to the juſtice of the caſe? for though the judge may have made ſome little ſlip in his directions to the jury, yet if juſtice be done by the verdict, the Court ought not to interfere and ſet it aſide. If, indeed, the facts be doubtful, and the attention of the jury has been drawn from the conſideration of them, that is a ground for a new trial: but if the facts be clear, and thoſe facts have been laid before the jury, we ought not to grant a new trial in order to give the unſucceſsful party the chance of obtaining another verdict, if the former verdict be agreeable to the equity and conſcience of the caſe. In this caſe, the defendant's counſel have miſtaken the effect of the judge's directions. He ſtated to the jury two queſtions, one,

(1) The ſtat. 13 *Eliz.* c. 5. "to avoid all feoffments, gifts, grants, or alienations of lands, goods, and chattels, deviſed and contrived of malice, fraud, covin, colluſion, or guile, to the end, purpoſe, and intent, to delay, hinder, or defraud creditors, and others, of their juſt and legal actions," &c. enacts, that "ſuch grants, &c. ſhall be clearly and utterly void, fruſtrate, and of none effect;" with a proviſo (ſ. 6.) that the act ſhall not extend to grants made upon good conſideration and *bona fide*.

Whether

Whether Lord *Abingdon* intended by the deed to secure the property to himself, and to deceive his creditors? the other, Whether there were any concerted scheme between Lord *Abingdon* and the scheduled creditors to defraud the other creditors? But the defendant's counsel have entirely dropped the former question; and an attempt has been made in the argument to confine our attention to the second part of the direction only. If, indeed, the direction had been, as has been contended in the argument, we should not have thought it quite accurate. But it seems that the jury were not desired to take the second question into their consideration, if they were satisfied on the former. In truth, the first question embraced the whole case; and we have only to consider whether any fraud was intended on *Townsend*.—*Fraud is sometimes a question of law, sometimes a question of fact, and sometimes a mixed question of law and of fact.* If we are to decide on the face of the deed itself, that is a question of fraud in point of law; now taking the deed by itself, not accompanied with the circumstance that there were other creditors of Lord *Abingdon*'s, there is no pretence for the objection. Nor does the objection occur here, that this was a conveyance of the whole of Lord *Abingdon*'s property; for, in the first place, it is not so stated in the deed; and the contrary appears to be the fact from the evidence; for Lord *Abingdon* offered, before the execution of the deed, to pay *Townsend* out of other funds than those included in the deed. This shews, that Lord *Abingdon* had no intention of defrauding *Townsend*; and it does not appear that there were any other creditors (except *Townsend*), who were not mentioned in the schedule. Now if no fraud were intended on *Townsend*, there is no objection to this verdict; for it is unnecessary in this case to consider the transaction between Lord *Abingdon* and the scheduled creditors. If it were necessary to consider it, as Lord *Abingdon* assigned over more than would probably be sufficient to satisfy those creditors, it seems that it was a fair proposal on his part, that a certain portion of the rents and profits should be reserved for his own benefit in the mean time. With regard to the circumstances of Lord *Abingdon* continuing in possession of the house, entering the horses in his own name, selling them, and keeping his name on the carts, they are all explained in a satisfactory manner. On the whole, it appears that the deed, taken by itself, is a good and valid one; that there are no extrinsic circumstances to shew that any fraud was intended either on *Townsend* or any other creditors; and the justice of the case being clearly with the plaintiff, there is no ground for granting a new trial.—*Per Curiam*: Rule discharged.

Cadogan *et al.* v. Kennet, *et al.* Ea. Ter. 16 Geo. 3. B.R. *Cowp.* 432.

An action of trover was brought by the plaintiffs, who were the trustees under the marriage settlement of Lord *Montfort*, against

againſt the defendant, Mr. *Kennet*, who was a judgment-creditor of Lord *Montfort*'s, and the other defendants, who were ſheriffs' officers, to recover certain goods taken by them in execution under a *fi. fa.*—At the trial, the plaintiffs proved Lord *Montfort*'s marriage-ſettlement: by which it appeared, that the goods in queſtion, which were the houſehold goods belonging to Lord *Montfort*, at his lordſhip's houſe in town; and which were very minutely particularized in a ſchedule annexed to the ſettlement, were all conveyed to the plaintiffs, *as truſtees*, for the uſe of Lord *Montfort* for life; remainder to Lady *Montfort* for life, remainder to the firſt and other ſons of the marriage in ſtrict ſettlement.—It was proved, that at the time of the ſettlement being made, it was known Lord *Montfort* was in debt: *but he thought the fortune of the lady he was to marry, which amounted to* 10,000l. *was amply ſufficient to pay all the debts he owed at that time, and had no idea of diſappointing any creditor.*—That Mr. *Kennet* was a creditor of Lord *Montfort* at the time of the ſettlement; that Lady *Montfort* was a ward of the court of Chancery; and the reaſon for including the houſehold goods in the ſettlement was, becauſe it was thought Lord *Montfort*'s real eſtate was not of itſelf ſufficient to make a proper and adequate ſettlement.—It appeared, alſo, that the ſettlement was referred to a maſter in Chancery, who approved of the ſettlement, and the inſerting the houſehold goods for the reaſon above-mentioned.—The jury found a verdict for the plaintiff with nominal damages, and if the Court ſhould be of opinion with the plaintiffs, then the goods were to be returned ſpecifically.—THE QUESTION was, Whether the plaintiffs, as truſtees under the marriage-ſettlement, were, againſt the defendant, entitled to the poſſeſſion of theſe goods for the purpoſes of the truſt? PER CURIAM: The principles and rules of the common law, as now univerſally known and underſtood, are ſo ſtrong againſt fraud in every ſhape, that the common law would have attained every end propoſed by the ſtatutes, 13 *Eliz.* c. 5. and 27 *Eliz.* c. 4. The former of theſe ſtatutes relates to *creditors* only; the latter to *purchaſers*. Theſe ſtatutes cannot receive too liberal a conſtruction, or be too much extended in ſuppreſſion of fraud. The ſtat. 13 *Eliz.* c. 5. which relates to frauds againſt creditors, directs, "That no act whatever done to defraud a creditor or credi-"tors, ſhall be of any effect againſt ſuch creditor, or "creditors:" but then ſuch a conſtruction is not to be made in ſupport of creditors, as will make third perſons ſufferers: therefore the ſtatute does not militate againſt any tranſaction *bonâ fide*, and where there is no imagination of fraud, and ſo is the common law: but if the tranſaction be not *bonâ fide*, the circumſtance of its being done for *a valuable conſideration* will not alone take it out of the ſtatute: there have been

ſeveral caſes where perſons have given *a fair and full price for goods, and where the poſſeſſion was actually changed*; yet being done for the purpoſe of defeating creditors, the tranſaction has been held fraudulent, and therefore void. One caſe was, where there had been a decree in the court of Chancery, and a ſequeſtration. A perſon, with knowledge of the decree, bought the houſe and goods belonging to the defendant, and gave a full price for them. The Court ſaid, the purchaſe being with a manifeſt view to defeat the creditor, was fraudulent; and, therefore, notwithſtanding a valuable conſideration, void.—So, if a man knows of a judgment and execution, and, with a view to defeat it, purchaſes the debtor's goods, it is void: becauſe the purpoſe is iniquitous, it is aſſiſting one man to cheat another, which the law will never allow. There are many things which are conſidered as circumſtances of fraud: the ſtatute ſays not a word about *poſſeſſion*: but the law ſays, if after a ſale of goods the vendee continue in poſſeſſion, and appears as the viſible owner, it is evidence of fraud; becauſe goods paſs by delivery: ſee vol. II. p. 908: but it is not ſo in the caſe of a leaſe, for that does not paſs by delivery. The ſtat. 27 *Eliz.* c. 4. does not go to *voluntary conveyances, merely as being voluntary*, but to ſuch as are fraudulent, a fair voluntary conveyance may be good againſt creditors, notwithſtanding its being voluntary. The circumſtance of a man being indebted at the time of his making a voluntary conveyance, is an argument of fraud. The queſtion therefore in every caſe is, Whether the act done is a *bonâ fide* tranſaction, or whether it is a trick and contrivance to defeat creditors? If there be a conveyance to a truſtee for the benefit of the debtor, it is fraudulent. The queſtion then is, Whether this ſettlement is of that ſort? It is a ſettlement which is very common in great families. In wills of great eſtates, nothing is ſo frequent as deviſes of part of the perſonal eſtate to go as heir-looms; for inſtance, the deviſe of the Duke of *Bridgewater*'s library; the old Duke of *Newcaſtle*'s plate.—So, in marriage-ſettlements, it is very common for libraries and plate to be thus ſettled, and for chattels and leaſes to go along with the land. If the huſband grows extravagant, there never was an idea that theſe could afterwards be overturned; if this Court were to determine they ſhould, the parties would reſort to Chancery. We come then to the circumſtances of the preſent caſe, which are very ſtrong; there is not a ſuggeſtion of any intention to defraud, or the moſt diſtant view of diſappointing any creditor; the very object of the marriage-ſettlement was, that the lady's fortune might be applied to the diſcharge of all Lord *Montfort*'s debts: the amount of this fortune was 10,000l. and was thought fully ſufficient for that purpoſe; beſides this, it is a ſettlement approved by a maſter in Chancery: moſt clearly

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the maſter in Chancery, and the great ſeal, could have no fraudulent view: but it appears further, that the reaſon why the goods were inſerted was, becauſe the ſettlement of the real eſtate alone was thought inadequate without them; clearly therefore, it was no contrivance to defeat creditors, but meant as a proviſion for the lady if ſhe ſurvived, and heir-looms for the eldeſt ſon. An argument, however, is drawn from the *poſſeſſion*, as a ſtrong circumſtance of fraud, but it does not hold in this caſe. *It is a part of the truſt* that the goods ſhall continue in the houſe, and for a very obvious reaſon; becauſe the furniture of one houſe will not ſuit another: and it was the buſineſs of the truſtees to ſee the goods were not removed. If Lord *Monifort* had let his houſe with the furniture, reſerving one rent for the houſe, and another for the furniture; or if the rent could be apportioned, the creditors would be entitled to the rent; but they have no right to take the goods themſelves: the poſſeſſion of them belongs to the truſtees, and the abſolute property of them is now veſted in the eldeſt ſon.—Though ſuch ſettlements are frequent, no caſe has been cited to ſhew they are fraudulent; how common are ſettlements of chattels, and money in the ſtocks? can there be a doubt but they are good? Yet the creditors would be entitled to the dividends during the intereſt of the debtor. Here there was clearly no intention to defraud, and there is a good conſideration: therefore, it could not be left to the jury to find the ſettlement fraudulent, merely becauſe theſe were creditors.—The goods muſt be kept in the houſe for the benefit of the ſon.

To make a voluntary ſettlement void againſt a ſubſequent purchaſer, within the ſtat. 27 *Eliz.* c. 4. it muſt be *covinous* and *fraudulent*, not *voluntary* only. In ejectment, the jury found a verdict for the defendant, ſubject to the opinion of the Court, on the following caſe:—"*William Watſon* being ſeiſed in fee, according to the cuſtom of the manor of *Hexham*, of the copyhold tenements mentioned in the declaration, on the 17th of December, 1763, executed *a letter of attorney* to *John Green*, authorizing him to ſurrender the ſame to the uſe of the ſaid *William Watſon* for his life, and after his deceaſe, to the defendant, *Routledge* (who was his nephew, by a ſiſter), his heirs and aſſigns for ever; which ſurrender was accordingly made on the 21ſt of the ſame December, and *William Watſon* was admitted thereupon; *this was voluntary, and without any conſideration, other than natural love and affection.* In the year 1767, the defendant paid his addreſſes to *Hannah Bell*; and a copy of the ſaid ſurrender was ſhewn by the defendant to her, and her father; who thereupon gave their conſent to the marriage, which ſoon after happened.—*William Watſon*, afterwards, on the 11th of January, 1773, ſurrendered the ſame premiſes to the uſe of *Hugh Watſon*, the

Doe *ex dim.* Watſon, *et al.* *v.* Routledge, Mic. Ter. 18 Geo. 3. B.R. *Cowp.* 705.

leſſor of the plaintiff in the firſt demiſe, and (who was his nephew by a younger brother) his heirs and aſſigns for ever; and by a deed of the ſame date, executed by *William Watſon*, reciting, that *Hugh Watſon*, upon the propoſal, and at the requeſt of *William Watſon*, had come to an agreement with *William Watſon*, for the abſolute purchaſe of the ſaid premiſes, for the ſum of 200l. and reciting the ſaid ſurrender; in purſuance thereof, *William Watſon* acknowledges the receipt of the 200l. from *Hugh Watſon* in full, for the purchaſe of the premiſes; and covenants with *Hugh Watſon*, that he, *William Watſon*, was owner of the premiſes, and had good right to ſurrender the ſame to *Hugh Watſon*, and his heirs; that they might quietly enjoy the ſame, free from incumbrances; and that *William Watſon*, and his heirs, ſhould make further aſſurance. There is a receipt on the back of the deed for the conſideration-money, ſigned by *William Watſon*; and the money was proved to have been paid by *Hugh Watſon* to *William Watſon*, at the execution of the deed. *Hugh Watſon* was, on the 12th of January, 1773, admitted upon the ſaid ſurrender, and entered into poſſeſſion of the premiſes.—*Hugh Watſon*, ſome time *before, and at the time of the ſurrender to him in* 1773, *knew of the former ſurrender in* 1763.—The premiſes at the time of the laſt ſurrender to *Hugh Watſon*, were worth between 50l. and 60l. per annum: and the inheritance worth between 1800l. and 2000l. *William Watſon* died on the 21ſt of June, 1774, and the defendant, *Routledge*, brought his ejectment, and thereby got poſſeſſion of the premiſes; *Hugh Watſon* then being a priſoner for debt in Carliſle gaol, having been committed on or about the 28th of April, 1774, and making no defence to the action.—*Hugh Watſon* afterwards took the benefit of the inſolvent debtors' act; and the two leſſors in the ſame demiſe were aſſignees of all *Hugh Watſon*'s eſtates and effects under the ſaid act.—THE POINT MADE ON THE BEHALF OF THE LESSOR OF THE PLAINTIFF at the trial was, that *the firſt ſurrender* in 1773, being *merely voluntary*, was by force of the ſtatute, 27 *Eliz.* c. 4. null and void in reſpect of the ſecond ſurrender in 1773, under which he claimed: he being therein a *bonâ fide* purchaſer of the premiſes in queſtion for a valuable conſideration. ON THE PART OF THE DEFENDANT, it was contended, 1ſt, That the ſtat. 27 *Eliz.* c. 4. *does not extend to copyholds.*—2dly, That a purchaſer for the conſideration of 200l. only, where the eſtate was fairly worth 2000l. is not ſuch a purchaſer as the ſtatute meant to protect againſt a prior voluntary ſettlement.—AND THE QUESTION WAS, Whether the plaintiffs were entitled to recover?—Lord MANSFIELD, CH. J. Four queſtions have ariſen, FIRST, Whether the ſtatute 27 *Eliz.* c. 4. extends to copyhold eſtates? If it does, then, SECONDLY, Whether the firſt deed

of

of 1763, is, under all the circumſtances of this caſe, *a fraudulent covinous deed*, within the true intent and meaning of the ſtatute? If it is, then THE THIRD queſtion that ariſes is, Whether the plaintiff comes under ſuch a ſettlement within the meaning of that ſtatute, as will entitle him to have the other ſet aſide? THE FOURTH and laſt queſtion is, Whether if the firſt deed cannot be ſet aſide *in toto* for the benefit of the aſſignees, the bankrupt has any right, as againſt the preſent defendant, to be conſidered as an incumbrancer for 200l. the purchaſe money.—Lord MANSFIELD, Ch. J. As to the firſt queſtion, there is great reaſon to ſay, that the ſtat. 27 *Eliz.* c. 4. does extend to copyhold eſtates? but it is ſtrange that ſuch a point ſhould be firſt agitated at this time; I ſhould rather think that it has been taken for granted, that the ſtatute *does extend* to copyhold eſtates, becauſe in being ſo conſtrued, it can work no prejudice to the Lord, and the object of the ſtatute is to ſuppreſs fraud: but it is not neceſſary, abſolutely, to determine that queſtion; I will ſuppoſe that it does for the ſake of argument: and ſuppoſing it does, I am ſtill of opinion againſt the plaintiff in this caſe.—The next queſtion then is, Whether the ſettlement of 1763 is, under all the circumſtances of this caſe, *covinous and fraudulent* within the true intent and meaning of the ſtat. 27 *Eliz.* c. 4.? Now in that ſtatute there is not a word that impeaches *voluntary* ſettlements, merely as being voluntary ſettlements, but as *fraudulent and covinous*. The title of the ſtatute is "againſt *covinous and fraudulent* conveyances," where *nominally* one man paſſes, and where *nominally* his eſtate is conveyed to another; but where, in fact, it is agreed, that the grantor ſhall keep it to his own uſe, and ſo to anſwer other purpoſes of fraud.—The enacting part conſiders it in the ſame light, and makes an expreſs proviſion againſt ſuch practices, as if they were a *crime*: for it ſays, ſect. 3. that "all parties, &c. to ſuch fraudulent grants, "&c. who ſhall attempt to defend the ſame, ſhall forfeit *one* "*year's value of the lands*, &c. ſo purchaſed; and alſo, being "lawfully convicted, ſhall *ſuffer ſix months' impriſonment*, "without, &c." But no perſon making a voluntary ſettlement, *by way of proviſion for his family*, was ever conſidered in that criminal light. Where a fraudulent uſe is made of a ſettlement, that indeed may be carried back to the time when the fraud commenced.—A cuſtom has prevailed, and leant extremely to conſtrue voluntary ſettlements fraudulent againſt creditors; but if the circumſtances of the tranſaction ſhew it was not fraudulent at the time, it is not within the meaning of the ſtatutes, though no money was paid: for inſtance, what is generally done in marriage-ſettlements: if a father, upon the marriage of his eldeſt ſon, in a ſettlement upon him, makes remainders to half a dozen younger

brothers after the conſideration of the marriage, thoſe remainders are good within the meaning of the ſtatute againſt any claim of creditors; *and the reaſon is, becauſe it was a good ſettlement at the time.* A father has a right to give his eſtate to all his children; and, therefore, may fairly ſay, unleſs you agree to theſe limitations, I will not join. Again, a marriage is had: ſuppoſing any relation has money in his hands belonging to the woman, and ſays, "I will not pay the money "unleſs you make a ſettlement."—A ſettlement in conſequence is made, it is a voluntary ſettlement; but the Court will ſay it is a good conſideration.—Again, the caſe of *Newſtead* v. *Searle* is very ſtrong; there, a woman who was poſſeſſed of an eſtate, and having children by a former huſband, was about to marry again: but before ſhe married, and becauſe ſhe was going to marry, ſhe made a voluntary ſettlement upon her children; her ſecond huſband afterwards perſuaded her to join in a ſale of his eſtate for a valuable conſideration: and the queſtion was, Whether the ſettlement was void? *The Court* held, that her doing a rational act without any intention or view of defeating any body, would not render the ſettlement fraudulent, though it was abſolutely voluntary.—One great circumſtance which ſhould always be attended to in theſe tranſactions is, whether the perſon *was indebted at the time* he made the ſettlement: if he were, it is a ſtrong badge of fraud. In the preſent caſe it is not expreſsly ſtated; but I take it for granted, that *William Watſon* had no children of his own: he had different nephews. In 1763, he meant to make, and did make, a ſettlement on his nephew by his ſiſter. This was notorious to the whole country; it was entered upon the records of the Court, and every body might, and did ſee it. What is the conſequence of it? the nephew gets credit, for it is not a ſecret private tranſaction; and though what happened previous to the marriage cannot be coupled with this caſe, becauſe the knowledge of it cannot be brought home to *William*, or *Hugh Watſon*; yet it ſhews that that happened which in general is ſuppoſed to happen from an act of this kind. The party gains credit by it, and if it gave him credit, he might likewiſe get a marriage by it. He appears, therefore, publicly for ten years together, with the knowledge of his uncle, entitled to the inheritance of his eſtate.—There is no allegation, that *William Watſon*, the uncle, owed a farthing at that time, or left a ſingle debt undiſcharged at his death.—On what ground then can *this firſt ſurrender* be conſidered or conſtrued, *covinous or fraudulent?*—With reſpect to notice in the caſe of creditors, it is not material whether a ſubſequent purchaſer has notice or not of a former fraudulent ſettlement: for it has been determined at law, and therefore muſt ſtand, that a man's having notice of a former ſettlement, which was fraudulent,

lent, ſhall not prevent his avoiding it, the ſame as if he had been ignorant of it: becauſe if he knew the tranſaction, he knew it was void by law, 5 *Co.* 60. 3 *Co.* 83. *Wood*'s Convey. 804. But there was no notion at that time that courts of law, in modern determinations, would have gone ſo far as they have done in conſtruing voluntary ſettlements fraudulent againſt creditors.—But in reſpect of *voluntary family ſettlements*, to be ſure, notice varies it much. In the caſe of a latter ſtatute, the regiſter act, 7 *Ann.* c. 20. though it is ſaid there poſitively, "that a regiſtered deed ſhall take place of an unregiſtered deed;" from whence it might be argued, that if a perſon knew of an unregiſtered deed, it ſhould not ſtand againſt him. Equity ſays, if the party knew of the unregiſtered deed, the regiſtered deed ſhall not ſet it aſide: becauſe he has that notice which the act of parliament intended he ſhould have.—I now come to the conſideration of the third queſtion, "Whether the deed of 1773 is ſuch a "deed as is entitled to protection, and ought to ſet the other "aſide?" In order to do that, it ſhould be a *bonâ fide tranſaction and a fair purchaſe* in the underſtanding of mankind; or *for a good conſideration*, as a ſettlement upon a marriage, in conſideration of the marriage; and there ſuch a ſettlement would ſet aſide, and take place of, a former fraudulent deed. It is not neceſſary that it ſhould be for money: but it muſt be a fair *bonâ fide* tranſaction: if it is colourable only, it cannot ſtand.—Now what are the circumſtances of the ſecond ſettlement in the preſent caſe? manifeſtly, a mere contrivance; the plaintiff had notice of the former ſettlement. *William Watſon*, the uncle, had changed his mind: What was to be done to ſet the prior deed aſide? a new one was to be made under ſuch circumſtances, and for ſuch a conſideration as they thought would effectuate the purpoſe. They agree, therefore, that all affection was to be left out, no generoſity to appear, or be mentioned; but the plaintiff is, "at the requeſt of the ſeller," to agree to give a price which it is to be ſuppoſed fully ſatisfies the ſeller: it is a groſs fraud, and no purchaſe at all; the conſideration of 200l. which is to ſupport it as a deed for valuable conſideration compared with the real value.—2000l. ſhews it to have been no purchaſe at all: but a gift. Then comes the FOURTH queſtion, which may ariſe in this caſe: "Whether, as againſt the preſent de-"fendant, the aſſignees of the plaintiff, *Hugh Watſon*, are en-"titled to be conſidered as incumbrancers for 200l?" as to that moſt undoubtedly; if *William Watſon* himſelf had come to be relieved againſt this ſettlement in 1773, ſaying it was by colluſion, and a fraud againſt the firſt, he could not be relieved without paying the 200l. and the complete relief would be, to put things juſt in the ſituation they were before, but that is not this caſe; for here, the plaintiff comes againſt a

third perſon, whoſe eſtate, *William Watſon*, the vendor, could not charge with a farthing: and, moreover, he comes fraudulently with full notice that the eſtate had been ſettled upon the defendant ten years: there is no colour, therefore, to ſet up any claim againſt the defendant to this ſum of money.—Aston, J. As to the purchaſe-money (the 200l), the aſſignees cannot come againſt the defendant *Routledge*, but they may come upon the aſſets of *William Watſon*.—With reſpect to the ſtatute, 27 *Eliz.* c. 4. the caſe in *Finch.* Rep. 102. ſeems to me to bring the deed of 1763, within that ſtatute, as being a deed upon good conſideration; but firſt, as to that ſtatute extending to copyholds, there are caſes where the words "lands, tenements, and hereditaments," have been conſidered as extending to copyhold eſtates, as well as to other lands. The reaſon why they have been conſtrued not to be included in the ſtatute of Elegit. 13 *Ed.* 1. ſtat. 27. *Hen.* 8. for transferring the poſſeſſion to the uſe, and ſtat. 12 *Car.* 2. 24. is, becauſe otherwiſe a prejudice would ariſe to the lord, and an alteration of the tenant without his conſent. *I ſhould rather think this ſtatute did extend to copyholds than not*, but it is not abſolutely neceſſary to decide that point.—Then as to the firſt ſettlement being a good one within the meaning of the ſtat. 27 *Eliz.* c. 4. there is no doubt but when *William Watſon*, the uncle, was admitted to this eſtate, under the firſt ſurrender, which he had taken to himſelf for life, with remainder to his nephew, the defendant, in 1763, the ſurrender was good: and admittance to his own eſtate for life, was an admittance likewiſe of his nephew in remainder; it was notorious, and gave fair credit to the nephew.—A great deal has been ſaid upon the conſtruction of the ſtat. 27 *Eliz.* c. 4. Whether there ſhould be *a full*, as well as a *bonâ fide* conſideration? It has been ſaid that a *bonâ fide* conſideration only is not ſufficient:—but it is, and the conſideration need not be full; for a mortgage is a good conſideration, though never a full one: the tranſaction in 1763, is a very fair one; but the ſubſequent ſurrender in 1773, from the circumſtances of it, is by no means ſo; for the purchaſe-money, which is only 200l. is not for the inheritance ſingly, but likewiſe for the eſtate for life of *William Watſon*, and the receipt expreſſes it to be in full; whereas it is not ſo, for the value of them both together is found to be at leaſt 2000l.—Willes, J. agreed, but deſired it might be obſerved, the Court gave no abſolute opinion upon the firſt queſtion, "Whether the ſtat. 27 *Eliz.* c. 4. extended to copyholds?"—Ashhurst, J. agreed.—Judgment for the defendant.

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Game.

# Game.

*Qualification.*] A LIFE-ESTATE of leſs than 150l. *per annum* is not a qualification to kill game.—On a motion to ſet aſide a verdict obtained by the plaintiff in an action of debt on the ſtat. 5 *Ann.* for the better preſervation of the game; the points of law which aroſe out of the facts in proof at the trial were, 1, Whether a perſon, having an eſtate for life of 100l. *per annum*, is qualified to kill game? 2. Whether a vicar, in reſpect of his church, has an eſtate of inheritance in him, or an eſtate for life only?—The firſt and moſt general queſtion depended upon the words of the act, which were, "that every perſon not having lands and tenements, or ſome other eſtate of inheritance, in his own or his wife's right, of the clear yearly value of one hundred pounds *per annum*, or for term of life; or having leaſe or leaſes of ninety-nine years, or for any longer term, of the clear yearly value of one hundred and fifty pounds; is hereby declared to be a perſon, by the laws of this realm, not allowed to have or keep for himſelf, or any other perſon, any greyhounds, &c.:" and the principal difficulty upon the argument ſeemed to be, whether the words "or for term of life," were properly referrible to the firſt or laſt branches of the ſentence, which created the exemption?—LORD MANSFIELD, Ch. J. A tenant for life muſt have an eſtate to the amount of 150*l.* *per annum* to qualify him to kill game.—The clauſe, as it ſtands in the act, is not grammar. It is by ſome ſlip made nonſenſical. The word "having" muſt be rejected; or the conſequence is, that the having of a term muſt, as the act is worded, operate as a (1) diſqualification: an impoſſible ſenſe in any way of conſidering this ſtatute. But leave out this word (and for the above reaſon it cannot be retained) and all is clear.—*Willes*, J. Conſtruing this act, as it ought to be conſtrued, by itſelf, and reading it without adverting to what might or might not paſs at the time in the minds of the framers of it, it plainly gives, agreeable to the general underſtanding and practice, a qualification to all ſuch as own a freehold of 100l. *per annum*. With no other title the clergy have always exerciſed this right, and ought not to be deprived of it. In the clauſe of the act, which is the ſubject of debate, there are two diſtinct branches of ſentences, the ſenſe of each of which is governed by the word

Lowndes, Eſq. v. Lewis, Clerk, Ea. Ter. 22 Geo. 3. B.R. *Cald.* 188.

(1) For inſtance, "Every perſon not having ſome eſtate of inheritance, or for life, or having a leaſe for any term of years, is declared to be a perſon by the laws of this realm not allowed to keep greyhounds, &c."

"having."

"having." The break or pauſe is, where that word is taken up a ſecond time; and there a new direction, a new ſenſe and ſentence, begin. This conſtruction does no violence by rejecting any thing; and I cannot conſent by another conſtruction to extend the penalties of the act farther.—The uſage has been for perſons in poſſeſſion of an eſtate for life of 100l. *per annum*, conſtantly to exerciſe this privilege. It was this uſage, therefore, which ſpoke the ſenſe of mankind upon the ſubject, and ought to prevail. Whatever may be the good ſenſe of the thing, or the probable intention of the legiſlature, I think, that upon legal principles, if a penal act is defectively penned, it cannot be carried into execution. Without looking into the authorities cited, this is at preſent ſtrongly the impreſſion of my mind.—*Aſhhurſt*, J. The act, as it ſtands, is nonſenſe. This ſubjects us to the neceſſity of adding or rejecting ſomething. "Having," therefore muſt, in the laſt member of the clauſe, be rejected, or "not" muſt be added to it, to make the whole intelligible either way.—*Buller*, J. This caſe ſeems to me to admit of no doubt, when the queſtion is conſidered with reference to former acts in *pari materia*; and if we muſt either reject, or add, or tranſpoſe words in this act, to obtain a clear and conſiſtent meaning, under ſuch circumſtances we can do no other than reſort to former ſtatutes: and each of thoſe cited in the reign of king *James*, not only require in the caſe of eſtates for life a higher qualification than in the caſe of inheritances, but even to a double and treble amount. But upon the act itſelf the conſtruction muſt be, that eſtates for life are not equivalent to eſtates of inheritance, or the whole of the firſt clauſe is nugatory, and altogether rejected in effect; as the ſecond, which is having an eſtate of freehold, would have included it. The paſſage in *Comyns Dig.* Tit. Juſ. of P. 71. the caſe of *Bennet* v. *Talbot*, in 5 *Mod.* 307, and the printed form of convictions, all ſtrongly ſhew the general underſtanding upon the ſubject; and, added to the ſenſe of the legiſlature in the acts *pari materia*, afford to my mind an unanſwerable argument.—Lord *Mansfield*: We will think of it; and ſhould we change our opinions, we will let you know. In the mean time let the Rule be diſcharged.—It was never mentioned again.

Wetherell v. Hall, Mic. Ter. 23 Geo. 3. B.R. *Cald.* 231.

An equitable as well as legal eſtate gives a qualification under the game laws: but the *clear value* of the neceſſary eſtate, means the value clear, at leaſt, of all mortgages or incumbrances, created by the owner or thoſe under whom he claims.—On the trial of an action of debt, upon the ſtat. 5 *Ann.* a verdict was found for the plaintiff, ſubject to the opinion of the Court upon the following caſe.—The defendant, upon his marriage with his preſent wife, became ſeiſed in her right of an eſtate of inheritance, part of which was copyhold, and held of the manor of Bondgate in Darlington, in the county

county of Durham; which, at the time of committing the offence mentioned in the declaration, and before, were together of the clear yearly value of one hundred and three pounds: but it farther appeared, that the ſaid defendant and his wife, before the committing of the offence, (to wit) on the tenth day of May, one thouſand ſeven hundred and eighty, duly ſurrendered a cloſe, part of the ſaid copyhold eſtate, unto *Robert Kelſey*, by way of mortgage, and to ſecure to *Kelſey* the payment of four hundred pounds; and the ſaid cloſe was of the clear yearly value of fourteen pounds, parcel of the 103l.—THE QUESTION was, Whether the defendant at the time of committing the offence was duly qualified to uſe engines to kill and deſtroy the game?—LORD MANSFIELD, Ch. J. The privilege here is given to property; and the *ceſtuy que truſt*, the mortgagor, is really the owner: the truſtee, the mortgagee, is merely nominal. We conſider the defendant's intereſt in this Court juſt as it would be conſidered in a court of equity. It is an intereſt ſubject to the payment of the mortgage: it is a qualification of property; and though it is not neceſſary that he ſhould have a legal eſtate, he muſt have ſuch property in the land as ſhall produce a clear income of 100l. *per annum*; or it might be carried ſo far, as that he might have nothing, and yet enjoy the privilege. What then are a mortgagor and mortgagee in Chancery? One the owner, and the other as having a charge upon the land; and the charge goes along with it.—*Buller*, J. In the caſe of rent-charges the cognizance of the juſtice is admitted; and in many others they muſt interfere, as in contracts between landlord and tenant. Neither is there any pretence on the part of the defendant to complain of hardſhip. Poſſeſſion is *primâ facie* evidence of property. The defendant muſt therefore be preſumed to be the intire owner. The hard taſk lies upon the other party; who muſt make proof of the contrary. If the juſtice may receive proof of rent-charges, and ſervices, what ſhould prevent his doing the like as to mortgages? The only point then is, whether the words "clear yearly value" mean "clear yearly value to the perſon in poſſeſſion?" The words of this act would by themſelves leave little room for doubt; but, when explained and ſupported by the ſtatutes of K. *James in pari materia*, the words of which are, "over and above all charges and repriſes," it can no longer admit of queſtion, but that it muſt mean clear value to the perſon in poſſeſſion: for, by the common rule of conſtruction, all ſtatutes upon the ſame ſubject are conſidered as making one ſyſtem of law; and conſequently the words in the two laſt ſtatutes muſt be referred to the ſtatute in queſtion.—*Willes* and *Aſhhurſt*, Juſtices, concurring.—Judgment for the plaintiff.

A diploma, conferring the degree of doctor of phyſic, granted by either of the univerſities in Scotland, does not give a quali- Jones *v.* Smart, Mic. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 44.

qualification to kill game under 22 and 23 *Car.* 2. c. 25. Alſo an eſquire, or other perſon of higher degree, as ſuch, is not qualified under that act; though the ſon of an eſquire, or the ſon of other perſon of higher degree, is.—On the trial of an action of debt on the ſtat. 5 *Ann.* c. 14. for killing game without being duly qualified. Evidence was given of a diploma from the univerſity of St. Andrew's in Scotland, appointing the defendant doctor of phyſic; which it was contended gave him a ſufficient qualification under the 22 and 23 *Car.* 2. c. 25.—And this point now came on before the Court in the ſhape of a ſpecial caſe; and the only QUESTION was, Whether the diploma were a legal qualification?—And it was contended on *the behalf of the plaintiff*, that the defendant was not qualified. 1ſt, Suppoſing him to have the ſame rank as a doctor of the Engliſh univerſities, yet he is not ſuch a character as was meant to be qualified by the ſtatute of *Charles* the Second.—2dly, Suppoſing that doctors of the two Engliſh univerſities have the right contended for by the preſent defendant (which in itſelf is a very doubtful matter), yet this diploma does not confer ſuch a right.—FOR THE DEFENDANT three queſtions were made. 1ſt, Whether, on the conſtruction of the ſtatute 22 & 23 *Car.* 2. every perſon, as a member of the civil ſtate, who is an eſquire, or ſuperior in rank to an eſquire, may not kill game?—2dly, Whether a doctor of phyſic who has taken his degree at either of the Engliſh univerſities be not ſuch perſon?—3dly, Whether a Scotch diploma does not confer the ſame privileges?—THE COURT took time to conſider of their opinion: but Lord MANSFIELD, Ch. J. then ſaid, that as to this latter ground, he had no doubt that all privileges granted by the ſtatutes to the univerſities were confined to our own, and did not extend to Scotland, or other foreign univerſities, which were governed by their own particular laws and cuſtoms. But that the general queſtion upon the conſtruction of the ſtatute of *Car.* 2. ſhould not paſs undecided.—Afterwards the Court delivered their opinions *ſeriatim*.—Lord MANSFIELD, Ch. J. This is an action of debt brought by the plaintiff againſt the defendant, for uſing a gun for the purpoſe of killing game, not being duly qualified under the ſtatute. The ſpecial caſe ſtates that the defendant reſted his juſtification upon a diploma which was produced, whereby the univerſity of St. *Andrew*'s in Scotland, had conferred on him the degree of doctor of phyſic. Two objections have been raiſed by the counſel for the defendant againſt the competency of this action. Firſt, that under this diploma the defendant hath the ſame rights and privileges conferred upon him, as are required by a degree beſtowed by either of our univerſities. 2dly, That doctors in all the learned profeſſions are of higher degree than an eſquire; and therefore by the 22 & 23 *Car.* 2. they are exempted from the penalties of the ſeveral ſtatutes relating to game.—The ſtatute

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22 & 23 *Car.* 2. has theſe words, "other than the ſon and "heir apparent of an eſquire, or other perſon of higher de- "gree." For the defendant it has been contended, that "other "perſon of higher degree" relates to the eſquire himſelf, and means that a perſon of higher degree than an eſquire is qualified; whereas on the other ſide it is contended, that it means "other "than the ſon and heir apparent of an eſquire, or the ſon of "any other perſon of higher degree." To be ſure, abſurd conſequences may ſeem to follow from giving a privilege to the ſon, which the father has not: but the queſtion is, Has the ſtatute done it or not? I wiſhed to have the general point determined, becauſe of the conſequences. This Court conſidered the point once before in the caſe of *The King* v. *Utley*; and there they held, that the ſtatute meant the ſons of other perſons of higher degree. On full conſideration, I am not ripe to vary from the opinion given in that judgment. All the precedents are ſo. But what ſtruck me moſt was this, the drawer of this ſtatute of *Car.* 2. certainly had the former ſtatute of *Jac.* 1. in his view; for though it do not follow the other ſtatute throughout, yet it does in that clauſe, and that does not admit of a doubt; for there the word "of" is expreſsly inſerted. I cannot therefore unneceſſarily vary from the deciſion that has been given; I ſay, unneceſſarily, becauſe I am ſatisfied on the other ground of the opinion which I delivered the other day. —On that ground there is not a colour for ſaying that the defendant is qualified by the act of union. It is true, that by the fourth article of that act, the Scotch have the ſame general privileges as the Engliſh, but then they muſt have the ſame qualifications, otherwiſe they come not within the ſame deſcription; for the general article, which declares there ſhall be a communication of all privileges, can only mean ſuch as are of a general nature. A burgeſs of London is endued with certain privileges, to which a burgeſs of Edinburgh has no claim: ſo in every caſe where a privilege is of a qualified nature, it muſt be underſtood with that qualification. A doctor of the Engliſh univerſities may become a member of the college of phyſicians; may plead in Doctor's Commons; and has various other privileges, from all of which a Scotch doctor, as ſuch, is excluded. The qualification therefore muſt be from Oxford or Cambridge. In like manner, the ſtatute allowing men of certain degrees to have diſpenſations for holding two livings, neceſſarily refers to ſuch degrees only as are obtained in an Engliſh univerſity; for the church of Scotland is diſtinct from ours, and admits not of the ſame rules. Therefore, whatever rank the defendant may hold by courteſy, he is not in point of law to be conſidered as a doctor to this purpoſe.—WILLES, J. differed from the reſt of the Court, and aſſigned his reaſons.—ASHHURST, J. and BULLER, J. agreed with Lord *Mansfield*.

A lord

The Earl of Ailesbury *v.* Pattison, Mic. Ter. 19 Geo. 3. B.R. 1 *Doug.* 28.

A lord of a hundred, or wapentake, cannot grant a deputation to a game-keeper.—On the trial of an action of debt against the defendant, on the statute of 5 *Ann.* c. 14. a verdict was found for the plaintiff, subject to the opinion of the Court, on a question, Whether the defendant had any right or authority to kill game upon the manor of Whorleton? "*William Marwood*, Esq. was "lord and chief bailiff of the liberty, wapentake, or hundred, "of Langbaurgh, in the North Riding of the county of York. "The said *William Marwood* and his servants, and the "servants of those under whom he claimed, had used to kill "game on the manor of Whorleton, which is within the said "wapentake, and also, on all the rest of the said wapentake. "The plaintiff was lord of the said manor of Whorleton, and "had usually appointed a game-keeper within the said manor, "for the purpose of preserving the game, and had a game-"keeper at the time of the facts committed as laid in the "declaration. The said *William Marwood*, as lord and "chief bailiff of the said wapentake, on the 21st day of July, "1777, granted a deputation to the defendant (his menial "servant), who was killing game at the time in the declar-"ation mentioned, and did kill one grouse within the said "manor of Whorleton, for the said *William Marwood*, by "his order, and for his immediate use."—Lord MANSFIELD, Ch. J. All acts in *pari materiâ*, are to be taken together as if they were one law. In the statute of *Car.* 2. the words, "other royalties," are used, but that must mean royalties of the same nature with manors. If royalties of a higher nature had been meant, the statute would have begun with them. The reason why this word was used in the act of *Car.* 2. was, because such royalties go by different names in different parts of the kingdom; as honours, baronies, fees, &c. But in the act of 5 *Ann.* c. 14. the words are only "lordship or manor;" and the acts of 9 *Ann.* and 3 *Geo.* 1. recite the others, and only mention "lords and ladies of manors."—Postea to the plaintiff.

Calcraft *v.* Gibbs, Ea. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 681.

And it is no defence to an action for penalties on the game laws that the defendant has a deputation from a person claiming to be lord of the manor, if there appear to be no ground for the claim.—To an action, on the statute of *Anne*, for keeping and using a gun for the destruction of game, without being qualified, and also for shooting without a certificate, the defence was under a deputation, granted by Mr. *Roebuck*, as lord of the manor of Northfleet. The plaintiff produced a grant from the crown to him of the manor of Northfleet; and the defendant had purchased *Ingress* of him, which lies within this manor. The judge thinking that the question respecting the boundaries of a manor ought not to be tried in an action on the game laws, the plaintiff was nonsuited, but he had leave to move to set it aside.—And on a motion for that

that purpoſe, THE COURT thought the point too clear for argument; for that though the judges at *Niſi Prius* had frequently refuſed to enter into a minute diſcuſſion of the boundaries of manors in actions on the game laws: one inſtance of which was mentioned as having happened ſome years ago at Stafford, before Lord Ch. J. *Wilmot*, yet that in the preſent caſe there was no pretence of title in Mr. *Roebuck*. And, therefore, they made the rule abſolute (1).

This cauſe went down to trial a ſecond time, when it was further proved by the defendant, as the ſervant of Mr. *Roebuck*, under whoſe directions he acted, though without any indemnity from him, that when *Roebuck* purchaſed the eſtate of the plaintiff in 1788, *it was agreed, that the former ſhould have the deputation of the manor of Northfleet, of which the plaintiff was lord, and in which the eſtate purchaſed was ſituated.* That the laſt certificate which had been granted to any one as game-keeper to the plaintiff for this manor, was in the ſame year of 1798. That in 1790, and 1791, cer-

Calcraft *v.* Gibbs, Mic. Ter. 37 Geo. 3. B.R. 5 *Ter. Rep.* 19.

(1) *Hankins* v. *Bailey*, Bridgewater ſummer aſſizes, 1791. In an action for a penalty under the game laws for ſhooting a pheaſant, *Buller*, J. nonſuited the plaintiff; it appearing that the defendant was game-keeper of Sir *Richard Hoare*, of his manor of Bruton, and had, as ſuch, conſtantly ſhot over the place where the pheaſant was killed; no evidence being given that the place was out of the manor. And he ſaid he would not put it upon the defendant to prove that the place was within the manor (though preſſed by the plaintiff's counſel ſo to do), for that he would not in ſuch an action try the boundaries of the manor.

*Blunt* v. *Grimes*, Saliſbury ſpring aſſizes, 1789. This was an action of debt brought for penalties under the game laws. The killing being proved; it appeared that the defendant was game-keeper to Lord *Shafteſbury*, and that Lord *Shafteſbury* was owner of the lands where the game had been killed. *Bond*, on his behalf, opened a caſe of title to the manor in Lord *S.* and derived it through ſeveral ancient deeds, as far back as the reign of queen *Elizabeth*. Beſides which, he offered to ſhew a ſeiſin in fact of Lord *S.* and his anceſtors, by repeated acts of ownerſhip, and exerciſe of manerial rights, by felling timber on the waſtes, &c. as far as the oldeſt witneſſes could remember, which would be ſufficient in this caſe.—*Morris*, for the plaintiff, interrupted him, by ſaying that he knew of no diſtinction intended to be taken between the evidence in this caſe and any other. That this action had been agreed to be brought between the parties, expreſsly to try the right to the manor in queſtion; that they were aware that Lord *S.* had exerciſed acts of ownerſhip, which was the very thing complained of; and that the plaintiff was ready to prove, by ancient writings and records, that the plaintiff was lord of the manor.—BULLER, J. obſerved that it was not competent to the parties to enter into any ſuch agreement; nor ſhould he give his aſſent to it. He was clearly of opinion that this was a very improper mode of trying the ancient right to the manor. For he ſhould hold that if the defendant proved only a colourable title in Lord *S.* as lord of the manor, and the exerciſe of thoſe manerial rights in fact, which had been opened, that would be a ſufficient defence againſt the penalties of the act, and he ſhould direct the jury to find for the defendant. Whereupon, by agreement, the record was withdrawn.

tificates

tificates had been granted to the defendant as game-keeper to Mr. *Roebuck* for this manor; and as ſuch game-keeper, and by the particular orders of *Roebuck*, he had continued to ſhoot there after having been warned by the plaintiff to deſiſt. RUNNINGTON, who tried the cauſe, directed the jury, that if they were ſatisfied that the defendant acted *bonâ fide* as *Roebuck*'s game-keeper, under his direction, and ignorant of the nature and extent of his claim to ſport over the manor in queſtion, they ſhould find a verdict for him, on the ground that this was not a proper form of action for trying diſputed claims. On this, the jury found for the defendant. A rule to ſhew cauſe why there ſhould not be a new trial having been obtained, it was inſiſted in ſupport of the rule, on account of a miſdirection in point of law, that if the right were clear, and there were no colour for a diſpute about the title to the manor, it was perfectly immaterial from what motive the defendant had acted.—PER CURIAM: If this caſe had been properly left to the jury, and they had even drawn a wrong concluſion, we ſhould not have been diſpoſed to grant a new trial in ſuch an action as the preſent. But where there is any ground of objection to the law delivered by the judge, on which the verdict has proceeded, if ſuch objection be well founded, it is immaterial what the nature of the cauſe is. The application for a new trial is a direct appeal to the juſtice and laws of the country, and cannot be tried and diſpoſed of by any other rule. The Court before declared, as they now do again, that where a party has a fair colourable title only to a manor, a penal action is not a mode of proceeding by which they will inveſtigate it. Now, nothing of the ſort is even pretended; for it is admitted on the part of the defendant, that the plaintiff was the lord of the manor. But it is inſiſted that he promiſed the deputation of it to Mr. *Roebuck* at the time of the purchaſe of the eſtate, under whom the defendant acted. That, therefore, decides the queſtion at once; for *a man cannot convey to another the power of appointing a game-keeper without a conveyance alſo of the manor itſelf.* Such a power is a mere emanation of the manor, and inſeparable from it. It is a mere ſhadow, accompanying the ſubſtance. But it has been ſaid further that the defendant acted *bonâ fide*, and therefore, had not incurred the penalty of the ſtatute. But were we to declare that, becauſe a defendant acted *bonâ fide*, it was a ſufficient excuſe in this action, it would operate almoſt as a total repeal of the ſtatutes inflicting theſe penalties. Therefore, whether the defendant acted *bonâ fide* or not, if he had no colour of title, it could never be a proper conſideration to be left to the jury; and the verdict which proceeded on ſuch miſdirection, in point of law, muſt in conſequence be ſet aſide. The ſervant, indeed, choſe to truſt to what his maſter told him upon the ſubject; but

but as the maſter had no right to the manor, or even colour of title, it is no juſtification to the ſervant.—Rule abſolute.

But a game-keeper of a lord of a manor has a right to carry a gun any where out of the manor.—On the trial of an action of treſpaſs againſt the defendant, a juſtice of the peace, for taking and carrying away the plaintiff's gun from him. There was a verdict for the plaintiff, on the following facts: "Lord *H.* lord of the manor of Ringwood, appointed the "plaintiff his game-keeper, within the ſaid manor; on the "10th of October, the plaintiff hunted and beat for game "in the ſaid manor, and in a large field there ſprung a covey "of partridges; after their firſt flight he ſhot at them within "the manor; they took a ſecond flight, and the plaintiff "purſued them out of the manor, but could not find them; "as he was returning again to the manor, he was met by the "defendant about three quarters of a mile diſtant from that "manor, who aſked him if Lord *H.* had qualified him? the "plaintiff anſwered, 'I have a deputation from the lord of "the manor of Ringwood;' the defendant replied, 'You are "now out of that manor,' and demanded his gun, and took it "from him. The defendant did not ſhoot out of the manor, "but was three quarters of a mile out of the manor with his "gun and dog with an intention to ſhoot at game."—By the ſtat. 3 *Geo.* 1. c. 11. It is enacted, that no lord of a manor ſhall make any perſon to be a game-keeper with power to kill game, unleſs ſuch perſon be qualified by the laws of this realm ſo to do; or unleſs ſuch perſon be truly and properly a ſervant to the ſaid lord; or be immediately employed and appointed to take and kill the game for the ſole uſe of the ſaid lord, and not otherwiſe.—The plaintiff was neither a qualified perſon to kill game by the laws of the realm, nor was properly a menial ſervant to the lord of the manor.—TWO QUESTIONS aroſe at the trial: 1ſt, Whether from the facts proved, the plaintiff had been guilty of any offence againſt the game laws, ſo as to ſubject him to have his gun ſeized and taken from him by the defendant?—2dly, Whether, as the plaintiff was neither a qualified perſon, nor a menial ſervant to the lord, he could be appointed his game-keeper? Lord MANSFIELD thought the defendant had no right to ſeize the gun; and that it was not neceſſary that the plaintiff ſhould be a qualified perſon, or a menial ſervant to the lord, in order to make him capable of having a deputation as a game-keeper from the lord of the manor.—Afterwards, on a motion for a new trial, TWO QUESTIONS were made:—1ſt, Whether the plaintiff was a perſon qualified to receive a deputation from the lord of the manor to be a game-keeper at all?—2dly, Suppoſing he is, Whether the juſtice of peace (the defendant) under the ſtat. 5 *Ann.* c. 14. ſ. 4. had a right to take his gun from him, while he was ſporting, for the purpoſe of killing game? for the Court thought it made no difference in the

Rogers *v.* Carter, eſq. Mic. Ter. 9 Geo. 3. C.B. 2 *Wilſ.* 387.

caſe, whether he ſhot or not, out of the manor.—PER CURIAM: The ſtat. 22 and 23 *Car.* 2. c. 25. is the firſt act that introduces game-keepers, whereby it is enacted, that lords of manors, &c. may, by writing under their hands and ſeals, authorize game-keepers within their royalties to ſeize guns, &c. or other engines for taking or killing game.—The ſtat. 4 and 5 *W.* and *M.* c. 23. ſ. 4. puts game-keepers upon a footing with the ancient keepers of parks, whereby it is enacted, that all lords of manors or their game-keepers may, within their royalties, reſiſt offenders in the night-time in the ſame manner, and be equally indemnified, as if ſuch fact had been committed within any ancient chaſe, park, or warren.—The ſtat. 5 *Ann.* c. 14. ſ. 4. adds power to the game-keeper to kill game upon the manor.—The ſtat. 9 *Ann.* c. 25. ſ. 1. enacts, That no lord or lady of a manor ſhall make above one game-keeper within one manor with power to kill game, and the name of ſuch perſon ſhall be entered with the clerk of the peace, ſuch entry to be made and viewed without fee.—The ſtat. 3 *Geo.* 1. c. 11. reciting the ſtat. 5 *Ann.* c. 14. and the ſtat. 9 *Ann.* c. 25. and the abuſe of thoſe ſtatutes, by lords of manors granting deputations to the farmers, tenants, and occupiers of the lands within their reſpective manors to be game-keepers, with power to kill and deſtroy the game, which practice tended to the deſtruction of the game; for remedy whereof, it was by this ſtatute enacted, that no lord or lady of a manor ſhall appoint any perſon to be a game-keeper with power to kill game, unleſs ſuch perſon be qualified, or be truly a ſervant to the ſaid lord or lady, or immediately employed to kill game for the ſole uſe of ſuch lord or lady, &c.——As to the firſt queſtion, we are all of opinion, that the plaintiff was a perſon properly qualified to receive a deputation from the lord of the manor to be a game-keeper, although he was neither a qualified perſon, nor a menial ſervant to the lord of the manor; that this ſtat. 3 *Geo.* 1. never was meant to check or hinder lords living at a diſtance (from their manors) from appointing any perſon whatſoever to kill game for the immediate uſe of the lord; if it was otherwiſe, this act would take away the right of every lord living at a great diſtance from his manor; we, therefore are of opinion, that the plaintiff was well qualified to kill game in the manor of Ringwood, and conſequently to carry a gun for that purpoſe. The plaintiff being ſo qualified, the ſecond queſtion ariſes upon the ſtat. 5 *Ann.* c. 14. ſec. 4. Whether the juſtice of peace under that ſtatute, had a right to take his gun from him while he was ſporting for the purpoſe of killing game in another manor, out of the manor of Ringwood; for we take it to be true, that the plaintiff intended to kill game when he was out of the manor of Ringwood, and when the gun was taken from him; and I think it makes no difference in the caſe, whether he ſhot at game out of that

manor

manor of Ringwood or not, if he had killed game where he was not a game-keeper, he might have been convicted in the penalty of 5l. but he was entitled to keep, and have dogs, guns, and nets, for the taking and killing of game any where. Upon the debating this case at the bar, cases were cited from the civil law books and our law books touching the property of game and other creatures *feræ naturæ*, and the lawfulness of pursuing the same, but we shall not take notice of those matters, because we are now to judge upon a law of penalties: and the words of penal laws must in all cases be strictly pursued; if the words be doubtful, courts of justice will explain and construe them in favour of the subject; if they be plain and clear words, the office of the court is *jus dicere et non dare*, and we must not rack and torture words to punish the subject. The first part of sec. 4. of this stat. 5 *Ann.* gives a penalty of 5l. against any person not qualified for keeping an engine to kill game, and then proceeds to give justices of peace and lords of manors power to take away the game, and such engine in the custody of such person not qualified to keep the same; but game-keepers are all qualified to keep such engines, therefore are not the objects of this clause. But it is objected the plaintiff was using the gun to kill game out of the manor of Ringwood: the answer is, he had a right to keep it any where, and if he killed game with it out of the manor, he might have been convicted in the penalty aforesaid, but the justice had no right to take the gun from him; it would be confounding the right of keeping with the right of using the gun to say otherwise, we cannot think the legislature had any such meaning. The acts of parliament come from lords of manors themselves, who most commonly furnish their game-keepers with dogs, guns, nets, &c. we cannot think their property was intended to be put in the power of their game-keepers to forfeit the same, whenever they might please to exceed their authority under the deputations. By the stat. 22 and 23 *Car.* 2. game-keepers themselves are impowered to seize guns; what? shall a game-keeper in the very next manor to mine have a power to take my game-keeper's gun if he happen to be trespassing in my neighbour's manor? this would be a humiliating disgrace indeed, and could never be meant by the legislature; and if game-keepers were permitted to seize one another's guns, there would be a kind of a border-war among them: if this was a doubtful case, we should incline to the same opinion we are of, to prevent breaches of the peace; but it is a clear case, and the game-keeper is neither within the words or meaning of the stat. 5 *Ann.* c. 14. s. 4. Upon the whole, we are all of opinion that the gun of a game-keeper of a manor cannot be seized either *eundo* or *redeundo*, or any where else, and that the defendant, the justice of peace, had no right to take away the plaintiff's gun from him. The rule to shew cause why

there ſhould not be a new trial was diſcharged. *Per totam Curiam.*

Smith *v.* Wallis, Ea. Ter. 26 Geo. 3. B.R 1 *Ter. Rep.* 225.

Under the certificate act 25 *Geo.* 3. c. 50. only thoſe defendants who are acquitted upon a proſecution for ſeizing guns are entitled to treble coſts.—A verdict had been given for the defendant in an action on the late game act, for ſhooting without a certificate. And the maſter had taxed treble coſts under that clauſe in the act for protecting perſons ſued for any thing done in purſuance of the act.—It was now moved that the maſter might review his taxation, on the ground that the ſtatute only intended to give treble coſts to thoſe perſons who were proſecuted for ſeizing guns.—This was oppoſed in the firſt inſtance, on the ground that the act meant to give treble coſts to perſons ſued for penalties under the act. BUT THE COURT were of a different opinion, and made the rule abſolute.

The King *v.* P. Bleaſdale, *et al.* Tr. Ter. 32 Geo. 3. B.R 4 *Ter. Rep.* 809 *Nolan.* 139.

*Conviction.*] Two perſons cannot be convicted in ſeparate penalties under 5 *Ann.* c. 14. ſ. 4. for uſing a greyhound to deſtroy game.—This was a conviction on the ſtatute of 5 *Ann.* c. 14. ſ. 4. for uſing a greyhound to deſtroy game, without being qualified; for which the defendants were convicted in 5l. each; which THE COURT, without hearing any argument, ſaid could not be ſupported; for that it was only one offence; and that the magiſtrate ſhould only have convicted them in one penalty. That this queſtion depended on the 5 *Ann.* c. 14. ſ. 4. which enacts "that if any perſon or perſons, not qualified, &c. ſhall keep or uſe any greyhounds, &c. to kill and deſtroy the game, and ſhall be thereof convicted, &c. the perſon or perſons ſo convicted, ſhall forfeit the ſum of five pounds." And they ſaid that this point had been ſeveral times decided; in *Hardman* v. *Whitacre*, *Bull. N. P.* 189. and in others.

The King *v.* John Wheatman, Ea. Ter. 20 Geo. 3: B.R. 1 *Doug.* 345.

In a conviction on the game laws, the information muſt negative, ſpecifically, every one of the qualifications in the ſtat. of 22 & 23 *Car.* 2. c. 25.—On a rule to ſhew cauſe, why a conviction for uſing a gun ſhould not be quaſhed. The objection was, that the information, as ſet forth in the conviction, did not allege ſpecifically, that the defendant was "not owner or keeper of any foreſt, chaſe, park, or warren."—It was contended, that it is neceſſary to ſtate in the information, particularly, that the defendant had none of the qualifications enumerated in the ſtatute of 22 & 23 *Car.* 2. c. 25. ſ. 3. and the caſe of *Rex* v. *Maurice Jarvis*, H. 30 *Geo.* 2. 1 *Burr.* 148. was relied on, as a deciſive authority in point.—On the other ſide, it was argued that it is ſufficient, if the want of every one of thoſe different qualifications appear in any part of the record, and it did appear by the evidence, as ſet forth, that the defendant had none of them.—Lord MANSFIELD: This will not do. The defendant can be convicted only of the charge in the information, and that muſt be ſufficient to ſupport the conviction.—ASHHURST, J. The evidence muſt prove, but cannot ſupply any defects in the information.—The rule was made abſolute.

In

In an action againſt an unqualified perſon for uſing a gun. The declaration ſtated, that the defendant uſed a gun, being an engine to kill and deſtroy the game. In arreſt of judgment it was objected, that *it was not averred that the defendant uſed the gun for the deſtruction of game*, but the Court overruled the objection. Lord MANSFIELD, Ch. J. A verdict will not mend the matter where the giſt of the action is not laid in the declaration, but it will cure ambiguity. Here, according to one way of pointing, the offence is ſufficiently charged, for putting a comma after the word "engine," the offence is ſufficiently charged; for it will then ſtand thus: "that the defendant uſed a gun, being an engine, for the deſtruction of the game;" and here is no charge in the declaration, but according to that conſtruction. This differs widely from the caſe of a conviction, where ſuch an ambiguity might be a good objection; in the latter (a conviction), great nicety is required: the Court muſt ſee that the offence is within the juriſdiction of the juſtice, and that he has purſued his authority. The caſe of *Frederick* v. *Lookup* (*ante*, vol. I. 424), is very ſtrong, becauſe there it was abſolutely neceſſary that the offence ſhould be committed *in the pariſh*, to entitle the plaintiff to recover, and *muſt have been ſo proved*; after verdict, therefore, for the plaintiff, the Court held it was cured: ſo here *the uſe* muſt have been proved at the trial, or the verdict could not have been found for the plaintiff.

Avery v. Hoole, 18 Geo. 3. B.R. 2 *Doug.* 683. [n. 1.] *Cowp.* 825.

*Evidence.*] Keeping of dogs of the kinds enumerated, is, as well as uſing them, an offence againſt the game laws; and evidence *primâ facie* of the purpoſe for which they are kept. —This was a conviction under the ſtat. 5 *Ann.* c. 14. for the better preſervation of the game, the defendant was convicted *for keeping and uſing a certain dog, called a greyhound, to kill and deſtroy the game*, &c. On a rule to ſhew cauſe why this conviction ſhould not be quaſhed, two objections were taken; 1ſt, That it was not fully and ſufficiently ſtated, that there had been an uſing of the greyhound, *i. e.* how and in what manner, and for what purpoſe: 2dly, That it was not expreſsly and poſitively averred, that he had kept and uſed *a greyhound* at all. Lord MANSFIELD, Ch. J. Convictions muſt certainly be preciſe, that the Court may ſee whether the offence committed falls within the juriſdiction of the magiſtrate; and, whatever the conſequences are, they muſt be quaſhed if not ſo. In this act there are two offences deſcribed; *a keeping and an uſing*; and the legiſlature mean, that there may be *a keeping to deſtroy*, &c. which is not of neceſſity to be proved by an uſing for that purpoſe. If it were ſo, it would be tautologous; for ſuch evidence would be a proving of the other offence. The keeping therefore of a thing prohibited being an offence under the act, it is neceſſarily *primâ facie* evidence of a keeping for the purpoſe prohibited; and it is incumbent upon the defendant to ſhew that it is kept

Rex v. Hartley, Ea. Ter. 22 Geo. 3. B.R. *Cald.* 175.

for another purpoſe; as that in the preſent caſe, it is a houſe-dog, a favourite dog, or a particular ſpecies of greyhound. The deſcription cannot be more preciſe, unleſs ſome particular inſtance of uſing is ſhewn; which, if keeping of itſelf conſtitutes an offence, cannot be neceſſary. As to the other objection, that the averment in this conviction is defective, in ſtating only that this was *a dog called a greyhound*, I think it poſitive enough. It muſt mean the dog of that ſpecies, generally known in this country. *Willes*, J. The caſe of the *King* v. *Gardner*, 1 *Strange*, 496. is in point, and muſt govern this. There is hardly another uſe to which this ſpecies of dog can be applied. *Aſhhurſt*, J. There is no doubt but that, under the common acceptation of the words uſed in the conviction, this is a ſufficiently apt deſcription of a greyhound; and it is not neceſſary in convictions to adhere to the letter. *Buller*, J. concurring.—Rule diſcharged and conviction affirmed.

The King *v.* Thompſon, Tr. Ter. 27 Geo. 3. BR. 2 *Ter. Rep.* 18.

So in this caſe, which was a conviction on 5 *Ann.* c. 14. for *keeping and uſing* a gun to kill and deſtroy the game, the evidence was only *that the defendant on ſuch a day, &c. did keep and uſe a gun to kill and deſtroy the game.* On the firſt argument, which turned on another point, THE COURT being of opinion that there was no ground for that objection, deſired that it might be argued on another objection, which they ſuggeſted, viz. WHETHER *the evidence was ſufficiently ſet forth, ſo that the Court could ſee by what act the defendant had incurred the penalty*; for they obſerved that the act of keeping a gun was in itſelf ambiguous, and that it muſt be ſhewn to be kept for the purpoſe of killing game, in order to bring the party keeping it within the act of parliament; it was not like keeping *a greyhound or a ſnare* which could not be kept for any other purpoſe, and which was expreſsly prohibited by the act. ASHHURST, J. If this were a new caſe, I ſhould moſt undoubtedly be of opinion that this conviction could not be ſupported; becauſe I think that the evidence ſhould be ſet forth particularly, that we may judge whether the juſtice has convicted upon proper evidence. The fact of keeping or uſing the gun for the purpoſe of deſtroying game ſhould appear; but it is only ſtated here that *the defendant kept and uſed*, &c. which is the reſult of his evidence. Then, *whether he kept it for the purpoſe of killing game, is likewiſe a queſtion of law, for an ignorant witneſs in the country might fancy that a woodcock or a rabbit was game.* So that it ſeems to me, that permitting this general evidence to be ſtated, is allowing the witneſs to give his ſentiments on the law as well as on the fact. But at the ſame time, as the precedents of convictions are uſually in this form, and as the conviction in *The King* v. *Hartley* was ſimilar to the preſent, it is better to ſupport this conviction, than by quaſhing it to overturn all former precedents. BULLER, J. If this precedent had never been adopted, I ſhould have been of opinion that the evidence ſhould have

have been fully set forth; but after so many convictions have been made in the same form, it would be dangerous to quash the present. The distinction taken in *The King* v. *Filer*, 1 *Strange*, 496. is good in law: it is not an offence to keep or use a gun, unless it be kept or used for the purpose of killing game. But it is here stated by the evidence, "that the defendant did keep and use a gun to kill and destroy the game." As to the other question respecting game, I cannot agree that the witness, in swearing that the defendant used a gun to destroy game, would be swearing to a question of law, because it is settled by act of parliament, and every man is bound to know what is game: if he swear that to be game, which is not so in law, he would be guilty of perjury: game must be understood in its legal sense. GROSE, J. I cannot give my consent to support this conviction. *The justice should return particularly all the facts and the conclusion in the conviction; first the information, the summons, the appearance, or the defendant's default in not appearing, that the information was read to the defendant, that he was asked what he had to plead, the whole of the evidence particularly, and the adjudication.* The witness should swear to the facts, and not to the law. And in this case it is almost incredible that the witness should have sworn in the manner in which this evidence is set out: *the justice should not have received it, if it were offered in this general way; but should have questioned the witness as to the manner in which this gun was kept, for what purpose it was used, and what particular kind of game he killed, or attempted to kill.* All these particulars should have been specially set forth, in order that we might judge whether they constituted an offence within the act of parliament. Here the witness swore to the law, namely, "that the defendant kept and used a gun to kill and destroy the game." And in the case of *The King* v. *Baker*, 1 *Stra.* 316. a conviction for taking Pilchards was quashed, because the witness swore generally that the defendant was guilty of the premises, which was taking upon himself to swear to the law. Now the reasoning in that case applies strongly to the present, for the evidence here stated only amounts to that, that the defendant is guilty of the premises. I confess indeed that the case of *The King* v. *Hartley* is of considerable authority the other way. But I would rather choose to decide this case according to that of *The King* v. *Baker*, because I think nothing can be more mischievous to the country than suffering a justice of the peace to state the conviction generally. And there can be no inconvenience in stating particularly the whole matter for the opinion of the Court, if the justice do not exceed his authority. Although the present conviction cannot be quashed, because my brothers have given their opinions in support of it, yet I did not choose that this question should pass *sub silentio*; especially as this declaration of my

opinion may have the effect of inducing juſtices of the peace in future to ſtate the whole matter upon the record. The Court, however, entertaining ſome doubt on another part of the conviction, namely, whether it ſufficiently appeared that the evidence was given in the defendant's preſence, they deſired that the matter might ſtand over. On the next day, Ashhurst, J. ſaid, On looking into the caſes, we find that this objection has before been made; and the Court have held that in caſes circumſtanced like the preſent, they will intend, that as the whole proceedings are ſtated to have paſſed on the ſame day, the evidence was given in the preſence of the defendant. As to the principle drawn from the old caſes, that the Court will be aſtute in diſcovering defects in convictions before ſummary juriſdictions, there ſeems to be no reaſon for it. Whether it was expedient that thoſe juriſdictions ſhould have been erected was a matter for the conſideration of the legiſlature; but as long as they exiſt, we ought to go all reaſonable lengths to ſupport their determinations. Therefore in whatever light they may have formerly been viewed, yet the country are now convinced that they derive conſiderable advantage from the exerciſe of the powers delegated to the juſtices of the peace; and in modern times they have received every ſupport from the courts of law. Therefore I ſee no reaſon for altering the opinion which I gave yeſterday. Buller, J. It has been decided in ſeveral caſes that there is no foundation for this objection. The firſt of them was *The King* v. *Aiken* (1), where the conviction, as far as the evidence went, was preciſely ſimilar to the preſent, the Court ſaid, "It may be preſumed that "the witneſs was examined in the defendant's preſence." The next caſe was that of *The King* v. *Kempſon* (2); there the ſame objection was made, but the whole tranſaction appearing to have paſſed before the magiſtrate on the ſame day, *Aſton*, J. ſaid, "Enough appears upon this conviction to ſhew that the "witneſs was examined in the preſence of the defendant. It "muſt be ſuppoſed that all that paſſed was at one and the ſame "time." Beſides that, the precedent in *Burn* is in the ſame form. With reſpect to the other queſtion, that alſo has been decided by the caſe of *The King* v. *Hartley* (p. 645, *ſupra*), there the firſt objection was, that the defendant had ſworn to the law; for that, what was game was a queſtion of law, but that objection did not prevail. The ſecond objection was, that the evidence was not ſufficiently ſet forth, becauſe the manner of keeping or uſing the greyhound did not appear, and the conviction only purſued the language of the act of parliament. Upon that occaſion, Lord *Mansfield* ſaid, convictions muſt be preciſe, that the Court may ſee that they fall within the juriſ-

(1) 3 *Burr.* 1785. p. 681, *infra.* (2) *Cowp.* 241. *ante*, vol. II. 61c.

diction

diction of the juſtices. There are two offences deſcribed by the act of parliament, *keeping*, or *uſing*, for the purpoſe of deſtroying game. There may be a keeping without its being for the purpoſe of deſtroying game, therefore there ſhould be evidence of the purpoſe for which it is kept. But the evidence ſtates, that the defendant *uſed* as well as *kept* the greyhound for the deſtruction of game. So that this caſe goes the whole length of deciding the other objection which was made yeſterday (1). GROSE, J. *As the precedent in* Burn *(though it ſeems to be a faulty one), has been recognized by this Court in the caſe of* The King *v.* Hartley, *of which I was not aware before yeſterday, I think it muſt be ſupported.* It might be highly inconvenient to overturn it; and I ſhould be ſorry that any opinion of mine ſhould ſhake the authority of an eſtabliſhed precedent; ſince it is better for the ſubject that even faulty precedents ſhould not be ſhaken than that the law ſhould be uncertain.—Conviction affirmed.

The King *v.* T. Davis, Hil. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 177.

And proof that the defendant "did keep and uſe a gun to kill and deſtroy the game," is ſufficient evidence to ſupport a conviction on the game laws, though the witneſs add his reaſon for believing it, "that the gun was fired by the defendant who was walking about a piece of ground at H. with that apparent intent."—This was a conviction on the ſtat. 5 *Ann.* c. 14. ſ. 4. for keeping and uſing a gun for the deſtruction of game. It appeared on the conviction, that the evidence was that the defendant did keep and uſe a certain engine called a gun, with intent to kill and deſtroy the game; and that he *(the witneſs)*, was ſatisfied that the ſaid *T. Davis* did keep and uſe the ſaid gun for the purpoſe aforeſaid, from the circumſtance of his hearing a gun go off, and obſerving that it was fired by the ſaid *T. Davis*, who was then walking about a piece of ground in the pariſh of Hadſor aforeſaid, with that apparent intent, &c. Two objections were taken to the conviction; 1ſt, That *Pyndar*, on whoſe evidence alone the conviction was founded, was an incompetent witneſs, becauſe he was an inhabitant of the pariſh; 2dly, But even if he were a competent witneſs, that the evidence given was not ſufficient to ſupport the conviction. *Per Curiam:* The firſt objection is anſwered by the ſtat. 27 *Geo.* 3. c. 29. which was paſſed to prevent difficulties of this kind, and to enable inhabitants and pariſhioners to give evidence in proſecutions where the penalty is given to the pariſh, provided the penalty do not exceed 20l. With regard to the other objection, here was evidence tending to prove the offence. That being the caſe, we have no authority to examine further, and ſee whether the concluſion drawn

(1) *Vide* 2 *Str.* 1098. 1 *Wilſ.* 315.

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by the magiſtrate be or be not the inevitable concluſion from the evidence. It is ſufficient in convictions, if there were ſuch evidence before the magiſtrate as in an action would be ſufficient to be left to a jury; here we cannot ſay that there was no evidence of the fact for the conſideration of the magiſtrate. In the caſe of *R.* v. *Gardiner*, the defendant was only charged "with having and keeping a gun, being an engine for deſtroying game." In the caſe of *R.* v. *Thompſon*, the evidence was, that the defendant "did keep and uſe a gun to kill and deſtroy the game," which the Court decided to be ſufficient evidence.—Conviction affirmed.

The King v. Lovet, Hil. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 152.

It is no objection to an information on the game laws that it is not *qui tam*.

Alſo on an information, charging the defendant with keeping and uſing a dog and alſo a gun on the ſame day, he can only be convicted in one penalty.

And if the evidence be given on the ſame day that the defendant appeared and pleaded, it will be intended that the evidence was given in his preſence.

This was a conviction before a juſtice of the peace on the game laws. The information ſtated, that the defendant, on the 5th of September, 1796, at, &c. did keep and uſe a certain dog, called a ſetting-dog; and alſo, a certain engine called a gun, to kill and deſtroy the game, againſt the form of the ſtatute, &c. without praying that he might have a moiety of the forfeiture, or ſaying for whom he ſued: it further appeared on the conviction, that on the 16th of September, the defendant appeared in perſon, and pleaded not guilty; and that, on the ſaid 16th of September, a credible witneſs, &c. ſwore, that the defendant, on the 5th of September, at, &c. "did keep and uſe a certain dog called a ſetting-dog; and alſo, a certain engine called a gun, to kill and deſtroy the game." Whereupon the defendant was convicted, and he was adjudged, for his offence aforeſaid, to have forfeited 5l. to be diſtributed as the ſtatute directs. Three objections were taken to the conviction: 1ſt, That the information was not *qui tam*, it being only for the informer, and not for the pariſh? 2dly, That the information charged the defendant with two offences, viz. "keeping and uſing a dog;" and alſo, "keeping and uſing a gun," and he was only convicted of one, for his offence aforeſaid; 3dly, That it did not appear, that the evidence was given in the preſence of the defendant (1); for it does not follow that becauſe the evidence was given on the ſame day when the defendant pleaded, he was preſent when it was given. But Lord *Kenyon*, Ch. J. ſtopping the

(1) See *King* v. *Vipont*, *ante*, vol. II. 608, and the *King* v. *Crowther*, *infra*, p. 653.

counſel

counſel who were to have argued on the other ſide, ſaid, That none of the objections were well founded: as to the firſt, the precedents agree with this information. With regard to the ſecond, the defendant is only charged with one offence; and therefore could only be convicted of one: if a perſon go in purſuit of game with a dog and gun on the ſame day (1), he can only be convicted of one penalty. On the third objection, perhaps, I ſhould have had great doubts, if this were *res integra*; but as it was ſo lately decided in *K.* v. *Thompſon*, *ante*, p. 646. that where the evidence is given on the ſame day when the defendant appeared, it will be intended that the evidence was given in his preſence, and as that precedent may have guided the magiſtrates on ſimilar occaſions ſince, I am inclined to ſupport this conviction. *Per Cur.* Conviction affirmed.

And although it has been held by the court of King's Bench (from an unwillingneſs to overturn a precedent, though erroneous (2), which has been long acted under), that in a conviction on the game laws, evidence that the defendant kept and uſed a gun to deſtroy game, is ſufficient, without ſhewing how and in what manner in particular (3); yet as this is contrary to the eſtabliſhed rule in all other convictions, the Court has conſtantly reprobated the practice, and declared themſelves to be of opinion, that it is the duty of magiſtrates, in all caſes, to ſtate the whole of the evidence, and not merely the reſult of it. Accordingly, in the above caſe of the *King* v. *Lovett*, a criminal information was moved for againſt the magiſtrate who made the conviction, for not ſtating all the evidence given: in fact, a good deal of evidence was given on behalf of the defendant, to ſhew that he was game-keeper of a certain manor, which the magiſtrate thought inſufficient for the purpoſe, and convicted the defendant, only ſtating in the conviction, in the language of the act of parliament, that "on, &c. the defendant did keep and uſe, &c." without ſtating the particulars of the evidence, and wholly omitting the evidence given for the defendant. *The Court*, after hearing the affidavits on both ſides, being of opinion that the magiſtrate had not acted corruptly, and thinking that he might have been miſled by the precedent in *K.* v. *Thompſon* (in which the Court, though they affirmed the conviction, recommended it to the magiſtrates in future, to ſtate the whole evidence upon the record), diſcharged the rule; expreſſing, in ſtrong terms, that they thought it the duty of magiſtrates, in all caſes, to ſtate the whole of the evidence, and not merely the reſult of it.

Same Caſe, 7 *Ter. Rep.* 153.

(1) See the *K.* v. *Beaſdale*, *ante*, p. 644. (2) *Burns'* Preſident.
(3) See the *K.* v. *Thompſon*, *ante*, p. 646.

On

The King *v.* Clarke, Ea. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 220.

On a queſtion of qualification of a defendant for killing game, the convicting magiſtrates may ground their opinion of his not being qualified on the fact of the defendant's having on a former day ſworn under the income-act to an eſtate under 100l. a-year.—On a conviction on the 5 *Ann.* c. 14. ſ. 4. for keeping and uſing a greyhound for the deſtruction of game without being duly qualified. The informer depoſed that on the 14th of September, 1798, at, &c. the defendant "did keep and uſe a greyhound to kill and deſtroy the game, and *that he* (the informer), *then and there ſaw the ſaid defendant courſe and kill a hare with the ſaid greyhound, &c.*" The conviction then proceeded as follows: "and it duly appears to us the ſaid juſtices, in the preſence of the ſaid defendant, that he on the 22d of March, 1798, at, &c. before *B. F.* and *B. C.* &c. commiſſioners appointed by 'an act for granting to his majeſty an aid and contribution for the proſecution of the war,' then and there acting as ſuch commiſſioners, did make a declaration in writing, ſigned by him, that his *annual income* did not exceed, &c. [ſetting forth certain proceedings before the ſaid commiſſioners, and ſhewing, that upon an inveſtigation before them, he then was aſſeſſed at 88l. and no more.]—The conviction then proceeded to ſtate that the defendant, being called upon to make his defence, ſaid that he was poſſeſſed of an eſtate in the pariſh of Whitgift, of the yearly value of 100l. and upwards, and produced *A. B.* a witneſs, who ſaid that '*he knew the defendant's ſaid eſtate, and he thought the ſame worth* 100*l. a-year, and that he, the witneſs, would give* 100*l. a-year and upwards for it; but admitted that he would not ſwear that the defendant's ſaid eſtate was worth* 100*l. a-year clear of reprizes.*' Wherefore, &c."—It was objected to the conviction, becauſe it did not appear that the facts on which the magiſtrates adjudged that the defendant was not duly qualified were properly in evidence before them; they having relied upon a prior tranſaction which happened before themſelves when acting as commiſſioners for another purpoſe, but which ought to have been eſtabliſhed on oath at the time of the conviction before the magiſtrates in the preſence of the defendant, in order that he might have had an opportunity of controverting or explaining it.—PER CURIAM: It muſt be taken *pro confeſſo*, that the defendant at the time mentioned in the conviction when he was before the commiſſioners on the amount of his income had not then an eſtate of 100l. a-year in value. It is evidence out of his own mouth. And the witneſs adduced by him did not contradict this, even if he were credited to the full extent of what he depoſed; for he would not undertake to ſay that the eſtate was of that value clear of reprizes.—THE COURT at the ſame time teſtified their approbation of the manner in which the conviction was drawn up; in which the magiſtrates had

had not ſimply ſtated, in the terms of the act of parliament, that the defendant had kept and uſed the greyhound for the purpoſe of killing the game, but had ſet forth the particular evidence of his having ſo done, namely, that the witneſs had "ſeen him courſe and kill a hare with the ſaid greyhound;" and had alſo ſet forth all the evidence for and againſt the defendant upon the queſtion of his qualification. And they recommended this as a precedent to be followed in future; expreſſing themſelves much diſſatisfied with the general mode of ſtating the evidence which had been practiſed in theſe caſes.—Conviction affirmed.

The King *v.* Thomas Spencer Crowther, Hil. Ter. 26 Geo. 3. B R. 1 *Ter. Rep.* 125.

A conviction on 5 *Ann.* c. 14. was quaſhed becauſe the witneſs was not ſworn and examined in the preſence of the defendant, for it is not ſufficient to read over the depoſition in the defendant's preſence.

But the evidence need not negative every ſpecific qualification under the 22 and 23 *Car.* 2. 25.

This was a conviction before a juſtice on the ſtat. 5 *Ann.* c. 14. for uſing a gun. And it was moved to quaſh the conviction, on the two following grounds: 1ſt, That the evidence on which the conviction was founded was not given in the preſence of the defendant; for *on the defendant's appearing before the juſtice, the witneſs only affirmed that the depoſition which he had given, on laying the information, was true.* That it was a principle in our law that the evidence muſt be given in the preſence of the defendant, that he might have an opportunity of croſs-examining the witneſs. (Vide the *King* againſt *Vipont* and others, *ante*, vol. II. p. 608). 2dly, That the qualifications required by the ſtatute 22 and 23 *Car.* 2. c. 22. were not negatived by the evidence. The evidence was only general, that what he did was "againſt the form of the ſtatute in ſuch caſe made "and provided." And it ought to have been as ſpecial as the information itſelf.—PER CURIAM: The firſt objection is good; the witneſs ought to have been re-ſworn in the defendant's preſence. As to the other point, there is no caſe in which it has been directly decided that the evidence ſhould negative every particular qualification. It cannot be ſo from the nature of the caſe.—Conviction quaſhed.

Briggs *v.* Sir Frederick Evelyn, Tr. Ter. 32 Geo. 3. C.B. 2 *Hen. Black.* 114.

The lord of a manor who is alſo a juſtice of the peace, is entitled to a month's notice of an action brought againſt him, for taking away a gun in the houſe of an unqualified perſon, by ſtat. 24 *Geo.* 2. c. 44. for it will be preſumed that he acted as a juſtice.—This was trover for a gun. The facts of the caſe were theſe: The plaintiff, who was game-keeper of the manor of Effingham in Surrey, ſent a gun to a blackſmith, between the 20th and 30th of Auguſt, 1791, to be mended. The blackſmith having repaired it, kept it ſome time in his houſe, but did not uſe it. The defendant, who was lord of an

an adjoining manor, in which the blackſmith lived, and alſo a juſtice of the peace, on the 17th of September, went together with his own game-keeper to the blackſmith's houſe to ſearch for guns and other engines uſed for the deſtruction of the game, and finding the gun in queſtion, took it away. It was objected at the trial, that the defendant ought to have had a month's notice of the action, according to the ſtat. 24 *Geo.* II. c. 44. having acted as a juſtice of the peace, under the powers given by ſtat. 5 *Anne*, c. 14. ſ. 4. and on that objection the plaintiff was nonſuited.—On a rule having been granted to ſhew cauſe, why the nonſuit ſhould not be ſet aſide, THE COURT ſaid (after cauſe ſhewn), that though juſtices of the peace could not avail themſelves of their privilege as juſtices, where they acted in any other capacity which was *diverſo intuitu*, yet, as in the preſent caſe, the ſubje-matter was within their juriſdiction, the defendant was to be taken to have acted as a juſtice, and therefore entitled to notice, previous to the commencement of the action, and diſcharged the rule.

## Gaming.

Blaxton v. Pye, Ea. Ter. 6 Geo. 3. C.B. 2 *Wiſ.* 903.

A HORSE-race is gaming within the ſtat. 9 *Ann.* c. 14.—An action of *aſſumpſit* upon a wager of fourteen guineas to eight guineas, by the plaintiff with the defendant, upon two races to be run by two horſes called Elephant and Granby, that Elephant would win one of the races, viz. that if Elephant won one of the races, defendant promiſed to pay plaintiff eight guineas, and in conſideration thereof, if Elephant won neither of the races, plaintiff promiſed to pay defendant eight guineas; the event was, that Elephant won one race, ſo the defendant loſt the wager; after verdict it was moved in arreſt of judgment, that the conſideration of laying fourteen guineas to eight guineas in this caſe is *nudum pactum*, becauſe the laying above ten pounds upon a horſe-race is a bet within the ſtatutes againſt gaming; if the ſtatute of 16 *Car.* 2. c. 7. and the ſtat. 9 *Ann.* c. 14. be taken together; ſo that the plaintiff could not poſſibly loſe the fourteen guineas, and therefore, ought not be allowed to win the eight guineas of the defendant; AND OF THAT OPINION was the whole Court, and the judgment in this caſe was arreſted; AND THE COURT ſaid, they ought to extend the ſtat. of 9 *Ann.* to prevent exceſſive betting upon all ſports as well as games, and that although horſe-racing is not mentioned in that ſtatute, yet it is within the general words *other game or games*, as in the caſe of *Goodburn* v. *Marley*, 2 *Stra.* 1159.—See alſo *Alcinbrook* v. *Hale*, *ante*, vol. I. p. 275.

And

And if a bet be unlawful on one ſide, and lawful on the other, neither can be recovered, for want of mutuality.—Aſſumpſit, for five guineas, won by betting at a horſe-race; the bet was ten guineas by plaintiff to five by defendant.—Plaintiff won, and obtained a verdict. And now it was moved in arreſt of judgment: FIRST, That this was within the ſtatute, 9 *Ann.* c. 14.—SECONDLY, That there was no mutuality; for, as the defendant could not have recovered the ten guineas, by reaſon of the ſtatute of Queen *Anne*; therefore, the plaintiff ſhall not now recover the five. And in ſupport of the rule it was inſiſted, that it did not ſignify, whether the game be lawful or not; but if a man loſes 10l. by playing or betting at it, it is within the ſtatute. AND OF THAT OPINION WAS THE COURT; and held, that as the ten guineas could not have been recovered, by reaſon of the ſtatute, there was no mutuality in the wager. And *Aſton*, Juſtice, mentioned the caſe of *Connor* and *Quick* in the King's Bench about ten years ago; when the Court took a diſtinction between running a horſe for 50l. which was lawful; and betting on the ſide of the horſe, which was not ſo.—Judgment was arreſted.

Clayton *v.* Jennings, Ea. Ter. 10 Geo. 3. B.R. 2 *Black.* 706.

A match for 25l. a ſide, is a running for 50l. within the horſe-race act.—Covenant, for 25l. due on articles; whereby the plaintiff and defendant mutually covenanted, to run each a horſe, and that the loſer ſhould pay the winner 25l. play or pay: and that, at all events, the defendant ſhould pay the plaintiff 5l. before ſuch a day. The breach aſſigned was, that the defendant did not run his horſe, nor pay the money. Verdict for the plaintiff at Glouceſter aſſizes.—It was moved in arreſt of judgment, that this, being a match for leſs than 50l. was contrary to law, and that horſe-racing is within the ſtatute of gaming. *Stra.* 1159. The Court took time to conſider, and afterwards gave judgment for the plaintiff, becauſe two ſums of 25l. make 50l (1).

Bidmead *v.* Gale, Ea. Ter. 9 Geo. 3. B.R. 1 *Black.* 671. 4 *Burr.* 2432. 2 *Wilſ.* 309.

So

(1) This was clearly a match for 50l. though the ſtakes were unequal.

*Bidmead* contributed 25l. + 5l. = 30l.
*Gale* contributed - 25l. — 5l. = 20l.

50l. the ſtake to be run for.

As *Bidmead* contributed 30l. and *Gale* only 20l. (that is, three to two), it may be ſuppoſed that *Bidmead*'s was the better mare, in the proportion of three to two; and that his chance of winning was in the ſame proportion of three to two. And if they had agreed to divide the ſtake of 50l. without running the match at all, *Bidmead* ought to take up 30l. of it; and *Gale*, only 20l. If it had been an equal chance "whoſe mare ſhould win;" *Bidmead* would, in ſuch caſe, have been very

Johnſon v. Bann, Mic. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 1.

So in this caſe, which was an action brought to recover a wager of 5l. on the event of a horſe-race; it appearing, that the bet had been made on a horſe-race for a ſmaller ſum than 50l. THE COURT ſaid, that it was ſufficient, without adverting to caſes, to ſay that the horſe-race itſelf was prohibited by ſtatute; and as the race, which was the ſubject of the wager was illegal, ſo alſo was the wager.

Ximenes *v.* Jaques, Mic. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 499.

So alſo, in an action of aſſumpſit on a wager of 100 guineas, and the expences of travelling, that the plaintiff would perform a journey of 240 miles in a poſt-chaiſe and pair of horſes in twenty-four hours; being allowed to change poſt-chaiſes and horſes as often as he pleaſed, but the expences were not to exceed the uſual ſum paid per mile for a poſt-chaiſe and pair on the poſt roads. There being a verdict for the plaintiff, it was afterwards moved in arreſt of judgment, and after cauſe ſhewn, and time taken to conſider, the Court made the rule abſolute for arreſting the judgment.

Brown *v.* Berkley, Ea. Ter. 15 Geo. 3. B.R. *Cowp.* 281.

A foot-race is alſo a game within the ſtat. 9 *Ann.* c. 14.—The plaintiff declared in an action of covenant upon certain articles of agreement for the ſum of 20l. laid between the plaintiff and the defendant, that the defendant did not, within one month from the date of the agreement, find a man who ſhould carry on foot twenty-four ſtone weight, ten miles, within fifteen hours' time: to this declaration the defendant demurred.—In ſupport of the demurrer, it was inſiſted that this was a wager within the ſtat. 9 *Ann.* c. 14. and therefore void; and *Lynall* v. *Longbottom*, 2 *Wilſ.* 36. was cited, where it was admitted, that a foot-race was within the ſtat. 9 *Ann.* and adjudged by the Court, that as one horſe ſtarting alone was a horſe-race, ſo one perſon running alone was a foot-race.—THE COURT took time to conſider: afterwards, Lord MANSFIELD, Ch. J. delivered the opinion of the Court as follows: We took time to ſee if we could diſtinguiſh this caſe from *Lynall* v. *Longbottom*; we think there is no difference between them, and therefore, there muſt be judgment for the defendant.

Bones *v.* Booth, Mic. Ter. 19 Geo. 3. C.B. 2 *Black.* 1226.

An action brought by the loſer to recover back money loſt at play is *remedial* and not *penal*, and a new trial may be had therein. And if company never part, though dinner intervenes, the loſs is at one ſitting.—On a motion for a new

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very imprudent in betting three to two: becauſe the chance of winning being *(ex hypotheſi)* equal, the true value of ſuch equal chance would be 25l. a-piece; whether they ſhould run the match, or agree to divide the 50l. In either caſe, the ſtake was 50l. whether it ſhould be run for, or divided without running. If run for, it would have been a match for fifty pounds. And I imagine, adds Sir *James Burrows*, that the law of Weſtminſter-Hall does here happily coincide with the laws of the turf: 4 *Burr.* 2433.

trial,

trial, it appeared, that the action was brought to recover back fourteen guineas won by gaming, upon the ſtatute of 9 *Ann.* c. 14. The play was at the Weſt-India coffee-houſe in Briſtol. They played at all-fours for two guineas a game, from Monday evening to Tueſday evening, without any interruption, except for an hour or two at dinner, but the plaintiff and defendant never parted company. It was inſiſted at the trial that this was not won at any one ſitting, ſo as to fall within the ſtatute, becauſe the dinner had intervened. But the judge thought otherwiſe. However, the jury found a verdict for the defendant, much to the diſſatisfaction of the judge. It was moved for a new trial without coſts.—PER CURIAM: There muſt be a new trial, the verdict being manifeſtly contrary to evidence. The ſtatute (with reſpect to the party loſing) is *remedial*, not *penal*. He is to recover back his money, and to that end the third ſection of the ſtatute allows a bill in equity for a diſcovery, which plainly ſhews it was not conſidered as a penal ſtatute. Had this been a proceeding on that branch of the ſtatute which inflicts pillory, &c. it had been otherwiſe. The ſtatute makes the winning of 10l. at one time or ſitting, a nullity; and therefore gives the loſer an action to recover back what ſtill properly continues to be his own money. To loſe 10l. at one time, is to loſe it by a ſingle ſtake or bet; to loſe at one ſitting is to loſe it in a courſe of play where the company never part, though the perſon may not be actually gaming the whole time. The ſtatute 18 *Geo.* II. c. 34. (a law made in *pari materiâ*), may ſerve to explain this. To loſe 10l. at any one time, or 20l. *within twenty-four hours*, is equally penal by that ſtatute.

This was a conviction by two magiſtrates upon the 12 *Geo.* II. c. 28. made for the preventing of exceſſive and deceitful gaming; which was removed by *certiorari* into this Court. The information, which was laid on the 1ſt of September laſt, charged the defendant with having on the 25th of Auguſt, 1792, at a certain houſe in Norris-ſtreet, &c. ſet up, maintained, and kept a certain fraudulent game to be determined by the chance of dice under the denomination of the game of hazard, againſt the form of the ſtatute, &c. *The evidence ſhewed that the defendant was maſter of the houſe, and acted as maſter of a hazard-table there, on the 25th of Auguſt: but no mention was made of any dice being then uſed. But on the 26th of Auguſt one witneſs ſaw a dice box and dice on the table, round which many perſons were aſſembled, the play having been diſcontinued on the witneſs's entering the room.* The defendant was convicted in the penalty of 200l. "to be diſtributed as the ſtatute aforeſaid did direct." In the *certiorari*, by which this conviction was returned here, it was alleged that the conviction was made by *C. Conant* and *P. Neve*, "two of the keepers of the peace, and juſtices for the county

12 *Geo.* 3 *Tr. Ter.* The King *v.* John Liſton, 33 B.R. 5 *Ter. Rep.* 338. *Nolan*, 259.

of Middleſex, duly appointed to execute the ſaid office of a juſtice of the peace at the Public Office in Great Marlborough-ſtreet, &c. being one of the ſeven public offices eſtabliſhed purſuant to the ſtatute 32 *Geo.* III. c. 53, bearing date ſubſequent to the eſtabliſhment of the ſaid ſeven offices, &c." THREE OBJECTIONS were taken to this conviction: FIRST, That the juſtices had no juriſdiction; for the 12 *Geo.* 2. c. 28. on which this conviction is founded, refers to the 10 and 11 *W.* 3. c. 17. entitled "An act for ſuppreſſing of lotteries," And if theſe games are to be conſidered as lotteries, the juriſdiction of the magiſtrates is taken away in expreſs terms by a ſubſequent act of the 27 *Geo.* III. c. 1. ſ. 2. SECONDLY, That the evidence did not ſupport the charge. As there was no evidence that there were any dice uſed on the 25th of Auguſt, the day mentioned in the information.—THIRDLY, That the penalty is directed to be diſtributed according to the 12 *Geo.* II. which is altered by a ſubſequent act, namely, the 32 *Geo.* III. c. 53. ſ. 5. whereby it is provided that the penalties levied by the juſtices under that act ſhall, except the informer's ſhare, be paid to the receiver appointed by that act. PER CURIAM: There is no pretence for either of the objections. The firſt has been already over-ruled in a caſe which came before us about two years ago, *Eaſt.* 31 *Geo.* III. The lotteries meant by the 27 *Geo.* III. c. 1. are ſtate lotteries only. As to the ſecond objection, there was evidence ſufficient to ſupport the charge. The charge is for ſetting up, maintaining, and keeping a certain game to be determined by the chance of dice, called hazard; and the proof is, that certain perſons were found in the houſe playing at hazard; and whether hazard were played with cards or with dice, it is equally prohibited by the act. However, if it were neceſſary to be ſtated, it does appear here, that a dice-box and dice were found on the table the ſubſequent day, which from the manner in which they were found was ſufficient to warrant the juſtices to conclude that the game of hazard was there played. And the juſtices were not confined to evidence on the particular day. As to the third objection, we cannot take notice of any fact which does not appear upon the face of the conviction itſelf, on the validity of which we are called upon to decide. It muſt either ſtand or fall upon its own merits, and we cannot take in aid any extraneous information to ſupport or quaſh it: and BULLER, J. added, It is not to be taken for granted that the objection would have any weight even if the fact appeared regularly before us. For I do not think that the clauſe in the 32 *Geo.* III. applies to the caſe until the adjudication has been made under ſome former ſtatute, whereby the penalty is inflicted. The clauſe relied on does not affect to repeal any of theſe acts, but only provides that where by any former acts the penalties would be diſtributed amongſt other perſons than the informers, in all caſes where ſuch convictions

victions are made by magiſtrates under the new act, the ſhares of all but the informer ſhall be paid to the receiver of the ſeveral offices. This clauſe is the warrant to thoſe magiſtrates for paying over thoſe ſhares to their receiver inſtead of thoſe who would otherwiſe be entitled to the money. Until the conviction is made, the receiver cannot maintain an action for money had and received to recover thoſe ſums: but it was not intended by this clauſe to vary the form of thoſe convictions.—Conviction affirmed.

## Gaols.

The King *v.* the Earl of Exeter, Tr. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 373.

The lord of a franchiſe is not, as ſuch, bound to repair a gaol within it: but he may be ſubject to ſuch a charge by immemorial uſage.—The Earl of *Exeter* was indicted for not repairing the gaol at Peterborough. The firſt count in the indictment ſtated, that the liberty of Peterborough is, and has been immemorially, an ancient liberty, within which there has been, time out of mind, an ancient and common gaol for the reception and ſafe cuſtody of debtors, felons, and other offenders, taken within the ſame; that the defendant is lord of the ſaid liberty; and that he and his predeceſſors, lords of the liberty, have immemorially been uſed and accuſtomed and of right ought to repair the ſaid ancient and common gaol whenever the ſame became decayed and ruinous, &c. It then ſtated, that the gaol was decayed and ruinous, &c. There were five other counts in the indictment, in none of which was it ſtated, that the defendant and his predeceſſors had immemorially been uſed and accuſtomed to repair, &c. The defendant pleaded not guilty to the firſt count, and demurred to the five laſt counts.—It was objected to the ſufficiency of the five laſt counts, becauſe they did not ſtate any immemorial obligation in the defendant to repair the gaol.—The Court ſaid, That the firſt count ſeemed to be correctly drawn, becauſe it alleged that the defendant and his predeceſſors, lords of the liberty, had immemorially repaired the gaol; and that ſuch a charge might be ſupported in law; for that different obligations were annexed to eſtates in different parts of the country: that, for example, of repairing the county gaol for Devonſhire, till lately a charge on Mr. *Rolle*'s eſtate; and that of repairing roads *rotione tenuræ* in a variety of inſtances. But that the ſubſequent counts of this indictment could not be ſupported, becauſe they did not contain a ſimilar allegation with that in the firſt count; and that the lord of a franchiſe was not bound, merely as lord, to repair the gaol within it, without an immemorial uſage to charge him.—Judgment for the defendant on the five laſt counts.

## Gavelkind.

Davenport *v.* Tyrell, Hil. Ter. 9 Geo. 3. B R. 1 *Black.* 675.

The poſſeſſion of one coheir in gavelkind is not the poſſeſſion of the other, where he enters with an adverſe intent, to ouſt the other.—This was error, from the court of King's Bench in Ireland in an ejectment; and the caſe was ſhortly this: *Maurice Tyrrel* died ſeiſed of lands, which according to the ſtatute of 2 *Anne*, in Ireland, being a papiſt, deſcended in gavelkind. At the time of his death he had two ſons living, *Richard* and *James*; but on his death, in 1704, his ſon *Richard* entered alone, and held the ſame till his death, for ſixty-two years; and in the mean time ſettled the ſame, by fine and recovery, and marriage ſettlement, to which *James* his brother was privy. On the death of *Richard* in 1766, leaving two daughters, *James* the leſſor of the plaintiff brought an ejectment againſt his two nieces, for two thirds of a moiety of the lands, claimed by him as co-heir, in gavelkind to *Maurice*, and recovered by default, *and probably by colluſion*; and then he brought this ejectment againſt the widow for the other third of the ſaid moiety, which ſhe claimed as her dower, and alſo under the ſettlement. For the plaintiff it was contended, that as *Richard* and *James* were co-heirs in gavelkind, *the poſſeſſion of the one was alſo the poſſeſſion of the other*; therefore no argument could be drawn from the long poſſeſſion of *Richard* (1). For the defendant it was argued, that ſixty-two years' ſole poſſeſſion, and the fine, were a bar to this action, by common law; that this was a diſſeiſin: and was a queſtion, not between joint-tenants, or tenants in common, but tenants in gavelkind, who are male coparceners (2). PER CURIAM, The adverſe poſſeſſion of one gavelkind tenant will not operate as the poſſeſſion of both. That rule is a qualified rule; and in the preſent caſe, the acts of ownerſhip, fine, &c. make an actual ouſter. The ſtatute of limitation operates here as an extinguiſhment of the remedy of the one, not as giving the eſtate to the other.

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## Habeas Corpus.

Wood's caſe, Hil. Ter. 11 Geo. 3. C.B. 2 *Black.* 745. 2 *Wils.* 172.

*By what court granted.*] THE court of Common Pleas has a general juriſdiction to grant writs of *habeas corpus* in all caſes whatſoever.—It was moved for an *habeas corpus* to *Lewis Chambers*, to bring up the

(1) *Bro. Coparceners*, 1. *Moor*, 868. *Halmſley* and *Price*. *Cro. Eliz. Stirling* and *Pennington*. *Ford* and *Grey*, *Co. Lit.* 252. *Salk.* 391. *Lit.* ſect. 398.

(2) *Cro. Car.* 303. *Co. Lit.* 140. *Co. Lit.* 373, 374. *Ibid.* 243. *Stirling* and *Pennington Canc.* 25th February, 1739. *Viner.* Joint-tenants. 512.

wife

wife of one *Wood*; on an affidavit of the husband, that he was a prisoner in the fleet, and that *Chambers* detained his wife from him, against her consent. Some doubts being started, as to the power or propriety of this Court's granting such an *habeas corpus* at common law, for a person under private confinement, the Court chose to consider of it till the next day. And then, DE GREY, Ch. J. expressed his surprize, how such an objection could arise, against the jurisdiction of this Court, characteristically; and said that he had no doubt;—I have looked into the books, to see what is therein said touching this matter. The first instance of this kind is upon the statute of *Magna Charta*, 2 *Inst.* 55. a. where Lord *Coke* in his comment says, "If a man be taken or committed to prison against the law of the land, what remedy hath the party grieved?" It is there answered, that "he may have an action, or he may cause the party to be indicted at the king's suit; or he may have an *habeas corpus* out of the King's Bench or Chancery, though there be no privilege; or in the court of Common Pleas or Exchequer, for any officer or privileged person there; and if it appears upon the return of the writ, that his imprisonment be just and lawful, he shall be remanded; but if it shall appear to the Court that he was imprisoned against the law of the land, they ought by the force of this statute to deliver him; if it be doubtful he may be bailed." So in 4 *Inst.* 290. if a man be imprisoned by a judge of the forest for killing or chasing deer, and afterwards offers sufficient pledges, it may be demanded, what remedy is there for the party? The answer is, he may have an *habeas corpus* out of the King's Bench; or if he have privilege, out of the Common Pleas, or of the Exchequer, or out of the Chancery without any privilege, either in the term or vacation, and may be bailed to appear at the next eyre. In *Dier*, 175, *Scroggs* v. *Colfehill*, the court of Common Bench was moved to grant an *habeas corpus cum causa*, to be directed to the warden of the Fleet. And upon good deliberation of the Court, the motion was held reasonable, and was granted because the person was privileged. In 2 *Hale's Hist. Pl. Coron.* (before the *habeas corpus* act), it is laid down that this writ of *habeas corpus* is a writ of a high nature; for if persons be wrongfully committed, they are to be discharged upon this writ returned; or, if bailable, they are to be bailed, if not bailable, they are to be committed. This writ (says that book) issues out of the great courts of Westminster, but hath different uses and effects. It may issue out of the court of Common Pleas or Exchequer, but that is or ought to be always where a person is privileged, or to charge him with an action. But by the stat. 16 *Car.* 1. c. 10. they have an original jurisdiction to bail, discharge, or commit upon an *habeas corpus*, one committed by the council table, as well as the King's Bench, although there be no privilege for the person committed. I do not find that this matter hath come

much in queſtion until a few years before the *habeas corpus* act. *Buſhel*'s caſe, Sir *Thomas Jones*, 13. 22 *Car.* 2. *anno* 1670. The caſe was, that *Buſhel*, amongſt others, jurors in London, upon the trial of a traverſe, upon an indictment againſt divers perſons for conventicling againſt the form of the ſtatute lately made, were fined and impriſoned at the ſeſſions of the Old Bailey, becauſe they gave their verdict *contra plenam evidentiam et directionem curiæ in materia legis*, and ſo acquitted the priſoners. In this caſe it was debated at the bar and the bench, whether the Common Bench ſhould award an *habeas corpus* in this caſe. *Wild*, *Archer*, and *Tyrel*, juſtices: —This court may well award it: and for this purpoſe they cited 1 *Anderſon*, 297, 298. 2 *Inſt.* 615. *Moor*, 839, 1132. 1 *Brownl.* 33. *Vaughan*, Ch. J. to the contrary; and he ſaid, that ſome *habeas corpuſes* are granted of courſe, others not without motion; that this court had not power of granting the writ in general, but only in caſe of privilege, or exceſs of juriſdiction by an inferior court; in which caſe every one had privilege to be diſcharged by the courts of Weſtminſter. This court does not grant it becauſe they have conuzance of the cauſe, but becauſe that there is a probable ſuggeſtion that this court may deliver the party. If, upon the return, the cauſe be expreſsly juſt, the party ought to be remanded; if expreſsly unjuſt, diſcharged; if doubtful, bailed. The writ is, *ad ſubjiciendum et recipiendum quod curia conſideraverit, et ut curia noſtra viſa cauſa illa*, or *quod de jure & conſuetudine regni noſtri fuerit faciendum*, &c. Now this court, in cauſes criminal, cannot iſſue this writ.—He urged that the want of precedents in this court is a ſtrong argument that ſuch writs are not grantable here. The writ alſo requires that the body *una cum die captionis habeat*, whereby the court may be certified how long the party hath been in cuſtody; becauſe, if for a long time, and no proceeding againſt him, the court ought to bail the priſoner, although he was committed for felony or treaſon; which is improper for this court, which hath not conuzance of crimes; for this court is for common pleas between ſubject and ſubject, but in the caſe of a crime, the plea is between the king and his priſoner. He cited 2 *Inſt.* 53. *in margine*, & 55. *Weſtm.* 1. c. 15. And to the authority cited on the other ſide from *Anderſon*, he ſaid, that all the four cauſes there mentioned are of perſons under the protection of this court; and concluded that the court ought not to grant the writ in this caſe. But, upon the opinion of the three other judges, the writ was granted. And at a future day, the ſheriffs of London, to whom the writ was directed, returned it with the cauſe *ſupra*. And upon argument of the ſufficiency or inſufficiency of the return, the priſoner was diſcharged. In *Vaughan*, 154, 155, there are ſeveral caſes upon *habeas corpus*, where the court of Common Pleas hath diſcharged perſons impriſoned by other courts

upon

upon the inſufficiency of the return only, and not for privilege; whether the priſoner is privileged as an officer of this court, or is a ſtranger, it is all one, in my opinion, and if the return be bad he ſhall never be remanded, becauſe contrary to *magna charta*.—The next caſe is in Eaſter term, 23 *Car.* 2. C. B. *Carter.* 221, *J. S.* parſon, libels for tithes againſt *J. D.* he is certified *contumax*; the biſhop, according to 27 *Hen.* 8. cap. 20. certifies to two juſtices to impriſon him, without bail or mainpriſe: they do ſo. *Baldwin*, ſerjeant, moved for an *habeas corpus* in the Common Bench, and it was granted by three judges, but the chief juſtice was againſt it. *Wild*, one of the judges, ſays: "In queen Elizabeth's time there "was no diſtinction, but an *habeas corpus* was to be allowed in "the Common Bench or King's Bench; and I cannot ſee "(ſays he), how we can deny this *habeas corpus ſalvo juramento*. Theſe writs have gone beyond ſea. Doctor *Pru*"*jean* was to cure a madman (ſir *Robert Carr*'s brother), "this court ſent an *habeas corpus* for him beyond ſea." And ſee 2 *Vent.* 22. *Thomas Rudyard*'s caſe in C. B. 1 *Mod.* 235. and 2 *Mod.* 198. *Jones*'s caſe in C.B. touching the granting *habeas corpus* by this court in various caſes a little before the *habeas corpus* act. Practice, of late years, has carried this matter of ſuing for *habeas corpus* into the King's Bench; but now the writ being indorſed to iſſue by the ſtatute, may be granted in any caſe of impriſonment, by any court in the hall.—By the ſtatute of 16 *Car.* 1. c. 10. it ſeems to me that the legiſlature then thought that this court had the very ſame juriſdiction with reſpect to granting writs of *habeas corpus*, that the court of King's Bench had; for the words of the ſtatute are, "That the judges of the court of "King's Bench, or Common Pleas, ſhall, for the ordinary "fees uſually paid for the ſame, grant an *habeas corpus*;" ſo they took it to be the courſe and practice of the Common Pleas, as well as the King's Bench, to grant writs of *habeas corpus*, in order to be certified whether a ſubject impriſoned was impriſoned contrary to *magna charta*, or not.—This is a matter between ſubject and ſubject, and I cannot ſee (as was ſaid by *Wild*, J.) how we can deny this *habeas corpus*, *ſalvo juramento*; as at preſent adviſed, I think we are bound by law to grant it, and that it ought to iſſue accordingly.—*Gould*, J. of the ſame opinion. The writ of *Homine replegiando* was returnable in this Court, as well as in the King's Bench. In 2 *Hal. P. C.* 313, many caſes are cited, where priſoners were diſcharged by this Court on *habeas corpus*, though no cauſe of privilege returned.—*Blackſtone*, J. of the ſame opinion. He thought, that originally the writ of *habeas corpus* at common law could only be iſſued out of the court of Common Pleas, when the party was privileged, or to charge him with a ſuit. But that afterwards in *favorem libertatis*, a mere ſuggeſtion of privilege was allowed to be ſufficient to grant the writ; and a

*capias* was afterwards ſued out for conformity, to affirm the juriſdiction. This is the meaning of 2 *Hal. P. C.* 144. "If a perſon is ſued in the court of Common Pleas, or is ſuppoſed to be ſo ſued, an *habeas corpus* lies in the Common Pleas. But when the ſtatute 16 *Car.* 1. had put both courts upon the ſame footing, with regard to the writs of *habeas corpus* therein mentioned, this nicety began to be diſregarded, and the caſes cited by Lord Chief Juſtice in *Car.* 2d's time, have now eſtabliſhed the general juriſdiction beyond a doubt."—*Nares*, J. of the ſame opinion, cited 2 *Inſt.* 615. and the ſaying of Lord *Hobart*, *boni judicis eſt, ampliare juriſdictionem.*

The writ was granted, and a return was made the laſt day of the term, that Mrs. *Wood* was not in the cuſtody of *Chambers*, before, at, or ſince the writ. And Mrs. *Wood* herſelf appeared perſonally, and declared, ſhe was under no reſtraint or confinement; and was told by the Court, ſhe was at liberty to go where ſhe pleaſed.

The King *v.* Reynolds, Mic. Ter. 36 Geo. 3. B. R. 6 *Ter. Rep.* 497.

*For what cauſe.*] A maſter is not entitled to ſue out an *habeas corpus* to bring up an apprentice out of the cuſtody of another.—A writ of *habeas corpus* having iſſued, directed to the defendant, a captain of the navy, at the inſtance of *T. Wake*, a mariner, *to bring up John Weſt*, an apprentice, aged 22, who had been impreſſed. It was moved to quaſh the writ of *habeas corpus*, on the ground that the *habeas corpus* was not iſſued either at the inſtance or with the conſent of the apprentice. Lord KENYON, Ch. J. The writ of *habeas corpus* was improperly iſſued. The writ ought not to be iſſued at the inſtance of the maſter; but the apprentice, who is of ſufficient age to judge for himſelf, ſhould have applied for it if he had wiſhed it. Suppoſe this apprentice had been taken into the ſervice of any other maſter, we ſhould not have granted an *habeas corpus* at the inſtance of his firſt maſter, *Wake*, but ſhould have left *Wake* to his action for ſeducing his apprentice: then, as far as reſpects the queſtion before the court, it is immaterial whether the apprentice be now in the king's ſervice or in that of any other maſter. The writ of *habeas corpus* has been improperly iſſued, and ought to be quaſhed.

The King *v.* Edwards, Tr. Ter. 38 Geo. 3 B. R. 7 *Ter. Rep.* 745.

And in this caſe where a ſimilar writ had iſſued at the inſtance of the maſter, *The Court* ſaid, That the diſtinction was properly taken in the above caſe of *R.* v. *Reynolds*, that though the apprentice might obtain the writ the maſter could not, for that its object was the protection of the liberty of the party. That the maſter was not without a remedy, for that he might have his action againſt thoſe who detained the apprentice after knowing him to be an apprentice. But they added, that the lord chief juſtice had the power, under an old ſtatute paſſed in the reign of *Henry* 8. of granting warrants for the purpoſe of bringing up apprentices in this ſituation, and that Lord *Mansfield* had frequently exerciſed that power.

And

And Lord KENYON added, That though the Court would make this rule abſolute to quaſh the writ of *habeas corpus*, he ſhould iſſue his warrant to bring the apprentice before him to be diſcharged unleſs the admiralty agreed to releaſe him.—Rule abſolute.

Rex v. Sir Francis Blake Delaval, William Bates, and John Fraine, Tr. Ter. 3 Geo. 3. B.R. 3 *Burr.* 1435. 1 *Black. Rep.* 410.

*Anne Catley* (an infant of about 18, and the daughter of a gentleman's coachman), being produced in court by Sir *Francis Blake Delaval*, in obedience to an *habeas corpus*.—Lord MANSFIELD Ch. J. ſaid, That the three principal caſes that have occurred ſince queen *Anne*'s time, that were applicable to the preſent caſe, were Mrs. *Turberville*'s caſe (*Rex* v. *Clarkſon, et al.* 1 *Strange*, 444); *Frances Holland*'s caſe (*Rex* v. *Mary Johnſon*, 1 *Strange*, 579, and 2 Ld. *Raym.* 1334); and *James Smith*'s caſe (*Rex* v. *Penelope Smith*, 2 *Strange*, 982.)—And he thought that what was done by the Court, in every one of them, was right; though he did not agree with the ſayings that were reported in the books to have been made uſe of in determining them.—In caſes of writs of *habeas corpus* directed to private perſons, "to bring up infants," the Court is bound, *ex debito juſtitiæ*, to ſet the infant free from an improper reſtraint; but they are not bound to deliver them over to any body, nor to give them any privilege. This muſt be left to their diſcretion, according to the circumſtances that ſhall appear before them.—There is a privilege *redeundo*; unleſs the Court ſhould ſee ground to declare the contrary.—In the three particular caſes which he had mentioned, all that was actually done, he ſaid, was right; though he did not agree with all that was ſaid.—In the firſt of theſe caſes (*Rex* v. *Clarkſon, et al.*), the infant was a marriageable young lady, who lived with her guardian. A man claimed her as his wife; ſhe denied the marriage. The Court could not try the marriage by affidavit; and they could not deliver her to the man as her huſband, without allowing the marriage. She choſe to remain with her guardian; and the Court, upon being informed, "that the man had a deſign to ſeize her," ſent a tipſtaff home with her, to protect her.—In the ſecond caſe (*Rex* v. *Mary Johnſon*), the child was too young to judge for itſelf; ſhe was not more than 9 or 10, or as ſome accounts ſay, ſix years old; but certainly not old enough to exerciſe any judgment of her own. And there was a legal guardian appointed by the will of her father; and therefore it was right to let the legal guardian take her, as ſhe was too young to judge for herſelf. The guardian appointed, in that caſe, by the ſpiritual court was nothing at all; for they appoint any body guardian in that court, for the mere purpoſe of appearing.—In the third caſe (*Rex* v. *Penelope Smith*), the child wanted but ſix weeks of fourteen. And that caſe was determined right (barring the *dictums* that were uſed in it); for the Court were certainly right in refuſing to deliver the infant to the father, of whoſe deſign in applying for the cuſtody

tody of his child, they had a bad opinion. The true rule is, that the Court are to judge upon the circumſtances of the particular caſe, and to give their directions accordingly.—In the preſent caſe there is no reaſon for the Court to deliver her to her father. Let the girl therefore be delivered from all reſtraint, and be at liberty to go where ſhe will—and whoever ſhall offer to meddle with her *redeundo*, let them take notice that they do it at their peril.—But I ſee no reaſon in this caſe to ſend an officer with her to protect her, upon a mere *apprehenſion or ſuppoſition* that any body will behave improperly upon the occaſion.

The King *v.* Ward, Mic. Ter. 3 Geo. 3. B.R. 1 *Black. Rep.* 386.

An *habeas corpus* was granted to compel the defendant to bring in the body of *Elizabeth Vernon*, an infant, under 21, who had eloped from her father, and lived at the defendant's houſe, who was her aunt, and was ſuſpected to be going to Scotland with the defendant's privity, in order to marry an Iriſh officer; the defendant having not only refuſed to reſtore the young lady to her father, but alſo kept her from him by force.—The Court alſo granted a rule to ſhew cauſe why an information ſhould not be filed againſt her.

Rex. *v.* Peter Wright, Robert Voſs, *et al.* Mic. Ter. 1 Geo. 3. B.R. 4 *Burr.* 1099.

On a motion on behalf of the relations and friends of one Mrs. *Francis Savage* [IT BEING REPRESENTED, THAT SHE WAS TOO INFIRM AND WEAK TO BE BROUGHT INTO COURT BY AN *habeas corpus*], a woman addicted to, and almoſt deſtroyed by, liquor: It was repreſented that ſhe was in the hands of very improper perſons, who were ſuſpected to be uſing artifices with her, in order to the obtaining a will from her, when ſhe was in very improper circumſtances of mind to make one; and was too much under their influence, even if her underſtanding and memory had been more perfect and leſs diſordered by intemperate drinking; and the Court made a rule upon the defendants to ſhew cauſe why an information ſhould not be exhibited againſt them for the miſdemeanors charged in the affidavits. It was alſo added to the rule, *at firſt* (and *without* any rule to ſhew cauſe as to this part of it), "That *Frank Nichols*, doctor of phyſic, *Robert Halifax*, "apothecary, *Catharine Forcer*, widow (who was mother-"in-law to Mrs. *Savage*, then a widow), *Thomas Lloyd*, "gentleman (attorney for Mrs. *Forcer*), *John Little*, and "*Anne* his wife (relations to Mrs. *Savage*), *Margaret Francis*, "a nurſe, and *Jane Francis*, a maid-ſervant, ſhould, at all "proper times, and ſeaſonable hours, reſpectively be ad-"mitted and have free acceſs to the ſaid Mrs. *Francis Savage*, "widow, daughter-in-law of the ſaid *Catharine Forcer*, at "the dwelling-houſe of the ſaid *Robert Voſs* (one of the "defendants), in Furnival's Inn Court, Holborn, to conſult "with, adviſe, and aſſiſt the ſaid *Francis Savage*."

Rex *v.* W. Clarke, Mic. Ter. 3 Geo. 3. B.R. 3 *Burr.* 1362.

So where it appeared, upon the affidavit of a phyſician, that the perſon confined was a lunatic, and not fit to be introduced in court, and that the relations were applying for a *commiſſion*

*of lunacy* againſt her.—THE COURT enlarged the time for making the return to an *habeas corpus* till the next term, being perfectly well ſatisfied by the affidavit that ſhe was not in a condition fit to be taken out of the care and cuſtody of thoſe to whom her perſon was intruſted, and who were upon the point of obtaining a proper legal authority for what they were doing; which, however intended for her benefit and advantage, had not yet obtained that ſtrict *legal* ſanction which they were now in a regular purſuit of. Serjeant *Whitaker*, who had moved for the *habeas corpus*, came afterwards into court, and deſired a rule for liberty to have acceſs to and inſpection of Mrs. *Hunt*, in order to ſee that ſhe was properly treated. But as he could not make out, that his application was made on behalf of any perſon who had the leaſt pretenſion to demand this, the Court rejected his requeſt.

A member of the Houſe of Commons, committed for a breach of privilege, cannot be diſcharged on an *habeas corpus* during the ſeſſion.—An *habeas corpus* having been granted to bring up the body of *Braſs Croſby*, Eſq. Lord Mayor of the City of London; on affidavit, that he was confined in the Tower, by virtue of a warrant from Sir *Fletcher Norton*, ſpeaker of the Houſe of Commons. Major *Collins*, Fort Major of the Tower, attended with the priſoner, in the abſence of Major *Rainsford*, Deputy Lieutenant of the Tower; who was confined with the gout, but had ſigned a return of the cauſe of his commitment and detention, directed to the Chief Juſtice only, and not to the other judges of the court. *On which it was moved to diſcharge the priſoner*; becauſe no legal return was made to the *habeas corpus*.—BUT THE COURT held the direction to be ſurpluſage, and that the return might be good, without any direction at all. The writ and return were, therefore, filed and read. The return ſet forth the cauſe of the priſoner's detention to be a warrant from the ſpeaker of the Houſe of Commons, in the following words: "Whereas the Houſe of Commons have "this day adjudged, that *Braſs Croſby*, Eſq. Lord Mayor of "the City of London, having diſcharged, out of the cuſtody "of one of the meſſengers of the houſe, *J. Miller* (for "whom the newſpaper, entituled the 'London Evening "Poſt,' from Thurſday, March the 7th, to Saturday, March "the 9th, 1771, purports to be printed; and of which "paper complaint was made in the Houſe of Commons, "the 12th day of this inſtant, March; and who, for his "contempt, in not obeying the orders of the Houſe, for his "attendance on the Houſe upon Thurſday the 14th day of "this inſtant, March, was ordered to be taken into cuſtody "of the ſerjeant at arms, or his deputy, attending the Houſe; "and who, by virtue of the ſpeaker's warrant, iſſued under "the ſaid order, had been taken into the cuſtody of the ſaid "meſſenger,

Braſs Croſby's Caſe, Ea. Ter. 11 Geo. 3. C.B. 2 *Black.* 754. 3 *Wilſ.* 188.

" meſſenger, and having ſigned a warrant againſt the ſaid " meſſenger for having executed the ſaid warrant of the " ſpeaker, and having held the ſaid meſſenger to bail for " the ſame, *is guilty of a breach of the privilege of this Houſe*; " and whereas the ſaid houſe have this day ordered, ' that the " ſaid *Braſs Croſby*, Eſq. Lord Mayor of the City of Lon- " don, and a member of this houſe, be, for his ſaid offence, " committed to the Tower of London.' Theſe are, there- " fore, to require you, to take into your cuſtody the body of " the ſaid *Braſs Croſby*, Eſq. the Lord Mayor of the City of " London; and you are then forthwith to deliver the body of " the ſaid *Braſs Croſby* the lord mayor, &c. into the cuſtody of " the lieutenant of his majeſty's Tower of London, or his de- " puty. For which this ſhall be your ſufficient warrant. Given " under my hand the 27th day of March, 1771." It was moved, that the priſoner might be diſcharged; becauſe the Houſe of Commons had exceeded its juriſdiction, by committing for a breach of privilege and contempt; which being ſtated on the face of the warrant (which recites the reſolution and order of the houſe), appears to be no breach of privilege or contempt at all. And they attempted to ſhew, that the priſoner had only done his duty as a magiſtrate; and that, therefore, the adjudication of the houſe was ill-founded.—De Grey, Ld. Ch. J. The writ by which the lord mayor is now brought before us, is an *habeas corpus* at common law, for it is not ſigned *per ſtatutum*; it is called a prerogative writ for the king, or a remedial writ; and this writ was properly adviſed by the counſel for his lordſhip, becauſe all the judges (including *Holt*), agreed, that ſuch a writ as the preſent caſe required, is not within the ſtatute; this is a writ by which the ſubject has a right of remedy to be diſcharged out of cuſtody, if he hath been committed, and is detained contrary to law; therefore the Court muſt conſider, whether the authority committing, is a legal authority; if the commitment is made by thoſe who have authority to commit, this Court cannot diſcharge or bail the party committed, nor can this Court admit to bail, one charged or committed in execution. Whether the authority committing the lord mayor, is a legal authority or not, muſt be adjudged by the return of the writ now before the Court; the return ſtates the commitment to be by the Houſe of Commons, for a breach of privilege, which is alſo ſtated in the return; and *this breach of privilege or contempt is, as the counſel has truly deſcribed it, threefold; diſcharging a printer in cuſtody of a meſſenger by order of the Houſe of Commons; ſigning a warrant for the commitment of the meſſenger, and holding him to bail*; that is, treating a meſſenger of the Houſe of Commons as acting criminally, in the execution of the orders of that houſe. In order to ſee whether that houſe has authority to commit, ſee *Co.* 4 *Inſt.* 23. Such an aſſembly muſt certainly have ſuch authority, and it is legal becauſe neceſ-

ſary:

ſary: Lord *Coke* ſays, they have a judicial power; each member has a judicial ſeat in the houſe, he ſpeaks of matters of judicature of the Houſe of Commons. 4 *Inſt.* 23. The Houſe of Commons, without doubt, have power to commit perſons examined at their bar touching elections, when they prevaricate or ſpeak falſely; ſo they have for breaches of privilege, ſo they have in many other caſes. *Thomas Long* gave the mayor of Weſtbury 4l. to be elected a burgeſs; he was elected, and the mayor was fined and impriſoned, and *Long* removed. *Arthur Hall*, a member, was ſent to the Tower, for publiſhing the conferences of the houſe, 4 *Inſt.* 23. This power of committing muſt be inherent in the Houſe of Commons, from the very nature of its inſtitution, and therefore is part of the law of the land; they certainly always could commit in many caſes: in matters of elections, they can commit ſheriffs, mayors, officers, witneſſes, &c. and it is now agreed that they can commit generally for all contempts. All contempts are either puniſhable in the courts contemned, or in ſome higher court; now the parliament has no ſuperior court, therefore the contempts againſt either houſe can only be puniſhed by themſelves. The ſtat. 1 *Jac.* 1. c. 13. ſ. 3. ſufficiently proves that they have power to puniſh; it is in theſe words, viz. "Provided always, that this act, or any thing "therein contained, ſhall not extend to the diminiſhing of "any puniſhment to be hereafter, by cenſure in parliament, "inflicted upon any perſon which hereafter ſhall make, or "procure to be made, any ſuch arreſt as is aforeſaid." So that it is moſt clear, the legiſlature have recognized this power of the Houſe of Commons. In the caſe of the Ayleſbury men, the counſel admitted, Lord Chief Juſtice *Holt* owned, and the Houſe of Lords acknowledged, that the Houſe of Commons had power to commit for contempt and breach of privilege. Indeed, it ſeems, they muſt have power to commit for any crime, becauſe they have power to impeach for any crime. When the Houſe of Commons adjudge any thing to be a contempt, or a breach of privilege, their adjudication is a conviction, and their commitment, in conſequence, is execution; and no court can diſcharge or bail a perſon that is in execution by the judgment of any other court. The Houſe of Commons therefore having an authority to commit, and that commitment being an execution, the queſtion is, what can this court do? It can do nothing when a perſon is in execution, by the judgment of a court having a competent juriſdiction; in ſuch caſe, this court is not a court of appeal. It is objected; 1. That the Houſe of commons are miſtaken, for that they have not this power, this authority; 2. That ſuppoſing they have, yet in this caſe they have not uſed it rightly and properly; and 3. That the execution of their orders was irregular. In order to judge, I will conſider the practice of the courts in common and ordinary caſes. I do

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not find any caſe where the courts have taken cognizance of ſuch execution, or of commitments of this kind; there is no precedent of Weſtminſter-hall interfering in ſuch a caſe. In Sir *J. Paſton*'s caſe, 13 *Rep.* there is a caſe cited from the year-book where it is held that every court ſhall determine of the privilege of that court; beſides, the rule is, that the court of remedy muſt judge by the ſame as the court which commits; now this court cannot take cognizance of a commitment by the Houſe of Commons, becauſe it cannot judge by the ſame law; for the law by which the commons judge of their privileges is unknown to us. If the court of Common Pleas ſhould commit a perſon for a contempt, the court of King's Bench would not inquire into the legality or particular cauſe of commitment, if a contempt was returned; yet in ſome caſes the court of King's Bench is a court of enquiry, but in this caſe it is only co-ordinate with this court. In the caſe of *Chambers*, *Cro. Car.* 168. *Chambers* was brought up by *habeas corpus* out of the Fleet; and it was returne that he was committed by virtue of a decree in the Star-chamber, by reaſon of certain words he uſed at the council-table, &c. for which he was cenſured to be committed to the Fleet, till he made his ſubmiſſion at the council-table, and paid a fine of 2000l. and at the bar he prayed to be delivered, becauſe the ſentence was not warranted by any law or ſtatute: for the ſtatute 3 *Hen.* 7. which is the foundation of the court of Star-chamber, doth not give them any authority to puniſh for words only. But all the court informed him, that the court of Star-chamber was not erected by the ſtat. 3 *Hen.* 7. but was a court many years before, and one of the moſt high and honourable courts of juſtice; and to deliver one who was committed by the decree of one of the courts of juſtice, was not the uſage of this court, and therefore he was remanded. The courts of B. R. or C. B. never diſcharged any perſon committed for contempt, in not anſwering in the court of Chancery, if the return was for a contempt; if the Admiralty Court commits for contempt, or one be taken up and committed on an *excommunicato capiendo*, this court never diſcharges the perſons committed. Formerly, when many abuſes were committed, and the people could not obtain a remedy, the ſubject was not contented with the ancient *habeas corpus*, but did not complain of the courts for refuſing them what they could not by law grant them; inſtead of that, they ſought redreſs by petition to the throne. In Chief Juſtice *Wilmot*'s time, a perſon was brought by *habeas corpus* before this court, who had been committed by the court of Chancery of Durham; that court being competent, and having juriſdiction, the man was not diſcharged, but recommitted. How then can we do any thing in the preſent caſe, when the law by which the lord mayor is committed, is different from the law by which he ſeeks to be relieved? He is committed by the law of parliament, and yet

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he would have redreſs from the common law; the law of parliament is only known to parliament men, by experience in the houſe. Lord *Coke* ſays, every man looks for it, but few can find it. The Houſe of Commons only know how to act within their own limits; we are not a court of appeal, we do not know certainly the juriſdiction of the Houſe of Commons; we cannot judge of the laws and privileges of the houſe, becauſe we have no knowledge of thoſe laws and privileges; we cannot judge of the contempts thereof, we cannot judge of the puniſhment therefore.—I wiſh we had ſome code of the law of parliament; but till we have ſuch a code, it is impoſſible we ſhould be able to judge of it. Perhaps a contempt in the Houſe of Commons, in the Chancery, in this court, and in the court of Durham, may be very different; therefore we cannot judge of it, but every court muſt be ſole judge of its own contempts. Beſides, as the court cannot go out of the return of this writ, how can we enquire into the truth of the fact, as to the nature of the contempt? We have no means of trying whether the lord mayor did right or wrong; this court cannot ſummon a jury to try the matter; we cannot examine into the fact; here are no parties in litigation before the court; we cannot call in any body; we cannot hear any witneſſes, or depoſitions of witneſſes; we cannot iſſue any proceſs; we are even now hearing *ex parte*, and without any counſel on the contrary ſide. Again, if we could determine upon the contempts of any other court, ſo might the other courts of Weſtminſter-hall, and what confuſion would then enſue! none of us knowing the law by which perſons are committed by the Houſe of Commons. If three perſons were committed for the ſame breach of privilege, and applied ſeverally to different courts, one court perhaps would bail, another court diſcharge, a third recommit.—Two objections have been made, which I own have great weight; becauſe they hold forth, if purſued to all poſſible caſes, conſequences of moſt important miſchief. 1ſt, It is ſaid, that if the rights and privileges of parliament are legal rights, for that very reaſon the court muſt take notice of them, becauſe they are legal. And, 2dly, If the law of parliament is part of the law of the land, the judges muſt take cognizance of one part of the law of the land, as well as of the other. But theſe objections will not prevail. There are two ſorts of privileges which ought never to be confounded; perſonal privilege, and the privilege belonging to the whole collective body of that aſſembly. For inſtance, it is the privilege of every individual member not to be arreſted; if he was arreſted before the ſtat. 12 & 13 W. 3. the method in Weſtminſter-hall was, to diſcharge him by writ of privilege under the great ſeal, which was in the nature of a *ſuperſedeas* to the proceedings; and as ſoon as it came into the court of B.R. and was pleaded there, then it became a record, and the pleading

ing concluded, *ſi curia domini regis placitum prædictum cognoſcere velit aut debeat.* The ſtat. 11 & 12 *W.* 3. has altered this, and there is now no occaſion to plead the privilege of a member of parliament. 2 *Stran.* 985. *Holiday* et al. v. Colonel *Pitt.* There is a great difference between matters of privilege coming incidentally before the Court, and being the point itſelf directly before the Court; in the firſt caſe the Court will take notice of them, becauſe it is neceſſary, in order to prevent a failure of juſtice; as in Lord *Banbury*'s caſe, where the court of King's Bench determined againſt the determination of the Houſe of Lords; but in that caſe they conſidered the legality and validity of the letters patent, without regarding the other right of a ſeat in the Houſe of Lords, with which the Court did not concern themſelves. The counſel at the bar have not cited one caſe where any court of this Hall ever determined a matter of privilege which did not come incidentally before them. If a queſtion is to be determined in this Court touching a deſcent, whereby property is to be determined, and which depends upon *legitimacy*; that is, whether the father and mother were married lawfully; this Court muſt determine by the biſhop's certificate; but in ſome caſes, where the letitimacy of marriage does not come in queſtion, but cohabitation only for a great length of time, which is evidence of a marriage, comes in queſtion, this Court will determine according to the verdict of a jury, although the courts of Weſtminſter Hall go by a different rule from the ſpiritual courts. But the preſent caſe differs much from thoſe which the Court will determine; becauſe it does not come incidentally before us, but is brought before us directly, and is the whole point in queſtion; and to determine it, we muſt ſuperſede the judgment and determination of the Houſe of Commons, and a commitment in execution of that judgment. Another objection has been made, which likewiſe holds out to us, if purſued in all its poſſible caſes, ſome dreadful conſequences; and that is, the abuſes which may be made by juriſdictions from which there is no appeal, and for which abuſes there is no remedy, but this is unavoidable: and it is better to leave ſome courts to the obligation of their oaths. In the caſe of a commitment by this Court, or the King's Bench, there is no appeal. Suppoſe the court of B.R. ſets an exceſſive fine upon a man for a miſdemeanor; there is no remedy, no appeal to any other court. We muſt depend upon the diſcretion of ſome courts. A man not long ago was ſentenced to ſtand in the pillory, by this court of Common Pleas, for a contempt. Some may think this very hard, to be done without a trial by jury; but it is neceſſary. Suppoſe the courts ſhould abuſe their juriſdiction, there can be no remedy for this: it would be a public grievance; and redreſs muſt be ſought from the legiſlature. The laws can never be a prohibition to the houſes of Parliament; becauſe, by law, there

there is nothing ſuperior to them. Suppoſe they alſo, as well as the courts of law, ſhould abuſe the powers which the conſtitution has given them, there is no redreſs, it would be a public grievance. The conſtitution has provided checks to prevent its happening; it muſt be left at large; it was wiſe to leave it at large: ſome perſons, ſome courts, muſt be truſted with diſcretionary powers; and though it is poſſible, it is in the higheſt degree improbable, that ſuch abuſes ſhould ever happen, and the very ſuppoſal is anſwered by Serjeant *Hawkins*, in the place cited at the bar. As for the caſe of the chancery committing for crimes, that is a different thing, becauſe the chancery has no criminal juriſdiction; but if that court commits for contempts, the perſons committed will not be diſcharged by any other court. Many authorities may be drawn from the reign of *Charles*, but thoſe were in times of conteſt. At preſent, when the Houſe of Commons commits for contempt, it is very neceſſary to ſtate what is the particular breach of privilege; but it would be a ſufficient return, to ſtate the breach of privilege generally: this doctrine is fortified by the opinion of all the judges, in the caſe of Lord *Shafteſbury*, and I never heard this deciſion complained of till 1704: though they were times of heat, the judges could have no motive in their deciſion, but a regard to the laws: the houſes diſputed about juriſdiction, but the judges were not concerned in the diſpute. As for the preſent caſe, I am perfectly ſatisfied, that if Lord *Holt* himſelf were to have determined it, the lord-mayor would be remanded. In the caſe of Mr. *Murray*, the judges could not heſitate concerning the contempt by a man who refuſed to receive his ſentence in a proper poſture: all the judges agreed, that he muſt be remanded, becauſe he was committed by a court having competent juriſdiction: courts of juſtice have no cognizance of the acts of the houſes of parliament, becauſe they belong *ad aliud examen*. I have the moſt perfect ſatisfaction in my own mind in that determination. Sir *Martin Wright*, who felt a generous and diſtinguiſhed warmth for the liberty of the ſubject; Mr. Juſtice *Deniſon*, who was ſo free from connections and ambition of every kind; and Mr. Juſtice *Foſter*, who may be truly called the *magna charta* of liberty of perſons, as well as fortunes; all theſe revered judges concurred in this point: I am therefore clearly, and with full ſatisfaction, of opinion, that the lord-mayor muſt be remanded.—*Gould*, Juſtice: I entirely concur in opinion with my Lord Chief Juſtice, that this court hath no cognizance of contempts or breach of privilege of the Houſe of Commons: they are the only judges of their own privileges; and that they may be properly called judges, appears in 4 *inſt.* 47. where my Lord *Coke* ſays, an alien cannot be elected of the parliament, becauſe ſuch a perſon can hold no place of judicature. Much ſtreſs has been laid upon an objection, that the warrant of the

ſpeaker is not conformable to the order of the houſe, and yet no ſuch thing appears upon the return, as has been pretended. The order ſays, that the lord-mayor ſhall be taken into the cuſtody of the ſerjeant or his deputy; it does not ſay, by the ſerjeant or his deputy. This Court cannot know the nature and power of the proceedings of the Houſe of Commons: it is founded on a different law; the *lex et conſuetudo parliamenti*, is known to parliament-men only. *Trewynnard's* caſe, *Dier*, 59, 60. When matters of privilege come incidentally before the Court, it is obliged to determine them to prevent a failure of juſtice. It is true this Court did, in the inſtance alluded to by the counſel at the bar, determine upon the privilege of parliament in the caſe of a libel; but then that privilege was promulged and known; it exiſted in records and law-books, and was allowed by parliament itſelf; but even in that caſe, we now know that we were miſtaken, for the Houſe of Commons have ſince determined, that privilege does not extend to matters of libel. The caſes produced reſpecting the High Commiſſion Court, &c. are not to the preſent purpoſe, becauſe thoſe courts had not a legal authority; the reſolution of the Houſe of Commons is an adjudication, and every court muſt judge of its own contempts. —*Blackſtone*, Juſtice: I concur in opinion, that we cannot diſcharge the lord-mayor; the preſent caſe is of great importance, becauſe the liberty of the ſubject is materially concerned. The Houſe of Commons is a ſupreme court, and they are judges of their own privileges and contempts, more eſpecially with reſpect to their own members: here is a member committed in execution by the judgment of his own houſe. All courts, by which I mean to include the two houſes of parliament, and the courts of Weſtminſter-Hall, can have no control in matters of contempt. The ſole adjudication of contempts, and the puniſhment thereof, in any manner, belongs excluſively, and without interfering, to each reſpective court. Infinite confuſion and diſorder would follow, if courts could by writ of *habeas corpus* examine and determine the contempts of others. This power to commit reſults from the firſt principles of juſtice; for if they have power to decide, they ought to have power to puniſh: no other court ſhall ſcan the judgment of a ſuperior court, or the principal ſeat of juſtice; as I ſaid before, it would occaſion the utmoſt confuſion, if every court of this Hall ſhould have power to examine the commitments of the other courts of the Hall, for contempts; ſo that the judgment and commitment of each reſpective court, as to contempts, muſt be final, and without control. It is a confidence, that may, with perfect ſafety and ſecurity, be repoſed in the judges, and the houſes of parliament. The legiſlature ſince the revolution (ſee 9 and 10 *W.* 3. c. 15.) have created many new contempts. The objections which are brought of abuſive conſequences prove too

too much, becauſe they are applicable to all courts of *dernier reſort: et ab abuſu ad uſum non valent conſequentia*, is a maxim of law as well as of logic. General convenience muſt always outweigh partial inconvenience; even ſuppoſing (which, in my conſcience, I am far from ſuppoſing) that in the preſent caſe the houſe has abuſed its power. I know, and am ſure, that the Houſe of Commons are both able and well inclined to do juſtice. How prepoſterous is the preſent murmur and complaint! the Houſe of Commons have this power only in common with all the courts of Weſtminſter-Hall: and if any perſons may be ſafely truſted with this power, they muſt ſurely be the commons, who are choſen by the people; for their privileges and powers are the privileges and powers of the people. There is a great fallacy in my brother *Glynn*'s whole argument, when he makes the queſtion to be, Whether the houſe have acted according to their rights or not? Can any good man think of involving the judges in a conteſt with either houſe of parliament, or with one another? and yet this manner of putting the queſtion would produce ſuch a conteſt. The Houſe of Commons is the only judge of its own proceedings: *Holt* differed from the other judges in this point, but we muſt be governed by the *eleven*, and not by the *ſingle one*. It is a right inherent in all ſupreme courts; the Houſe of Commons have always exerciſed it. Little nice objections of particular words and forms, and ceremonies of execution, are not to be regarded in the acts of the Houſe of Commons; it is our duty to preſume that the orders of that houſe, and their execution, are according to law. The *habeas corpus* in *Murray*'s caſe was at common law. I concur entirely with my Lord Chief Juſtice.—*Nares*, Juſtice: I ſhall ever entertain a moſt anxious concern for whatever regards the liberty of the ſubject; I have not the vanity to think I can add any thing to the weight of the arguments uſed by my Lord Chief Juſtice and my brothers: I have attended with the utmoſt induſtry to every caſe and argument that has been produced, and moſt heartily and readily concur with my Lord Chief Juſtice and my brothers.—The lord-mayor was reminded to the tower.—*See alſo the caſe of the* K. *v.* Flower, *under title* PARLIAMENT.

The caſe of three Spaniſh Sailors, Mic. Ter. 20 Geo 3. C B. 2 *Black.* 1324.

No *habeas corpus* lies for an alien enemy a priſoner of war, however ill-uſed or deceived.—It was moved for an *habeas corpus* to be directed to the commander of the Nightingale ſloop of war to bring up three Spaniſh ſeamen. An affidavit made in Spaniſh, but tranſlated and ſworn to be a juſt tranſlation, was read; ſtating that they were taken as priſoners of war on board of a Spaniſh privateer, and carried into Jamaica; where our homeward-bound fleet wanting hands, they were perſuaded to enter on board a merchant veſſel, Captain *Hannibal Luſh*, commander, on a promiſe of wages, and an immediate exchange by cartel upon their arrival in

England. But that Captain *Luſh*, on coming to England, had refuſed to pay their wages, and had turned them over to the Nightingale as priſoners of war: which was urged to be a palpable breach of faith, which this Court will interfere to prevent.—PER CURIAM: Theſe men, upon their own ſhewing, are alien enemies and priſoners of war, and therefore not entitled to any of the privileges of Engliſhmen; much leſs to be ſet at liberty on an *habeas corpus*. The ſtory, as related by them, is not much to the credit of Captain *Luſh*; but we can give them no redreſs. If they can ſhew they have been ill-uſed, it is probable they may find ſome relief from the Board of Admiralty.—Rule refuſed.

Dr. Betteſworth v. Hugh Parker Bell, Eſq. Ea. Ter. 1 Geo. 3. B.R. 3 *Burr.* 1875.

*Return.*]—An *hab. corp. ad ſatiſ.* & *recip.* may be returnable immediatè and before a judge.—It was moved to ſet aſide an *habeas corpus cum cauſa, ad faciendum et recipiendum*, &c. directed to the goaler of Aileſbury, returnable before the chief juſtice, immediatè. On the ground that ſuch a writ cannot be made returnable immediatè, nor before the chief juſtice: for, by a rule made in 1654, no *habeas corpus ad faciendum et recipiendum*, &c. can be returnable but in court, and at a day in term: except in London and Middleſex. It is contrary to the ſtatute of 4, 5 *W.* and *M.* c. 21. "For delivering declarations to priſoners (1):" for they have already declared againſt him in cuſtody of the ſheriff of Bucks.—PER CURIAM: There is no foundation for ſetting this writ aſide. It is teſted in term: which it ought to be. The rule is an old rule made in 1654; and ſeems to have gone in *deſuetudinem*. It was made long before the act of 4, 5 *W.* and *M.* And that act only gives the plaintiff leave to declare againſt him in cuſtody of the ſheriff: it does not take away the plaintiff's common law right "To remove him." He has a prior right to it: and the act leaves him, as it found him, in that reſpect. He is not precluded, by having charged him with a declaration, in cuſtody of the ſheriff, from afterwards removing him into the cuſtody of the officer of this Court.

Stephen Maſh's caſe, Hil. Ter. 12 Geo. 3. C.B. 2 *Black.* 805.

The Court will not receive the return of an *habeas corpus*, till the return-day.—It was moved, that the writ of *habeas corpus* that had iſſued, and the return, might be filed. But, being read, it appeared that the writ was not returnable till Wedneſday next, after eight days of the purification; whereupon, the Court refuſed to file it, till the day of the return. On which day the priſoner was again brought up, and the writ and return read and filed; in which it appeared that he had been committed by a warrant of one juſtice of the peace, under the ſtat. 9 *Geo.* 2. c. 35. ſ. 18, 19. "for being within

(1) This act, ſ. 2 and 3, gives leave to declare againſt priſoners in cuſtody of gaolers; alleging "in cuſtody of what ſheriff or other perſon, "&c. the priſoner is."

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" five miles of the ſea-coaſt, with intent to be aiding and " aſſiſting, in the running, landing, and carrying away pro- " hibited or uncuſtomed goods; and he was committed until " he ſhall be diſcharged by due courſe of law."—It was objected, that he ought not to have been committed, till diſcharged by due courſe of law; but that the words of the ſtatute ſhould have been purſued, viz. *Till he gives a ſatisfactory account of himſelf, to the juſtice who commits him; or, till he makes proof of his innocence, before the ſaid juſtice; or till he gives or finds ſecurity, not to be guilty of any of the offences aforeſaid.*—PER CURIAM: The commitment is ill, on account of the improper concluſion. The true diſtinction is: that, where a man is committed for any crime, either at common law, or created by act of parliament, for which he is puniſhable by indictment; there he is to be committed, *till diſcharged by due courſe of law:* but, when it is in purſuance of a ſpecial authority; the terms of the commitment muſt be ſpecial, and exactly purſue that authority.—Priſoner diſcharged.

On an *habeas corpus* to produce the body, with the cauſes of taking, and detaining: the party muſt return an anſwer to the *taking*, as well as *detaining:* and, in this caſe, having only made a return as to the detaining, THE COURT thought it no anſwer to the taking, and gave leave to amend the return, which was done in Court, by denying the taking alſo. Elizabeth Warman's caſe, Ea. Ter. 18 Geo. 3. C.B. 2 *Black.* 1204.

A writ of *habeas corpus* having been directed to the defendant to bring up the body of *Margaret*, the wife of *J. Greygoose*, the following return was made: " *I had not at the time of receiving this writ*, NOR HAVE I SINCE HAD, *the body of the withinnamed* M. Greygooſe DETAINED IN MY CUSTODY, *ſo that* I COULD NOT *have her before the withinnamed* W. H. Aſhhurſt, *as within I am commanded.*" The affidavit of *J. Greygooſe*, on which the writ iſſued, ſtated, that his wife, was in June, 1790, ſeduced by the defendant, with whom ſhe continued to live until the month of May laſt, when ſhe returned to her huſband; that about three days afterwards, in conſequence of a letter written by the defendant, threatening to publiſh her conduct in caſe of a refuſal to go back again to him, ſhe was induced to go back to the defendant, who (as the deponent believed) detained her by threats, and with whom ſhe was now living in a ſtate of adultery, but that ſhe was deſirous of returning to her huſband. The above return having been filed, a rule was obtained calling on the defendant to ſhew cauſe *why an attachment ſhould not iſſue againſt him for making an inſufficient return*, which was now oppoſed on three grounds; firſt, that under the circumſtances of this caſe, the writ of *habeas corpus* ſhould not have iſſued, the proſecutor having entered into articles of ſeparation; ſecondly, that this was a good return in ſubſtance; and, thirdly, if not a good The King *v.* James Winton, Mic. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 89.

return, that an attachment ought not to be granted on account of a mere ſlip in the return to the firſt writ of *habeas corpus*, but that an *alias* and a *pluries* writ ſhould firſt iſſue. PER CURIAM: Notwithſtanding what is to be found in ſome of the old books on this ſubject, it has been long ſettled that the Court will require a return to be made to the firſt writ of *habeas corpus*; and it is of infinite importance to every individual in the kingdom that we ſhould inſiſt on a return being made to that writ, without iſſuing an *alias* and a *pluries*. If the firſt writ be not obeyed, an attachment muſt iſſue immediately. Then it was argued on the authority of a caſe in 2 *Lev.* 128, 129. *Rex* v. Sir *R. Viner*, that this is a ſufficient return; but that caſe is by no means an authority to ſupport this return. It is to be obſerved, that the Court gave no opinion on this point; and for this reaſon: becauſe there was another objection to the return, which made it unneceſſary to conſider the effect of the other words of it. But the words there uſed are widely different from thoſe uſed in this caſe; there Sir *R. Viner* returned that "*he had no ſuch perſon in his cuſtody, nor had he on the day of iſſuing that (pluries) writ, or afterwards.*" But here the return is, "I had not at the time of receiving this writ, &c. nor have I ſince had, the body, &c. DETAINED in my cuſtody, &c." This is an equivocal return; the defendant does not deny having the party, he only denies the *detaining* of her; but we muſt enquire, when ſhe is brought up, whether or not ſhe be detained. As to the other ground, if this caſe turn out on farther inveſtigation to be like that of *R.* v. *Mary Mead*, 1 *Burr.* 542. where there were articles of ſeparation, that would be an anſwer to the writ. But that is not at preſent made out; and if the affidavit on the part of the proſecution be true, that the wife is deſirous of returning to her huſband, and is prevented by fear, or by the threats of the defendant, this caſe is diſtinguiſhable from that cited.

Rex *v.* Burbage, Tr. Ter. 3 Geo. 3. B.R. 3 *Burr.* 1440.

*Habeas corpus ad teſtificandum.*]—In general, an *habeas corpus ad teſtificandum* will lie, to remove a perſon in execution to be a witneſs, but the Court will refuſe it, where the application appears to be a mere contrivance.

Furly *v.* Newnham, Tr. Ter. 20 Geo 3. B.R. 2 *Doug.* 419.

But the Court will not grant an *habeas corpus ad teſtificandum* to bring up a priſoner of war.—The preſence of witneſſes in that ſituation is generally obtained by an order from the ſecretary of ſtate.—It was here ſtated, that this application had been made, but without ſucceſs.—The Court then granted a rule to ſhew cauſe why the defendant ſhould not conſent, either to admit the fact, or that the priſoner ſhould be examined upon interrogatories; and if this conſent ſhould be refuſed, the Court ſaid they would put off the trial from time to time, to give the plaintiff an opportunity of filing a bill in equity.

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On a rule upon the defendant to ſhew cauſe why he had not obeyed a writ of *habeas corpus ad teſtificandum*, requiring him to bring up two ſailors, the anſwer given was, that the writ was not ſigned by a judge.—Lord MANSFIELD, Ch. J. I refuſed to ſign the writ, becauſe there was no affidavit that the men had been ſerved with ſubpœnas, and that they were willing to attend, and without ſuch an affidavit, the writ ought not to go; they can never be brought up as priſoners againſt their conſent.—Diſcharge the rule with coſts.

Rex *v.* Roddam, Mic. Ter. 17 Geo. 3. B.R. *Cowp.* 672.

The defendant being brought up on an attachment for not only diſobeying an *habeas corpus* for delivering an impreſſed ſailor, but alſo impreſſing four of the boat's crew, which brought the writ.—THE COURT ſaid, that a fine of 200*l.* had been formerly ſet on ſuch an occaſion, but in this caſe, the captain having agreed with the injured parties, and the offence originating in inadvertence, they diſmiſſed the captain, on payment of a fine of 10*l.* only.

The King *v.* Captain Fackingham, Mic. Ter. 1 Geo. 3. B.R. 1 *Black. Rep.* 269.

## Hackney Coaches.

Under the ſtatute 10 *Geo.* 3. c. 44. ſ. 7. a juſtice of the peace after convicting a hackney coachman for refuſing to go with his coach may immediately commit him to the houſe of correction, if he do not pay the penalty.—To an action of treſpaſs and falſe impriſonment, the defendant, a juſtice of the peace, pleaded the general iſſue, and at the trial juſtified under a commitment of the plaintiff, the driver of a hackney coach, for refuſing to go with his coach from Kenſington to Hammerſmith, and not immediately paying the forfeiture of 30*s*.—The only queſtion was, Whether this commitment were warranted by the 10 *Geo.* 3. c. 44.? if it were, it was admitted, that the defendant was entitled to a verdict. The 10 *Geo.* 3. c. 44. ſ. 5. after reciting the 7 *Geo.* 3. c. 44. and that doubts had ariſen whether the commiſſioners have a power under it to commit offenders to priſon immediately upon conviction, "which power would be very beneficial in many inſtances to the public," *enacted, that three commiſſioners may in all caſes, where by law they may commit any offender to Bridewell, or any houſe of correction, commit him immediately, &c.* there to be kept to hard labour for any time not exceeding a month, and alſo to receive the correction of the houſe, &c. and ſ. 7. enacts, "that all the offences mentioned in that, and the recited acts, may be heard and determined, and all and every "the forfeitures and penalties thereby inflicted may be "recovered and levied, not only by three commiſſioners, &c. "*but alſo by any juſtice of the peace where ſuch offence ſhall be* "*committed, by ſuch ways and means as the penalties and for-* "*feitures in the ſaid act, of the* 9*th of* Anne, *are directed to* "*be*

Duck *v.* Addington, Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 447. *Nolan* 1.

" *be levied and recovered.*" And it was urged, that this laſt act did not give power to a magiſtrate to commit immediately. THE COURT ſaid, that on conſidering the four ſtatutes together, as being made in *pari materiâ*, and forming one general ſyſtem of law upon this ſubject, they thought that the legiſlature intended to give, and had given, by the ſeventh ſection of the 10 *Geo.* 3. c. 44. the ſame power to the juſtices of immediate commitment that was conferred on the commiſſioners by the fifth clauſe of that act.

## Hawkers and Pedlars.

Maxwell *v.* Mayor, Fa. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1314. 1 *Black Rep.* 271. 364.

THE manufactures of Scotland may be vended in England, by wholeſale, without a licence, from the hawkers' office.—The plaintiff was a native of Scotland: he was a hawker and pedlar, carrying linen goods of the manufacture of Scotland, from town to town in England; and expoſing them to ſale, in a room in each town, by wholeſale only.—The queſtion was, " Whether the plaintiff (who was a native of Scotland) being " a (1) wholeſale dealer in linens of the manufacture of Scot- " land, was obliged to take out a licence, to qualify him to " trade thus, by wholeſale, in England?"—THE COURT thought it proper that the following facts ſhould be aſcertained, before they gave their opinion; viz. " Whether, ſince " the union, perſons coming from Scotland, and bringing " linen or woollen goods into England, and ſelling them by " wholeſale, do or do not uſually take out licences: or " whether there have been any, and what, convictions of ſuch " perſons who have ſold Scotch linen thus by wholeſale?"—After having taken time to enquire into theſe facts, and to conſider it—Lord MANSFIELD now delivered the reſolution of the Court. He ſaid they had had certificates from the commiſſioners, and anſwers to them; and replies, and rejoinders and ſurrejoinders without end: but, upon the whole, they (the Court) were clear that there was no pretence for ſupporting ſuch an uſage as had been pretended on the ſide of the defendant. The uſage then being out of the caſe, the ſingle queſtion is, " Whether the linen-manufacture of Scot- " land is, or is not, the linen-manufacture of this kingdom " within the act of 9 and 10 *Will.* 3. c. 27 (2). and the act

(1) V. 3 *Ann.* c. 4. ſ. 4.

(2) The 29 *Geo.* 3. c. 26. ſ. 20. Impoſing new duties on hawkers and pedlars, contains a clauſe ſimilar to that in 9 and 10 *Will.* 3.

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" of union."—And we are of opinion, " that the linen-" manufacture of Scotland is the linen-manufacture of this " kingdom within thoſe acts."

Only one horſe-licence was required for hawkers, pedlars, and petty chapmen, travelling with ſeveral beaſts under the old act of 9, 10 *W.* 3. c. 27. ſ. 1 and 3, but this is now altered by 29 *Geo.* 3. c. 26. and a licence is required for each beaſt above the firſt. Rex *v.* Robotham, Ea. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1472.

A conviction of the defendant for trading as a hawker, pedlar and petty chapman, without having a licence, having been removed by *certiorari*. It was objected, That the evidence which the juſtice had ſtated in his conviction, was not ſufficient to ſupport his adjudication " That the defendant " had no licence." The charge was, " That the man had traded as a hawker, pedlar, or petty chapman, in ſelling a piece of muſlin, &c. without having a licence;" the evidence ſtated by the juſtice, in the conviction, is only " That the man refuſed to produce any licence." Whereas the trading without having any licence, and the refuſing to produce his licence (in caſe he really has one), are quite diſtinct offences; and are ſo conſidered by the act of 9, 10 *W.* 3. c. 27. which gives quite diſtinct and different penalties for them, viz. 12l. for the former, and 5l. for the latter. Refuſing to produce a licence which a man has, is, in its own nature, a very different thing from not having one to produce. And the man's having confeſſed " That he traded as a hawker, pedlar, and " petty chapman," is no ground for convicting him " For " trading as ſuch without a licence;" notwithſtanding his refuſal to produce it. And though the 8th ſection of this act (as well as the act of 3, 4 *Ann.* c. 4. ſ. 4.) gives the ſame forfeiture for not producing as for not having one; yet that cannot alter the nature of the offence. It was argued on the other ſide, in ſupport of the conviction, that it was founded on 9, 10 *W.* 3. c. 27. ſ. 8. which authorizes and ſtrictly requires the juſtices of peace, either upon confeſſion of the party offending, or due proofs of witneſſes upon oath, " *That the* " *perſon ſo brought before him had ſo traded as aforeſaid;*" and that no ſuch licence ſhall be produced by ſuch offender before the ſaid juſtice; by warrant under his hand and ſeal, to cauſe the ſaid ſum of 12l. to be forthwith levied by diſtreſs and ſale of the offender's goods, &c. That the only two facts requiſite to ground a conviction upon, under this clauſe, were, 1ſt, The trading in the manner deſcribed by the act of parliament; and, 2dly, The refuſing or declining to produce a licence. And both theſe facts were charged.—But Lord MANSFIELD ſaid, he could ſee no doubt of this conviction being a good one.—THE COURT affirmed the conviction. Rex *v.* Smith, Ea. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1475.

It was objected to a conviction on the hawkers and pedlars act; FIRST, That he was not ſummoned to anſwer to the charge.— Rex *v.* Roger Aikin, Mic. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1785.

charge.—PER CURIAM: He did appear, and denied the guilt; but did not desire further time to produce his evidence, or to prove his innocence: he seems, therefore, to have waived any further defence.—2dly, It did not appear that the witness was examined in the presence of the defendant.—PER CURIAM: It may be presumed, that the witness was examined in his presence.—3dly, The witness does not swear him to be a hawker and pedlar at the time of the conviction.—PER CURIAM: There is an inaccuracy in this conviction: but it appears, that the defendant had exposed his goods to sale, on the 15th, and the conviction was on the 17th.—Conviction affirmed.

The King *v.* Redfearne, Ea. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 273.

No hawker can expose goods to sale in any part of a market town but the public market place, by 29 *Geo.* 3. c. 26. s. 16, 17.—This was a conviction of the defendant, who was a licenced hawker and pedlar, in the penalty of 10l. under the 29 *Geo.* 3. c. 26. for having, on Friday the 22d of February last, being the market-day at Leeds, and during the market hours, exposed to sale within a house in the town of Leeds, and not in the open market-place where the open market is usually held, goods, wares, and merchandizes; not being an householder there, nor the house in which he so exposed the said goods, &c. being an house in which he had opened a room or shop, nor his usual place of abode, or of his carrying on business.—The 29 *Geo.* 3. c. 26. s. 16. impowers the abovementioned penalty. And the next section provides that nothing in the act shall extend to hinder any person from selling, or exposing to sale, any goods in *any public mart, market, or fair, but that such person may do therein as he lawfully might have done before the act.* And the hawkers conceived that under the above proviso they might expose their goods to sale in any part of a market-town *as they lawfully might have done before the act.*—*The Court* said, there was no foundation whatever for the construction contended for by the hawkers, for that the proviso only extended to sales in the public market-places, and on the days of the markets.—Conviction affirmed.

## Heir.

Goodtitle *ex dim.* Newman *v.* Newman, Hil. Ter. 14 Geo. 3. C.B. 2 *Black.* 938. 3 *Wilf.* 516.

WHERE lands descended to two daughters of the father by the first *ventre*, and after his death, an infant son was born of a second *ventre*, the mother at that time residing in part of the premises, and receiving rent for the other parts, both before and after the birth of her son; and the son died at the age of five weeks and three days.—It was held that this was a sufficient

ſufficient actual ſeiſin in the infant ſon, to make a *poſſeſſio fratris*; ſo that the lands ſhall not deſcend from him to his ſiſters of the half blood, but to a more remote heir of the whole blood.—Lord Chief Juſtice *De Grey*, after the caſe had been very fully argued, delivered the opinion of the whole court to the following effect:—This is an ejectment brought by the heir of a poſthumous ſon, to recover the premiſes in queſtion, which were purchaſed by his father, *who died, ſeiſed thereof in fee-ſimple, the 4th day of June*, 1760, leaving two daughters by his firſt wife, and his ſecond wife *enſient* of this poſthumous ſon; *the wife and daughters remained in the ſame houſe where the father died*, then the wife received ſome rent for the houſes, and afterwards, *in July*, 1760, *the ſon was born, and in his life-time the widow received more rent; then the ſon died, having lived five weeks and three days*, and ſhe received ſome more rent after his death. Lands in fee-ſimple muſt deſcend to the heir of the whole blood of the perſon laſt actually ſeiſed thereof; this is a *maxim* of the law of England which has ſubſiſted for ages, as appears by *Bract.* lib. 2. fol. 65. *Britton*, cap. 119. fol. 271. and *Fleta*, lib. 6. cap. 1. ſect. 14. Although this may ſometimes be very hard upon ſome children of the *half blood* of the perſon laſt *actually ſeiſed*, yet we muſt take the law as it is, and determine accordingly.—THE QUESTION therefore is, *Whether this poſthumous ſon was actually ſeiſed of the premiſes in queſtion?* Upon the death of the father, his two daughters would have been good tenants to the *præcipe* before the birth of the poſthumous ſon, who could not lay his title before he was born; the law veſted the *ſeiſin in law* in the daughters, upon the death of the father, and in like manner veſted the *ſeiſin in law* in the ſon, the moment he was born; if the daughters had aliened, or been diſſeiſed, the ſon would not have been *actually ſeiſed*, but would only have had a *right of entry* upon the poſſeſſion of the *alienee* or *diſſeiſor*. This was the ground of *Hill*'s argument, namely, that the daughters were diſſeiſed by the mother, *and that the ſon died having only a right of entry, ſo was never actually ſeiſed*. But the daughters were in actual poſſeſſion as well as the mother (of one houſe), from the time of the death of their father, until the birth of the ſon, and were alſo in actual poſſeſſion of the other three houſes by the poſſeſſion of the tenants thereof, whether any rent had been due, received or not received, before the birth of the ſon, 3 Rep. 41, 42. 4 Rep. 21. *Moore*, 125. *Co. Lit.* 14, 15. And the rent which was due, and received before the birth of the ſon, belonged to the daughters who were actually ſeiſed. For by *Babington* [Chief Juſtice, C.B.], Trin. 9 *Hen.* 6 25. a. If a man has iſſue, a daughter, and dies, his wife being *enſient*, the daughter may lawfully enter, and if ſhe dies, her heir may enter and take the profits for the time, and afterwards

afterwards if the wife, being *enſient* by the anceſtor paramount is delivered of a ſon, the ſon may enter, notwithſtanding that the heir of his ſiſter is *in* by deſcent, but he ſhall not have an action of *account* or any remedy for the *iſſues* in the mean time before his birth, becauſe that their entry was *congeable* until he was born; and if a church becomes void, and the ſiſter or her heir preſent, and their preſentee be inſtituted and inducted before his birth, he ſhall not have advantage of the avoidance, and yet by ſuch preſentation he ſhall not be out of poſſeſſion. At the time of the birth of the ſon [in the preſent caſe], his mother was in poſſeſſion as well as the daughters; the moment he was born, ſhe became his *guardian in ſocage*, and upon ſuppoſition that nothing was done to hinder it, the law will preſume that ſhe entered as *guardian* to her ſon as ſoon he was born, and nothing appears to the contrary upon the facts ſtated in the caſe; ſhe was *in* without any declaration of her intention how ſhe was *in*, and acts without any words amount in law to an entry, for acts without words may make an entry, but words without an act, viz. entry into the land, &c. cannot make an entry. *Co. Litt.* 245. b.—It was objected that the mother being in one houſe, and receiving the rents of the others, was a *diſſeiſor*, or that it was in the election of the daughter to make it a *diſſeiſin*. *Cro. Car.* 303. And that if one enters as *guardian* who is not ſo, he is a *diſſeiſor*. 1 *Roll. Abr.* 662. [*J.*] pl. 3.—In anſwer to this, the facts in the caſe are, that the mother continued in poſſeſſion from the death of her huſband; received the rents under leaſes; her poſſeſſion was general; it doth not appear that ſhe ouſted the daughters, or made any actual or particular claim; *ſhe might continue in the houſe by quarentine, which continued until the ſon was born*, and the entry of one is the entry of the others who have right to enter. 1 *Roll. Abr.* 740, 741. If *guardian by nurture* make a leaſe by indenture to one being *in* under the title of the infant, rendering rent to himſelf, which is paid accordingly, yet this is not any *diſſeiſin* to the infant. 1 *Roll. Abr.* 659. pl. 13.—It is to be obſerved that the title of the daughters expired on the birth of the ſon, before any election to make the mother a *diſſeiſor* was made, that the law will not preſume a *wrong*; there never was any determination that the mother's entry or poſſeſſion was by wrong in a caſe like this, and it is impoſſible to ſuppoſe in this caſe, that the whole rents and profits of the premiſes in queſtion were not applied by the mother to the common uſe of the daughters, herſelf, and the infant ſon; indeed, if the mother had entered as *guardian* to the daughters, ſhe not being their *guardian*, it would have been a *diſſeiſin*; ſo if ſhe had entered for her *dower* when it was not aſſigned to her; the poſſeſſion of the mother and daughters, was the poſſeſſion of the daughters, and when the ſon was born, the eſtate was diveſted out of the

the daughters and not before, then the ſon was in actual poſſeſſion and ſeiſin of the premiſes by his mother, who had a right to the poſſeſſion, as being his guardian by law, namely, the perſon next of blood to whom the inheritance cannot deſcend, her poſſeſſion was the poſſeſſion of her ſon. 3 *Rep.* 42. *Moore*, 125. A *guardian* need not be aſſigned. The ſeiſin of the *guardian* of a ſon by the ſecond *ventre* ſhall ouſt the daughters of the firſt *ventre*. 8 *Aſſize* 6. Upon the whole, we are all of opinion that the premiſes in queſtion belong to the leſſor of the plaintiff, and, therefore, we give—Judgment for the plaintiff.

Doe *ex dim.* John Barnett and Mary his Wife, and Thomas Marriott, *v.* Sarah Keen, an infant, by Philip Acock, her guardian, Mic. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 386.

*A.* died ſeiſed, leaving two infant daughters by different *ventres*; held that an entry generally by the mother of the youngeſt daughter, as her guardian in ſocage, conſtituted a ſufficient ſeiſin in the eldeſt infant daughter, to carry the deſcent of her moiety, on her death, to her heirs.—On the trial of an ejectment, a verdict was taken for the plaintiff, ſubject to the opinion of the Court, upon the following caſe: *William Keen, being ſeiſed in fee of the whole of the premiſes, died inteſtate on the 29th of July*, 1785, *leaving two daughters by different* ventres, *viz.* Elizabeth *and* Sarah Keen. *The defendant, on the death of the inteſtate* (the defendant's mother), *as her guardian in ſocage, entered upon the premiſes, and received the profits until the 7th of October*, 1796, *when ſhe died.* Elizabeth Keen *died on the 9th of March* (1), 1787, unmarried and inteſtate, and *Mary*, the wife of *John Barnett*, and *Thomas Marriott*, the leſſors of the plaintiff, are her heirs at law. THE COUNSEL FOR THE LESSORS OF THE PLAINTIFF, after ſtating the queſtion to be, Whether there was a ſeiſin in the daughter *Elizabeth*, under whom the leſſors of the plaintiff claim, ſo as to warrant their entry into her moiety as heirs at law to her? contended in the affirmative, FIRST, That the entry of the mother, as guardian in ſocage of the defendant, and her receipt of the profits, amounted to a ſufficient ſeiſin for her daughter; and for this the foregoing caſe of *Goodtitle* ex dim. *Newman* v. *Newman*, was cited; SECONDLY, That the ſeiſin of one coparcener is a ſeiſin for the other. *Lit.* ſ. 396. *Gilb. Ten.* 28. *Co. Lit.* 243. b. *Gilb. Ten.* 29.; 4 *Com. Dig.* tit. *Parceners* (A. 3); and *Jenk.* 242. pl. 25. *Hob.* 120. 1 *Rol. Abr.* 740. tit. *Entry* (F). *Co. Lit.* 15. a. Lord KENYON, Ch. J.—The fair reſult from all the authorities cited by the plaintiff's counſel is that which is drawn by him; but there is a ſhorter point on which this caſe may be decided in favour of the plaintiff.

(1) It was admitted at the bar to queſtions put by the Court, though not ſtated in the caſe, that *Elizabeth* died under age, and that the mother of the defendant occupied the premiſes herſelf.

Nothing

Nothing can be clearer than that an infant may conſider whoever enters on his eſtate as entering for his uſe; and, if ſo, that puts an end to the caſe at once, both theſe daughters being infants when their father died. This diſtinction was taken by Lord *Coke* (1), and has ſince been frequently adopted, that if the father die, his eſtate being out on a *freehold leaſe*, that is not ſuch a poſſeſſion as to induce the *poſſeſſio fratris*, unleſs the elder ſon live to receive rent after the expiration of ſuch leaſe: but it has been always the ſettled rule, that if the father die, leaving his eſtate out on *a leaſe for years only*, the poſſeſſion of the tenant is ſo far the poſſeſſion of the elder ſon, as to conſtitute the *poſſeſſio fratris*. Then here the inſtant the father died the mother entered; the rights of the different parties veſted without any incumbrance to prevent the immediate ſeiſin of the two parceners; the rent was due to both infants, and it might have been conſidered as received to the uſe of both, even if the entry had been made by a mere ſtranger. On this ſhort ground, therefore, though I think that the plaintiff's counſel alſo eſtabliſhed his poſition, that the poſſeſſion of one parcener is the poſſeſſion of the other, ſo as to create a ſeiſin in the other, and carry her ſhare by deſcent to her heirs, I am of opinion that the plaintiff is entitled to our judgment. — *Per Curiam*: Poſtea to the plaintiff.

Atkinſon, adminiſtratrix, v. Baker, Ea. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 229.

If an eſtate, *pour autre vie*, be limited to a man, his heirs, executors, adminiſtrators, and aſſigns, and be not deviſed, it deſcends to the heir as a ſpecial occupant.—This was an action of detinue to recover certain indentures of bargain and ſale and releaſe, and a certain memorandum in writing. The declaration alleged, that *T. Foſter*, *being ſeiſed for his own life* of a certain freehold eſtate, conveyed it by leaſe and releaſe to *H. Williams*, *his heirs* and aſſigns. That *Williams*, by a memorandum in writing, and ſigned by him according to the form of the ſtatute, acknowledged the conſideration-money in the above conveyance to be the proper money of *W. Atkinſon*, the plaintiff's inteſtate, and that the name of *Williams* was made uſe of in the conveyance in truſt for *W. Atkinſon*, *his heirs*, *executors*, *adminiſtrators*, *and aſſigns*. That *Williams* delivered the deeds and the memorandum to *W. Atkinſon*, who thereby became poſſeſſed of them, and who afterwards died inteſtate; on which adminiſtration was granted to the plaintiff, who thereby became lawfully poſſeſſed of the deeds, &c. and, being ſo poſſeſſed, afterwards loſt them; and that they came into the poſſeſſion of the defendant, who is the heir at law of *W. Atkinſon*, and who ſtill detains them. To this declaration there was a general demurrer, and joinder.

(1) Vid. *Co. Lit.* 15. a. and *Jenk.* 242.

PER

PER CURIAM: *If an eſtate*, pour autre vie, *be limited to a man, his heirs, and aſſigns, and it be not deviſed, it goes to the heir under the ſtatute of frauds, and is liable to the ſame debts as a fee-ſimple is. Where it is granted to a perſon, his executors, adminiſtrators, and aſſigns, the executors take it, ſubject to the ſame debts as perſonalty of any other deſcription is; and by the* 14 Geo. 2. *it is diſtributable.* Now in this caſe, before the plaintiff can recover the deeds in queſtion, ſhe muſt ſhew a title to the eſtate, in reſpect of which ſhe claims the deeds: but ſhe objects to the defendant's retaining them, becauſe his title, if any, is only equitable, and cannot be enquired into in a court of law. Now this court either has or has not a right to enquire in whom the equitable title is veſted; and in either way of conſidering the queſtion, there muſt be judgment againſt the plaintiff. If it be ſo doubtful a point that we cannot decide it in a court of law, the plaintiff muſt ſeek redreſs in equity, becauſe the right to theſe documents muſt follow the title to the eſtate. *And if we can examine into the title, the defendant, who is the heir at law of the tenant*, pour autre vie, *muſt have judgment.* The eſtate in queſtion was conveyed to *Williams*, his heirs, and aſſigns; and it appears by the deed of truſt, which, as being a declaration in writing, is valid by the ſtatute of frauds, that *Williams* held the eſtate in truſt for *Atkinſon*, his heirs, executors, adminiſtrators, and aſſigns. *The firſt limitation is to the heirs, and in the ordinary courſe of this ſpecies of property it goes to the heir at law, becauſe it is a real eſtate.* Then it is urged, that we ought to exclude the heir, in order to let in a more numerous claſs of creditors; but, however convenient it might be if ſuch were the law, when we are deciding according to law, we muſt take care not to infringe one of its firſt rules. *And here the heir at law is entitled to the eſtate as a ſpecial occupant, and has, conſequently, a right to detain the poſſeſſion of thoſe documents which belong to the eſtate.*—Judgment for the defendant.

Doe *ex dim.* Hodſden *v.* Staple, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 684.

If there be an agreement before marriage, that a ſettlement ſhall be made of the wife's eſtate, reſerving to her a power of diſpoſing of it, which agreement is ſigned by the intended huſband and wife, but *not ſealed*; and before the marriage the wife diſpoſes of it to the huſband, who ſurvives her, and deviſes the eſtate by will; the title of his deviſee is ſuch a doubtful equity as cannot be ſet up in an ejectment againſt the title of the wife's heir-at-law.—This was an ejectment brought to recover certain premiſes in Tatsfield, Surrey. At the trial, the jury found a ſpecial verdict, ſtating in ſubſtance as follows: On the 23d of Auguſt, 1758, *Richard Staple*, deceaſed, was ſeiſed of the premiſes in tail general, ſubject to a term of ninety-nine years, outſtanding in *A. Culver*, in truſt for ſecuring four ſeveral life annuities to *Sarah*

*Sarah Dixie*, *Joſeph Coxe*, *Mary Curwen*, and *Mary Day*; which term was determinable on the death of the ſurvivor of the ſaid annuitants, and, ſubject to the ſaid annuities, was limited in truſt to attend the inheritance, the reverſion being veſted in *Catherine Culver*. On the ſame day and year, *Catherine Culver*, in contemplation of a marriage with *James Hibbins*, *ſigned a paper-writing without ſeal or ſtamp*, produced at the trial, which, after reciting the intended marriage, and that *Catherine Culver* was entitled to a conſiderable property, both real and perſonal, ſtated that it was agreed, "*that the* "*ſaid* Catherine Culver's *fortune ſhould be ſettled, or remain* "*to their joint uſe for her life, or the life of the longeſt liver,* "*and if ſhe ſhall ſurvive the ſaid* James Hibbins, *her whole* "*fortune, together with her plate and jewels, to be ſettled to her* "*own uſe; and if the ſaid* Catherine Culver *ſhall happen to* "*die firſt, then the aforeſaid fortune to be at her own diſpoſal*;" and it was agreed, that proper ſettlement deeds to this effect ſhould be prepared as ſoon as it could conveniently be done. A duplicate of this paper, *without ſeal or ſtamp*, was ſigned by *James Hibbins*. On the ſame day and year *Catherine Culver* made her will, duly executed, to paſs real eſtates; and, after giving "*the whole intereſt of her fortune to* James Hibbins, *her* "*intended huſband*," for life; and, after ſeveral ſpecific deviſes, in which the reverſion in the premiſes in queſtion was not mentioned, *deviſed the reſidue of her eſtate and effects to the ſaid* James Hibbins, *whom ſhe appointed her executor*. On the ſame day and year the marriage took effect; and, on the 7th of April, 1759, *Catherine Culver* died without iſſue, in the life-time of her huſband, and of the ſaid *Richard Staple*; leaving *Mary Brazier* (who afterwards died in the life-time of *Richard Staple*), and *Richard Hodſden*, the leſſor of the plaintiff, her co-heirs.—The leſſor of the plaintiff had united in him all the rights of the two co-heirs of *Catherine Hibbins*; and, therefore, he was entitled to recover the premiſes in queſtion under one or other of the counts in the declaration, unleſs the will and the inſtrument of the 23d of Auguſt, 1758, defeated this title. For the plaintiff it was contended, that the marriage of the teſtatrix, Mrs. *Culver*, ſubſequent to the making of her will, was, by operation of law, a virtual revocation of it; firſt, becauſe her eſtate and intereſt in the lands were changed by it; and, ſecondly, becauſe the teſtatrix's capacity of revoking and altering the will in fact at her pleaſure, was determined by the marriage. Lord KENYON, Ch. J.—There is no doubt but that the will of a woman, made before coverture, ceaſes to be her will afterwards, becauſe it is of the eſſence of a will that it ſhould be valid during the remainder of the deviſor's life; therefore, generally ſpeaking, the will of a *feme ſole* ceaſes to have any operation after ſhe becomes covert. But it is equally clear, that where an

an eſtate is limited to uſes, and a power is given to a *feme covert* before marriage to declare thoſe uſes, ſuch limitations of uſes may take effect; and this is the rule even in a court of law. Then as to this caſe now before us; this will, *quâ* a will, ſtanding unſupported, would certainly have no effect: but it has been argued, that it receives ſupport from the inſtrument; but it muſt be remembered that that inſtrument is no deed; it is not under ſeal, and a ſeal is eſſential to a deed; therefore it cannot operate as a covenant to ſtand ſeiſed to uſes. In the caſe of *Peacock* and *Monk*, 2 *Vezey*, 191. Lord *Hardwicke* there points out ſeveral ways by which a power may be reſerved to the wife of making out a diſpoſition of the eſtate, ſo as to prevent its going to the heir at law, namely, either by way of truſt, or of power over an uſe: but he doubted whether even a court of equity could carry into execution a bare agreement for that purpoſe, to the prejudice of the heir at law: however that, which was then conſidered as a doubt, no longer remains ſo. For in *Wright* v. Lord *Cadogan* and others, 6 *Bro. Parl. Caſ.* 156. it was determined, that a court of equity would compel the heir to make a conveyance to the party, in whoſe favour ſuch an agreement was made. That point was very ably diſcuſſed in the Houſe of Lords on the doubt which Lord *Hardwicke* had thrown out in *Peacock* and *Monk*, though his doubts were not ſufficient to induce the Houſe to determine againſt ſuch an agreement. But is it poſſible for a court of law to enter into the diſcuſſion of ſuch nice points of equity? we have no ſuch authority. Sitting in this court we muſt look at the record, and ſee whether a legal title is conveyed to the party claiming under theſe inſtruments: now there is no colour for ſaying that theſe give any legal title. Without deciding, or preſuming to think, what a court of equity would do in this caſe, it is enough to ſay that we are to decide a legal queſtion, and cannot enter into ſuch an entangled equity; and, on that ground only, we are of opinion that the plaintiff is entitled to a verdict. ASHHURST, J. agreed. BULLER, J. alſo agreed.—It is material to conſider the ſituation in which theſe two parties ſtand: the plaintiff has no connection with the eſtate or intereſt which the defendant claims; his title is adverſe to him. An agreement was made, before marriage, between *Catherine Culver* and her intended huſband, and it has been attempted to connect it with a will made by her before marriage, under which the defendant claims: but, at beſt, that raiſes only a doubtful equity; and the title of the plaintiff being clear, the defendant cannot keep him out of poſſeſſion by a doubtful equity.—GROSE, J. alſo agreed.

Where an obligor is ſeiſed of a reverſion in fee, expectant on ſeveral eſtates tail; this reverſion, coming into poſſeſſion in

Smith *et al.* executors, *v.* Parker, *et al.*

Mic. Ter. 19 Geo. 3. C.B. 2 Black. 1230.

in the hands of his heir, is then aſſets by deſcent, to charge him with the debt.—Debt, by the executors of *John Auſtin* againſt the co-heirs of *Edward John Perrot*, deceaſed, upon a bond given by *Perrot* to *Auſtin*. On *Riens per Deſcent* pleaded, and the common replication thereto, iſſue was joined; and on the trial, a verdict was given for the plaintiff, ſubject to the following caſe; *Edward Perrot* (being ſeiſed in fee of lands to the value of the debt), on the 1ſt of March, 1726, deviſed them to his brother, *Charles Perrot*, for life; remainder to his nephew, *Robert Perrot*, for life, and his firſt and other ſons in tail; remainder to truſtees for thirty years; *remainder to* Edward John Perrot *for life, and his firſt and other ſons in tail*; remainder to *William Perrot* for life, and his firſt and other ſons in tail male; remainder to *Benjamin Perrot* for life, and his firſt and other ſons in tail male (with proper remainders to truſtees, to ſupport contingent remainders); remainder to the teſtator's right heirs for ever. On the teſtator's death, *Charles* entered, and died without iſſue; *Robert* died without iſſue before the teſtator; *Edward John* entered, and while in poſſeſſion made the bond now in queſtion, A.D. 1757, and died without iſſue; *William* entered and died without iſſue; and on his death, *Benjamin* being dead without iſſue, and all the ſaid perſons having died inteſtate, the lands came into poſſeſſion of the defendants, who were heirs at law, both of the teſtator and of *Edward John Perrot*, the obligor; which ſaid *Edward John* was alſo (while in poſſeſſion of the premiſes) the heir at law of the teſtator. THE QUESTION was, Whether theſe lands were aſſets by deſcent in the hands of the defendants? DE GREY, Ch. J.—I have no doubt upon this caſe. The only difficulty that could have ariſen in theſe circumſtances (and that no very conſiderable one) is, ſuppoſing all the ſucceſſive tenants for life, having in them the reverſion in fee, had entered into bonds, which of them ſhould have the priority. At preſent it is clear, that the heir of the obligor is a debtor to the obligee, but only liable to pay the debt, in reſpect of the aſſets which deſcend to him. How far then is this reverſion in fee, which has now taken place, aſſets in the hands of the heir? The true diſtinction is, that a reverſion expectant on an eſtate-tail is not *immediate* aſſets, and, therefore, it cannot be extended, nor can the heir be compelled to ſell it; which he may be in caſe of a reverſion on an eſtate for life. But ſuch reverſion on an eſtate-tail is aſſets *cum acciderit*, and the heir ſhall then be chargeable, which is the caſe now before the Court. GOULD, J.—A reverſion expectant after an eſtate-tail is not *valuable* aſſets, and, therefore, cannot (I apprehend) be valued by the jury according to ſect. 6. of ſtatute 3 & 4 *W.* & *M.* c. 14.; but when it comes into poſſeſſion it may then be valued, and ſhall charge the heir.

*Black-*

*Blackſtone*, J.—The obligor had actual ſeiſin of this reverſion, by his own ſeiſin as tenant for life. He might have ſold it, and might, therefore, charge or incumber it, though, ſtrictly ſpeaking, his bond is no charge upon the reverſion, but only upon the heir in reſpect of ſuch reverſion deſcending. And this reverſion is properly, the inſtant it veſts in the heir, aſſets by deſcent in his hands, though only dormant potential aſſets till it comes into actual poſſeſſion. *Nares*, J. of the ſame opinion.—Poſtea to the plaintiff.

## Highways and Turnpikes.

*Repair of highways.*]—The whole pariſh is bound to repair a highway of common right.—This was an indictment againſt the inhabitants of the diviſion of Great Broughton, in the pariſh of Bridekirk, for not repairing a highway. On behalf of the defendants it was objected, that by common law, excluſive of cuſtom, preſcription, &c. the inhabitants of a particular diviſion of a pariſh are not bound to repair; and here is no cuſtom, preſcription, or particular reaſon ſhewn, for obliging them to repair this highway. It being only alleged, in general, "that they *ought* to repair and "amend it, when and ſo often as it ſhall be neceſſary." PER CURIAM: It does not appear that the inhabitants of this diviſion are bound to repair this highway. By common law, and of common right, the inhabitants of the pariſh at large are bound to repair the highways; and here is no reaſon ſhewn, why this particular diviſion ſhould be obliged to do it. It ought to appear upon the face of the indictment, by what right the charge was laid upon this particular diviſion. If you lay a charge upon perſons againſt common right, you muſt ſhew how they are bound: it is not enough to ſhew that they immemorially *ought* to repair; it ſhould be ſhewn, that they *have* repaired.—Judgment reverſed.

Rex v. Inhabitants of Great Broughton, Hil. Ter. 11 Geo. 3 B.R. 5 *Burr.* 2700.

In this caſe it was determined, that if a pariſh lies in two diſtinct counties, an indictment for not repairing the highway may be brought againſt that part of the pariſh in which the ruinous road lies.—This was an indictment for not repairing a road, found in the county of Glouceſter, and removed into this Court by *certiorari*. The defendants pleaded, that the pariſh lay partly in one county, and partly in the other; and that the whole pariſh in general ought, *jointly*, to repair the road in queſtion, though it lies within their county of Glouceſter: and they traverſe that they themſelves are bound, *ſeparately* and *excluſively* of the other part of the pariſh, to repair it.—The replication purſues the indictment, and took

Rex v. Inhabitants of that part of the pariſh of Weſton-under-Penyard which lies in the county of Glouceſter, Hil. Ter. 10 Geo. 3. B.R. 4 *Burr.* 2507.

iſſue upon the traverſe.—It was inſiſted, in arreſt of judgment, that the whole pariſh, in general, are, by common law, bound to repair this road; therefore, as the whole pariſh are liable of common right, the indictment ought to have particularly ſhewn *how* theſe *inhabitants of* A PART ONLY *of it became liable or bound to this repair*; for want of which it was argued, that the indictment was a bad one. Ld MANSFIELD, Ch. J. thought, this caſe ſtood clear of all precedents and acts of parliament; and that it was to be determined upon principles; no common law caſe having been produced, where the pariſh lay in two different counties, and only one part of it generally indicted. There muſt always have been obligations upon pariſhes, to repair their highways.—This part of the pariſh here indicted is not a particular precinct: it is the whole of the pariſh that lies within this county of Glouceſter; and it might have been laid ſo. The indictment muſt be confined to the county. The old juriſdiction of counties was local; they were like different kingdoms. There was no juriſdiction out of the county; no proceſs out of it. The whole of the pariſh that lay within a county was liable to repair the road lying within the county. Where county bridges ſtand in different counties, one part of the bridge cannot ſtand without the other part; and, therefore, both counties ſhall, by act of parliament, be contributory: but that is not the caſe of roads.—This indictment ſeems reaſonable and right, and is, in my opinion, a good one.—Mr. Juſtice YATES concurred with Lord MANSFIELD, that this indictment was a proper one; and he even added the only proper one that could have been brought.—This is agreeable to the general obligation that pariſhes are under, to repair their highways. This is the whole of the pariſh that lies in the county of Glouceſter; and they are under a general obligation to repair that part of the road which lies in the county of Glouceſter. Here is no particular obligation by preſcription, or tenure, or otherwiſe; nor any thing relating to a vill, or a particular diſtrict. As the pariſh lies in two counties, an indictment againſt the whole pariſh, found in one of the counties, could not have been enforced; one county has no juriſdiction over the inhabitants of a diſtinct county.—PER CUR. Rule diſcharged.

The King *v.* The Inhabitants of that part of Clifton which lies in the county of Glouceſter, Hil. Ter. 34 Geo 3. 5 *Ter. Rep* 498.

But it has been ſince decided, that if a pariſh be ſituate, part in one county, and the reſt in another, and a highway lying in one part be out of repair, an indictment againſt *the inhabitants of that part only* is bad: the indictment muſt be againſt the whole pariſh.—This indictment alleged, *that the inhabitants* OF ALL THAT PART *of the ſaid pariſh of Clifton, which lies in the ſaid county of Glouceſter*, THE SAID PART OF THE COMMON HIGHWAY aforeſaid, ſo as aforeſaid being in decay, ought to repair and amend, when and as often as need

need shall require. At the trial, a verdict being found for the prosecutor, a motion was made in arrest of judgment, *on the ground that no indictment lay against part of a parish for the non-repair of a road lying within it, without stating that the part charged had immemorially repaired, or shewing some other legal foundation for their liability.*

A question was put by the Court, Whether a person bound, *ratione tenuræ*, to repair a road, could not be indicted in the county where it lay, though the person lived out of the county? And it was admitted that he might, but it was observed that this was from necessity only, for the indictment could only be brought in the county where the offence was committed; and he might be said to be an inhabitant there in legal construction, and by reason of his estate and tenure there: but that the same necessity did not apply to a case like the present, where some of the inhabitants of the parish lived within the county where the road lay.

Lord KENYON, Ch. J.—When this indictment was tried before me at Gloucester, it struck me, and after more mature deliberation I continue to think, that when the case of *R.* v. *Weston* was argued, the Court were surprized by the supposed weight of an argument, which, on consideration, has no weight at all: the reason there given for supporting the indictment was, that that was the only way in which justice could be obtained; for that, if the parties could not be indicted in that mode, there would be a failure of justice; but there was the mistake. That a parish at large is bound, of common right, to repair all the roads lying within it, cannot be controverted; but it is supposed that when a parish lies in two counties, it is an exception to that general rule; such an exception, however, was not even hinted at in any case on the subject, or any authority whatever, before the case of *R.* v. *Weston*. Lord *Mansfield* there said, that "*the indictment must be confined to the county:*" if by that expression his lordship meant that the indictment must be preferred in that county where the particular road lay, where the offence of not repairing happened, undoubtedly he spoke correctly: but, if he thought that the indictment could only be preferred against the person or persons who lived within the jurisdiction of the Court, where the indictment was preferred, I think he was mistaken; for it is admitted, that in the instance I put of a person who is bound, *ratione tenuræ*, to repair a road, living out of the jurisdiction of the county sessions where the road is situate, he must be indicted in that county; and yet the same objection, if it were a legal objection, would occur as well in that case as in the present. Every difficulty respecting the process may be obviated by removing the record into this Court. It would be more convenient, indeed, that the process on an indictment should go immediately

diately from the ſeſſions againſt all thoſe perſons who are the ſubjects of it: but that cannot be done in a variety of caſes; where, for inſtance, an aſſault is committed, and the offender goes out of the county before any proceſs can be ſerved upon him. In this caſe, however, there is leſs difficulty than in the one I have mentioned, becauſe, on an indictment againſt a pariſh for not repairing a road, it is not neceſſary for the proſecutor to ſerve every individual in the pariſh with proceſs; he may compel the appearance of any two who live within the county, upon whom the whole fine may be levied, and the reſt of the inhabitants muſt reimburſe thoſe two under the general highway act, 13 *Geo.* 3. c. 78. I am not aware of any other caſe on the highway act than thoſe which have been mentioned. There is a caſe in Sir *T. Raym.* 476. where a queſtion aroſe on the 43 of *Elizabeth*, reſpecting the maintenance of ſome poor children in a pariſh which lay in two counties; and Lord Ch. J. *Pemberton* and the other judges, to whom the queſtion was referred at Juſtice Hall at the Old Bailey, ſaid, that "without any particular uſage to the contrary, the pariſh in both counties ought to contribute their ſhares towards the relief of the children;" therefore, on the reaſon of the thing, as well as on authority, I am of opinion that this indictment ſhould have been preferred againſt the whole pariſh; for that, where the common law throws a burden on a whole pariſh, the whole pariſh muſt bear it: to that general rule I find no exception as to this particular caſe, and we cannot make an exception. I feel infinite reſpect for the opinions of thoſe judges who determined the caſe of *R.* v. *Weſton*; but, however reluctantly, I muſt abandon the principle on which they proceeded, the reaſon failing; and finding, on examination, that the difficulties which there occurred, and which were the foundation of that deciſion, do not appear ſo great as they were then ſuppoſed, I am bound to ſay that this indictment cannot be ſupported. Ashhurst, J. ſaid, as this was conſidered in *R.* v. *Weſton* as an excepted caſe, as from the inſtances occurring ſo ſeldom, it cannot be a great infringement on the general rule; and as that deciſion is a convenient one, he was diſpoſed to ſupport it, and to ſay that this rule ought to be diſcharged.—Buller, J. agreed that the deciſion in *R.* v. *Weſton*, was convenient, but thought it could not be ſupported in point of law. The whole ground of argument, taken by Lord *Mansfield* and Mr. J. *Yates*, was, that unleſs that indictment could be ſupported, juſtice could not be obtained. But it appears that it was ſtated to the Court, that there was no inſtance in which an indictment had been preferred againſt the whole of a pariſh lying in two counties, and the attention of the Court was directed to the manner in which proceſs could be enforced againſt the whole

of

of such a parish: they conceived it to be clear that the inhabitants of that part of the parish, which lies in another county, could not be compelled to appear, and therefore they proceeded upon a mistake. But consider what may be done in such a case without removing the record into this Court; the process is to be served on some of the inhabitants; then it may be served on those who live within the county; and the Court certainly has jurisdiction to proceed on the indictment; or if the inhabitants of that part of the parish which lies in the adjoining county come in and plead to the indictment; the Court below might try the question, for the defendants would be then precluded from disputing the jurisdiction of that Court. If so, the only objection is, that there is no direct mode of bringing those inhabitants of the parish, who live out of the county, before the Court below; but, at all events, that difficulty may be obviated by removing the proceedings into this Court by *certiorari*.—GROSE, J. also agreed. There is this passage in 3 *Bac. Abr.* 57: "If a parish is part in one county, and part in "another, and the highways in one county are out of repair, "the whole parish shall contribute to the repair." "And "wherever one part of the parish is charged with the repair "of any highways, it must be alleged that that part is liable "by prescription, or *ratione tenuræ*."—JUDGMENT arrested.

If a parish, consisting of two districts, which are bound to repair separately, be convicted for not repairing the road in one of the districts, the other district having no notice of the indictment, the Court will consider it as being substantially the conviction of the one district; and if the fine be levied on an inhabitant of the other, will grant a *special mandamus* for a rate to be levied on the district bound to repair the indicted part of the road.

The King *v.* Townshend, *et al.* Tr Ter. 20 Geo. 3. B.R. 2 *Dug.* 441.

If the inhabitants of a townships, bound by prescription to repair the roads within the townthip, be expressly exempted by the provisions of a road act from the charge of repairing new roads to be made within the township, that charge must necessarily fall on the rest of the parish.—This was a demurrer to an indictment. The indictment stated, that on the 8th day of April next, after the making and passing of a certain act of parliament passed in the 19th year, &c. "for "repairing and widening the road from Gander-lane, in the "county of Derby, to Sheffield, in the West Riding of the "county of York; and also the road branching out of the "said road, at or near Mosborough Green, in the said "county of Derby, to Clown, in the said county," *John Parker*, &c. being sixteen of the trustees appointed by the said act to put the same into execution, at a meeting held, &c. made an order that the road from Sheffield to Woodthorpe Common, being part of the road by the said act

The King *v.* the inhabitants of Sheffield, Mich. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 106.

directed to be ordered, altered, widened, turned, and repaired, and part thereof being in Sheffield Park, in the ſame act mentioned, ſhould be forty feet wide, &c. that at another meeting of the truſtees, held on the 28th of April, it was ordered that the footway ſhould be on the weſt ſide of the road through Sheffield Park, &c. That afterwards, to wit, on the firſt of January, 1780, the ſaid road, in the ſaid orders mentioned, in ſuch parts thereof as was and is lying in Sheffield Park, was, in purſuance of the ſaid orders, made and perfected, and then and there, by virtue of the ſame orders reſpectively, and of the ſaid act, became and was, and ever ſince hath been, a common public king's highway for all the king's ſubjects, &c. That afterwards, to wit, on the firſt of June, 1785, a certain part of the ſaid common king's highway in Sheffield Park (particularly deſcribing it), and continually, from that time, was and is ruinous and out of repair. And *that the inhabitants of the ſaid pariſh of Sheffield (except the inhabitants of the townſhip of Sheffield) ought to repair* and amend the ſame when and ſo often as ſhall be neceſſary. The ſecond count ſtated, that on the firſt of June, 1785, there was, and yet is, a certain common king's highway, leading from the town of Sheffield to Woodthorpe in the ſaid county of York, for all the liege ſubjects, &c. and that a certain part of the ſame common king's highway, ſituate and being in Sheffield Park (particularly deſcribing it) on the 2d of June, 1785, and continually from that time until, &c. was and yet is very ruinous and out of repair. And that the *inhabitants of the pariſh of Sheffield (except the inhabitants of the townſhip of Sheffield, who were exempted from the repair thereof by virtue of an act of parliament paſſed in the 10th year, &c.)* ought to repair and amend the ſame when as often as ſhall be neceſſary, &c. Plea, as to the firſt count, that from time immemorial the inhabitants of the ſaid townſhip of Sheffield have repaired, maintained, and amended, and ſtill of right ought to repair, maintain, and amend, all and every the king's highways lying or being within the ſaid townſhip of Sheffield, except the highway in the ſaid firſt count of the ſaid indictment mentioned, when and ſo often as it hath been or ſhall be neceſſary; and that during the time aforeſaid no other of the inhabitants of the ſaid pariſh of Sheffield, except the inhabitants of the ſaid townſhip of Sheffield, ever did, or were uſed to, repair or amend any part of the king's common highway within the ſaid townſhip of Sheffield. And that the ſaid highway in Sheffield Park, in the ſaid firſt count of the indictment mentioned, and thereby ſuppoſed to be in decay, was, and is, a certain highway in the ſaid park, and within the ſaid townſhip of Sheffield, newly made and ſet out by the truſtees appointed by the ſaid act for ſurveying, making, repairing, &c. the

the ſaid roads in the ſaid act mentioned, and for otherwiſe putting the ſaid act into execution, under colour of the ſaid act, in and through ground lately belonging to the earl of *Surrey*, and purchaſed by the ſaid truſtees for the purpoſe of making ſuch highway, where none had been before, and which was ſo made and ſet out as a better, nearer, and more commodious paſſage from the town of Sheffield aforeſaid to Woodthorpe aforeſaid, for the king's ſubjects to paſs and repaſs, &c. than in and through the ancient highways before uſed for that purpoſe; which highways ſo before uſed for that purpoſe, have, from time whereof, &c. been, and been uſed to be, repaired and amended by the inhabitants of the ſaid townſhip of Sheffield, and of other townſhips reſpectively, through which the ſame lay, and not by the inhabitants of the pariſh of Sheffield, except as aforeſaid, when and ſo often as hath been neceſſary; and this, &c. wherefore, &c. The ſame plea as to the ſecond count.—General demurrer and joinder.—PER CURIAM: The queſtion is, Whether the inhabitants of the pariſh of Sheffield are bound to repair the roads lying within the townſhip of Sheffield? This doubt ariſes on an act of parliament, paſſed in the nineteenth year of this reign. Before the paſſing of this act the townſhip uſed to repair all the highways lying within their diſtrict: but in this ſtatute there is a particular proviſo, by which it is enacted, "that no perſon or perſons, dwelling within the "townſhip of Sheffield, ſhall be liable to perform any ſtatute "work in repairing that part of the road leading through "Sheffield Park, or contribute any money towards repair-"ing the ſame." This being the caſe, the queſtion is, Whether or not the reſt of the pariſh are bound to repair? Now it is an incontrovertible poſition, that by the general law of the land the pariſh at large is *primâ facie* bound to repair all highways lying within it, unleſs by preſcription they can throw the *onus* on particular perſons by reaſon of their tenure: but, when that is the caſe, it is by way of exception to the general rule. It was argued at the bar as if a pariſh was only bound to repair by a particular cuſtom; whereas it is a common law *onus* for the public benefit: and, therefore, where no other perſons are bound to repair, the pariſh muſt do ſo *ex neceſſitate*. This manifeſtly appears from the different forms of indictments againſt a pariſh in general, or a townſhip in particular. In the former there is no other allegation than that the road lies within ſuch a pariſh, and that the inhabitants of it are bound to repair. But where the indictment is againſt a townſhip, or particular perſon, it muſt allege that from time immemorial they are bound to repair; which ſhews that the particular allegations is not neceſſary where they are bound by the general law. If nothing had been ſaid in this act of parliament about the repair

repair of the roads, excepting that they ſhould afterwards become highways to all intents and purpoſes, the *onus* of repairing muſt, by operation of law, have fallen on the pariſh at large. But inaſmuch as the townſhip is exempted from this burthen by the expreſs words of the act, it muſt neceſſarily fall on the reſt of the pariſh. Perhaps this was not in the contemplation of the legiſlature at the time of paſſing this act: but we do not go on the intention of the legiſlature. They have expreſsly enacted that the townſhip ſhall not be liable; and, therefore, the reſt of the pariſh muſt be ſo *ex neceſſitate*.—On theſe grounds we are clearly of opinion that there muſt be judgment for the crown.

The King *v.* the Commiſſioners of the Llandilo diſtrict of Roads in Carmarthenſhire, Hil. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 232.

If the truſtees, under a road act, turn a road through an incloſure, and make the fences at their own expence, and repair them for ſeveral years, they cannot be compelled to continue ſuch repairs, unleſs there be a ſpecial proviſion in the act to that effect.—This was a rule, calling on the defendants, who were the acting truſtees for the Llandilo diſtrict of the roads appointed under an act, 5 *Geo.* 3. for widening and repairing certain roads in Carmarthenſhire, continued by an act of the 26th of *Geo.* 3. to ſhew cauſe why a *mandamus* ſhould not iſſue, commanding them to cauſe to be repaired a wall on each ſide of the road, leading through the church-yard of Llandilovaur, in the ſaid county. In the year 1765, an ancient road leading through the town of Llandilovaur, which went along the outſide of the church-yard, was, by an order of the truſtees, carried through the middle of the church-yard; at which time the truſtees cauſed a wall to be built at their ſole expence on each ſide of the road ſo diverted, which they have ever ſince repaired till within the laſt three years. By a clauſe in the ſeventh folio of the act it is enacted, "that the truſtees ſhall apply the "money raiſed by the tolls, &c. in erecting gates and toll-"houſes, and repairing and widening the ſaid roads within "their reſpective diſtricts, and defraying the neceſſary coſts, "charges, and expences, attending the ſame, and the exe-"cution of the ſaid act." On ſhewing cauſe it was contended, that the *mandamus* could not be granted unleſs it were ſhewn, 1ſt, that no other perſons but the truſtees were liable to repair; 2dly, that the truſtees were bound to repair under the act; and, 3dly, that there was no other way of trying the queſtion relative to the liability of repairing.—Ashhurst, J. As no clauſe is inſerted in the act which throws the *onus* of repairs on the truſtees, we cannot make them liable.—Buller, J. We cannot make the truſtees liable by implication, if the act has not expreſsly declared them to be ſo. What is meant by a road in the act is the ſurface over which the ſubjects have a right to paſs.—Groſe, J. Suppoſe truſtees, under an act of parliament, make a road through

through private property, for which the party is entitled to satisfaction, the jury, in aſſeſſing the damages, muſt be taken to give him as much as will, beſides the value of the land, indemnify the party for the expence of keeping up the fences between the road and the encloſure.—Rule diſcharged.

The commiſſioners appointed by 6 *Geo.* 3. c. 78. (an act for dividing and encloſing certain lands in the pariſh of *C.*) which enacts that the public roads to be ſet out by them ſhould be repaired in ſuch manner as other public roads are by law to be repaired, and that the private roads ſhould be repaired by ſuch *perſon or perſons* as they ſhould award, have no power to impoſe on the pariſh at large the burden of repairing any of the private roads ſet out in purſuance of the act.—This was an indictment againſt the inhabitants of the pariſh of Cottingham, in the Eaſt Riding of the county of York, for not repairing a road, called Buſky Firth road, leading out of the road called the North Carr road, lying within the pariſh. It was alleged in the indictment that the commiſſioners, appointed under an act, 6 *Geo.* 3. c. 78. for dividing and encloſing certain lands in Cottingham, ſet out the road in queſtion, particularly deſcribing it, and awarded that it ſhould be for ever thereafter a private way or road for the uſe of the ſeveral owners of lands and grounds in Cottingham, their tenants, leſſees, heirs and aſſigns, and their ſervants, horſes, cattle, carts, and carriages only, and, after ſetting out other roads, *directed that all the roads by them awarded, whether public or private, ſhould be maintained and repaired by ſuch ways and means, and in ſuch manner, as the public highways were repaired by the laws of this realm.* It was then alleged that the road was in ſuch decay that the ſeveral owners of lands in Cottingham and their tenants, &c. could not paſs, &c.; and that the defendants ought to repair it. The defendants pleaded that no allotment was made to, or to the uſe or benefit of, the inhabitants of the pariſh in purſuance of the act; and that at the time of making the award under it the inhabitants of the pariſh were not liable to repair the private road in queſtion, or any other private road leading out of the North Carr road, or any other private road in, through, over, or upon the lands directed to be encloſed, &c. To this plea the proſecutor demurred.—THE QUESTION was, Whether the commiſſioners had or had not exceeded their authority in directing the pariſh of Cottingham to repair this road?—PER CURIAM:—It is contended, that the legiſlature meant that the pariſh, who derive no benefit from the act, ſhould be made ſubject to the burden of repairing this road. To be ſure, if ſuch were the poſitive direction of the act, we ſhould be obliged to conform to it, however hard it might preſs upon the pariſh: though if ſuch were the neceſſary and inevitable conſtruction of it,

The King *v.* the inhabitants of Cottingham, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 20.

we

we would defer giving our judgment until the parties aggrieved had an opportunity of applying to the legiſlature to correct the act. But the fair conſtruction of the act delivers the legiſlature from the imputation of having intended to throw a burden on thoſe who were not benefited by the enclosure. The act impowers the commiſſioners to ſet out all the roads, adding that the public roads ſhall be repaired as other public roads are repaired; and that the private roads ſhall be repaired *by ſuch perſon and perſons*, and in ſuch manner, as the commiſſioners ſhall direct. And the queſtion is, Whether the words "perſon and perſons" extend to any ſtrangers that the commiſſioners ſhall name, the inhabitants of Cornwall or Yorkſhire, for inſtance, or whether they muſt be confined to *ſuch perſons as are intereſted in the enclosure?* The clauſe embraces two diſtinct objects; the public roads, and the private roads. With reſpect to the former, it directs that they ſhall be repaired in ſuch manner as other public roads are, that is, *by the pariſh:* then having diſpoſed of the public roads, ſpeaking of the private roads, it ſays, that they ſhall be repaired by *ſuch perſon and perſons* as the commiſſioners ſhall direct; but this cannot be underſtood to mean any perſons in any diſtant part of the kingdom, but ſuch perſons intereſted in the enclosure as the commiſſioners thought ought to bear the burden. As to the public roads, the pariſh would have been bound to repair them, without any direction in the act: but they were not bound to repair private roads; and, therefore, this power was given to the commiſſioners, who are to direct by whom the expence of repairing them ſhall be borne. But when the commiſſioners directed that the pariſh at large ſhould repair theſe private roads, they exceeded the authority veſted in them by the act. —Judgment for the defendants.

*Rex v. Balme, et al.* Tr. Ter. 17 Geo. 3. B R. *Comyn.* 648.

This was an indictment againſt the defendants, who were ſurveyors of the highways for the townſhip of Bradford, *for diſobedience to an order of two juſtices* made upon them purſuant to the ſtat. 13 *Geo.* 3. c. 78. ſ. 16. by which it is enacted, "That if it ſhall appear, upon view of two or more "juſtices, &c. that the ground or ſoil of any highway be- "tween the fences thereof is not of ſufficient breadth, they "may order it to be widened and enlarged, or diverted and "turned." The defendants pleaded, that certain perſons, particularly named in the plea, were bound *ratione tenuræ* to repair the ſaid highway, and had always uſed and been accuſtomed to repair it; and that inaſmuch as the inhabitants of the townſhip of Bradford, at the time of making the ſaid order, were not liable to repair the ſaid highway, or any part of it, the ſaid order was void. To this there was a demurrer, and joinder in demurrer.—THE QUESTION *was, Whether the ſtat.* 13 Geo. 3. *c.* 78. *empowers juſtices to widen roads*

*roads repairable by private persons* ratione tenuræ? and that it did, it was observed, that the 13 *Geo.* 3. c. 84. (the general turnpike act) s. 63. after reciting, "that parts of highways, "&c. have been diverted by legal authority, and doubts have "arisen, or may arise, whether the inhabitants of any parish "liable to repair the old highways by statute duty, *tenure*, or "otherwise, ought to repair, or contribute thereto, it "'ENACTS, that such persons shall be liable to repair so "much of the new highway as shall be equal to the burden "of the old'." The defendant contended, *first*, that the provisions of the stat. 13 *Geo.* 3. c. 78. relative to the widening the narrow highways, did not extend to roads repairable by private persons *ratione tenuræ*. But, 2dly, supposing it did, there is a particular provision by stat. 13 *Geo.* 3. c. 78. s. 50. imposing a fine of not exceeding 5l. nor less than 10s. in cases where no particular penalty is before imposed; and no particular penalty is imposed in this case; that, therefore, this provision ought to have been pursued, and not the remedy by indictment.—PER CURIAM: It would be a strange construction of the statute, to say that the order of the justices is not legal. The very same section (16) that empowers the justices to *divert* or turn an old road, gives them, likewise, *a power of widening* such as are too narrow. The words are *general*—"If *any highway*," &c. and are clearly large enough to include *all roads*. It would be monstrous, therefore, to say, that when the legislature was directing, that persons liable *ratione tenuræ* to repair roads diverted should contribute in the same proportion as formerly, they did not mean they should contribute towards *widening* such as required widening.—As to the mode of prosecuting, there is no doubt but the justices may proceed summarily under the act, if they think proper: but they may elect to prosecute at common law for disobedience to an order of justices is an offence at common law, and, therefore, punishable by indictment.—The penalty given by the statute is only accumulative.

Rex v. Pettiward, *et al.* justices of peace for Surrey. Tr. Ter. 9 Geo. 3. B R. 4 *Burr.* 2452.

The old highway act, 7 *Geo.* 3. c. 42. s. 1. directed, "that upon the 22d of September in every year (unless that "day shall be Sunday, and then on the day following), the "constables, headboroughs, tithingmen, churchwardens, "surveyor or surveyors of the highways, and householders, "being assessed to any parochial or public rate, shall assem-"ble together at the church, &c.; and the major part of "them so assembled, shall make a list," &c. (1) And the question intended to be brought before the Court was, "Whether

(1) The new highway act, 13 *Geo.* 3. c. 78. s. 1. contains a similar direction.

"it

" it was *eſſentially requiſite*, that *ſome* perſon or perſons of " each body particularly ſpecified in the act of parliament " (conſtables, headboroughs, tithingmen, churchwardens, " ſurveyors, and houſeholders), ſhould be preſent at the " pariſh meeting appointed for naming the perſons to be re- " turned to the juſtices?" or, in other words, " Whether " the conſtables, headboroughs, tithingmen, churchwardens, " ſurveyors, and houſeholders, were made conſtituent parts " of ſuch aſſembly, ſo that ſome of each body muſt neceſ- " ſarily be preſent, as being of the *quorum?*"—THE COURT had great difficulty, how to come at the queſtion in the ſituation of the preſent caſe; and thought proper to diſcharge the preſent rule. But they ſeemed to incline very ſtrongly, that the legiſlature only meant it to be a full parochial meeting, without intending that each of theſe bodies ſhould be ſuch *eſſential* conſtituent parts of it, that their acts would be annulled and made void by the abſence of the churchwardens, or of the conſtables, or headboroughs, or tithingmen, or other reſpective denomination.—Mr. Juſtice ASTON obſerved, that a conſtable might, perhaps, *die* juſt before the meeting; or might abſent himſelf on purpoſe to fruſtrate the effects of the meeting: and it was not probable that the legiſlature meant that ſuch abſence ſhould render the acts of the meeting null and void.

The King v. C. Baldwin, eſq. *et al.* Hil. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 169

The magiſtrates are not bound to appoint ſurveyors of the highways from the liſt of perſons returned to them under ſtat. 13 *Geo.* 3. c. 78. if in their opinions the perſons named in the liſt are not qualified: but they may appoint other perſons of the pariſh who are qualified.—This was a rule to ſhew cauſe why a *mandamus* ſhould not iſſue to the defendants, juſtices of the peace, commanding them to nominate and appoint one or more perſons named in the liſt of twenty-one perſons made and returned to them, according to the directions of the ſtatutes, at a ſpecial ſeſſions. It appeared, that on the 22d of September, at a pariſh meeting, convened according to the directions of the general highway act, a liſt of twenty-one perſons was made, among whom were *V. Kerton* and *R. Southby*, and was delivered to the juſtices, &c. That on the 5th of November following, the defendants appointed *V. Kerton*, *R. Southby*, and one *W. Chivers* (who was not named in the liſt) ſurveyors for the year: and the ground of the motion for the *mandamus* was, that the juſtices had not appointed all the three ſurveyors from the liſt of twenty-one perſons returned to them: another objection was alſo taken to the appointment of the three ſurveyors, namely, that they were not appointed for the whole pariſh, but only for inferior diſtricts within the pariſh.—Lord KENYON, Ch. J. By the firſt ſection in the act of parliament, if the liſt of perſons returned to the juſtices does not contain the names of perſons whom the juſtices think qualified, the

juſtices

justices may appoint any other persons of the parish who are properly qualified. If, indeed, the magistrates act corruptly, they may be punished for an abuse of their discretionary power: but no corruption is even suggested in this case. The lists are directed by the act only for the purpose of assisting the magistrates, who, in many instances, might not, perhaps, know a sufficient number of persons fit to serve the office. With regard to the second objection; it appears that this has been the mode of appointing surveyors in this parish for several years past. And in many other parts of the country the surveyors are appointed for townships and other small districts. But, at any rate, if there be any objection to the appointment of the surveyors, the party objecting should first remove the appointments by *certiorari*, and then move to quash them.—Rule discharged.

No appeal lies to the quarter sessions against the allowance of the accounts of the surveyor of the highways under the stat. 13 *Geo.* 3. c. 78.—Upon a rule to shew cause why a *certiorari* should not issue to remove all orders made at the last general quarter-sessions of the peace, held at Wakefield on the 16th of January last, on an appeal of *T. Foster* against the allowance of the accounts of the surveyors of the highways of the township of Heptonstall in the said riding, it appeared, by the affidavits, that on the 2d of October, 1793, the account of the surveyor of the highways was produced at a vestry of the inhabitants of the township, when several items were objected to; upon which several of the inhabitants, who were dissatisfied with the accounts, attended, together with the surveyor, at the petty-sessions held at Halifax on the 16th of October, before three justices, when the justices unanimously allowed the account and confirmed the same. An appeal was entered against this determination at the next quarter-sessions, and the Court disallowed the several items objected to, amounting to 193l. 15s. 7d. and ordered the respondents to refund that sum to the inhabitants of the township. The question arose on the 13 *Geo.* 3. c. 78.; the 48th section of which enacts, that the surveyor shall enter in books the several sums which he shall receive and disburse in that character, "and shall produce such books and the "assessments made within that year, for the purpose of this "act, unto the inhabitants of the parish, &c. at a vestry to be "held for that purpose within fifteen days before the said "special sessions so to be held in the week next after Mi-"chaelmas quarter-sessions, to the intent that the said ac-"counts, &c. may be inspected by the inhabitants, &c.: "and every such surveyor shall, after the said books and "assessments shall have been produced at such meeting, take "the same to such justice of the peace for the limit wherein "such parish, &c. doth lie, and on such day, and at such "hour

The King *v.* the justices of the West Riding of Yorkshire, Ea. Ter. 34 Geo. 3. B.R. 5 *Term. Rep.* 629.

" hour, as ſhall be agreed upon at ſuch meeting, ſome day " after the ſaid meeting of the inhabitants, and before ſuch " laſtmentioned ſpecial ſeſſions; and then and there verify " ſuch account, or any part thereof, upon oath, if required; " and ſuch juſtice may allow ſuch account, if he find it juſt, " or poſtpone it until ſuch ſpecial ſeſſions, if he find cauſe " for ſo doing; in which caſe it may be ſettled and allowed " at ſuch ſpecial ſeſſions, after the parts objected to by ſuch " juſtice ſhall have been explained and verified by proper " evidence to the ſatisfaction of the juſtices at ſuch ſpecial " ſeſſions; and in caſe any articles contained in ſuch ac- " counts ſhall not be explained and proved to the ſatisfaction " of ſuch juſtices, they may diſallow the ſame: and whenever " the ſaid accounts ſhall be ſo ſettled and allowed, or diſ- " allowed as aforeſaid, all ſuch books and aſſeſſments ſhall " be tranſmitted to the churchwarden or overſeer of the poor " for ſuch pariſh, &c. to be kept for the uſe of ſuch pa- " riſh, &c.; and the ſaid ſurveyor ſhall forthwith deliver a " duplicate of ſuch book and account, &c. to the ſuc- " ceeding ſurveyor," &c.: and the 81ſt ſection enacts, " that if any perſon ſhall think himſelf aggrieved by any " thing done by any juſtice or juſtices of the peace, or other " perſon, in the execution of any of the powers given by " this act, *and for which no particular method of relief hath* " *been already appointed*, every ſuch perſon may appeal to " the quarter-ſeſſions," &c. and it directs that their determination ſhall be final and concluſive to all intents and purpoſes, and takes away the *certiorari*.—PER CURIAM: This rule only prays for a *certiorari* to remove all orders made at the laſt quarter-ſeſſions upon this ſubject, and it depends on the conſtruction of the 48th and 80th clauſes in the general highway act. It ſeems, from comparing thoſe two ſections, that it was not intended to give the quarter-ſeſſions any juriſdiction over this queſtion. The 80th ſection only gives an appeal to the quarter-ſeſſions in caſes for which no remedy is given. Then the queſtion is, Whether or not, under the 48th clauſe, any other ſpecific relief be given for this caſe? The 48th clauſe enacts, that the ſurveyor ſhall produce ſuch books (of accounts, &c.) to the inhabitants at a veſtry to be held for that purpoſe, within 15 days before the ſpecial ſeſſions to be held in the week next after Michaelmas quarter ſeſſions, that the accounts may be inſpected by the inhabitants, &c.; and that after the books ſhall be produced at ſuch meeting, the ſurveyor ſhall take the ſame to ſuch juſtice, at ſuch time as ſhall be agreed upon at ſuch meeting before the laſtmentioned ſpecial ſeſſions, and ſuch juſtice may allow ſuch account, or poſtpone it until ſuch ſpecial ſeſſions, &c. The appointment to go before the juſtice is to be made with the conſent of the inhabitants and of the ſurveyor; and if they

they all consent at first to go to the petty-sessions, instead of going before the magistrate, it may be doubted whether any of the parties can afterwards object to it. The justices at the petty-sessions have the same power over the surveyor's accounts that any one justice has. Then as a remedy is given in this case in the 48th section, the justices at the quarter-sessions had no jurisdiction to receive this appeal, and we are bound to grant a writ of *certiorari* to remove the proceedings at those sessions.—Rule absolute.

No appeal lies to the quarter-sessions against the allowance of the accounts of the surveyors of the highways under the 13 *Geo.* 3. c. 78.—In consequence of the *certiorari* which was granted in the last case, it was now moved to set aside the above order of sessions, on the ground that the sessions had no jurisdiction.—PER CURIAM: The argument in support of the jurisdiction of the quarter-session proceeds on a supposition that that part of the clause, which directs the books, &c. to be kept for the use of the parish, does not apply to the allowance of the accounts by a single justice, but it is only applicable to the allowance at the petty-sessions. But that is not the true construction of the clause. The single magistrate may allow the accounts, if he please: but if he has any difficulty, he may refer them to the petty-sessions, where they are to be examined and allowed; "and when the said "accounts shall be so settled and allowed," that is, either by the single justice, or by the petty-sessions, they are to be kept for the use of the parish, &c. And this mode of allowing the accounts was prescribed for the purpose of preventing any appeal to the quarter-sessions. It appears clearly to have been the intention of the legislature to substitute the petty-sessions for the quarter-sessions, to prevent the expence and inconvenience that would attend an appeal to the latter against the surveyor's accounts.—Rule absolute.

The King *v.* W. Mitchell, *et al.* Tr. Ter. 34 Geo. 3 B.R. 5 *Ter. Rep.* 701.

The inhabitants of a parish, into which a road is turned by turnpike trustees, are not bound to do statute work thereon.—The trustees of a turnpike road in Derbyshire had, by virtue of their powers, altered a road, which ran through the parish of Middleton, and carried it through part of the parish of Hyam; the trustees had distrained the plaintiff's goods, he being an inhabitant of Hyam, for not doing statute work on the said new-made road.—PER CURIAM: The roads, being by the act to be repaired, in the same manner, and by the same persons, as were formerly used to repair them; the inhabitants of Hyam could not be obliged to repair the new-made road: but whether the inhabitants of Middleton should be bound to repair this, as the old road still subsisted, we give no opinion; but rather incline that they should not.

Wheeler *v.* Cooper, Tr. Ter. 6 Geo. 3 B.R. 1 *Black.* 603.

Waite v. Smith, *et al.* Hil. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 133.

*What ſhall be deemed a highway* (1).]—That branch of the 19th clauſe of the 13 *Geo.* 3. c. 78. which directs that "when any highway *hath been diverted* above twelve months, &c. if a new highway *hath been* made in lieu thereof, &c. and the ſame *hath been* acquieſced in, &c. every ſuch "new highway ſhall, from *thenceforth*, be the public high-"way," is *retroſpective* only.—To treſpaſs for breaking and entering the plaintiff's cloſe, called the Higher Butts, in the pariſh of Barnoldſwick, in the county of York, and pulling down the gates there, the defendant pleaded firſt not guilty; and ſecondly, a ſpecial juſtification, that at the time when, &c. there was a common king's highway, in, through, and over the ſaid cloſe leading from Barnoldſwick, &c. to Thornton, &c. in the ſaid county, &c. and becauſe the gates in the declaration mentioned were erected acroſs the ſaid highway, which was thereby interrupted, the defendant pulled them down, &c. The replication traverſed the highway. At the trial the jury found a verdict for the defendants, ſubject to the opinion of this Court on the following caſe: At the time of committing the treſpaſs the plaintiff was occupier of the cloſe called the Higher Butts, as tenant to Mr. *Bagſhaw*. *Previous to the year* 1792 *there was no common highway over the ſaid cloſe; and, in that year, the highway leading from Barnoldſwick to Thornton, in the ſaid county, was ſtopped up by the Leeds and Liverpool canal being cut acroſs it; and a new road, leading from Barnoldſwick to Thornton, was then made by the Leeds and Liverpool canal company, acroſs the ſaid cloſe called the Higher Butts*, being then in the occupation of a different tenant, in the place of the highway ſo obſtructed. The old road was ſo ſtopped up and the new road made by the canal company without any order or authority from any juſtices of the peace, and without applying for or obtaining the licence of Mr. *Bagſhaw* for that purpoſe. In September, 1792, Mr. *Bagſhaw* was in Craven, where the roads lie, and then knew of the new road having been made. He left Craven a few days after, and continued abſent till 1794. No complaint was made to the canal company till 1794, when Mr. *Bagſhaw* returned into Craven. No ſuit or proſecution was commenced within a year after the road was ſo diverted and turned. The new road has been uſed by the public, in lieu of the old road, from the time when the old road was ſo ſtopped up as afore-

(1) *Miller* v. *Taylor*, Ea. Ter. 9 *Geo.* 3. 4 *Burr.* 2347.—If land be thrown into the highway, the intent there precedes the right: as it is given, ſo it may be uſed: but the intent circumſcribes the right. Feed it with cattle, and an action lies: there you exceed the purpoſe of the gift, and become a wrong doer. DICT. *per Aſton*, J.

ſaid,

ſaid, until the time of committing the treſpaſs; and the new road is nearer, and more commodious to the public, than the old road. At the time when the treſpaſs was committed, which was in the preſent year, the new road was ſtopped up by a gate, and gate poſts ſet acroſs it. The defendants entered into the cloſe called the Higher Butts by order of the canal company, to whom they were ſervants, and pulled down the gates and poſts by which the road was obſtructed as aforeſaid.—THE QUESTION was, Whether, under the circumſtances ſtated, the new road, made by the canal company, over the cloſe in queſtion, is, or is not, a public highway. The queſtion turned on the conſtruction of the ſtatute 13 *Geo.* 3. c. 78. ſ. 19. which after providing that two or more juſtices of the peace may, with the conſent of the owner of the land, divert any highway, ſo as to make it nearer or more commodious to the public (which part of the clauſe is clearly proſpective), proceeds to direct that "*where* "*any highway, &c. hath been diverted or turned above twelve* "*months, either from neceſſity, where the ſame hath been de-* "*ſtroyed by floods, or ſlips of the ground on which it was* "*made, &c. if new highways have been made in lieu thereof* "*nearer or more commodious to the public, and the ſame have* "*been acquieſced in, and no ſuit or proſecution hath been com-* "*menced for the diverting or turning the ſame*, every new "highway, &c. ſet out and uſed in the place of that ſo di-"verted and turned ſhall, from henceforth, be the public high-"way."—PER CURIAM: This appears to be a moſt vexatious attempt on the part of the defendants to injure the plaintiff's right of property; and, on conſidering attentively the different words uſed in the act, it cannot be juſtified. The intention of the legiſlature is perfectly clear; *they meant to give power to juſtices, in certain caſes, to divert roads in future, and to put an end to all further diſputes reſpecting thoſe that had been turned, even without authority, provided the new roads had been uſed and acquieſced in for a twelvemonth before.* BUT *there was no reaſon why thoſe that ſhould be diverted without authority after the act paſſed, ſhould be conſidered as legally diverted under the act, becauſe whenever it ſhould be thought, by thoſe who are competent to decide upon the ſubject, that another road may be nearer or more commodious to the public, that act gives authority to two juſtices to divert it, under certain circumſtances.* All the expreſſions in the different ſections of the act are carefully uſed to expreſs that intention, and to mark the difference between the future and the paſt. A different conſtruction would be productive of groſs injuſtice; for, then, in every caſe of a minority, or of the abſence of the owner, and even in other caſes where the tenant choſe to acquieſce in a new road being uſed, or to collude with thoſe who uſed it, the uſing of it for a twelvemonth would be concluſive evi-

dence of the right againſt the owner of the land, though he had no means of preventing it by bringing an action of treſpaſs, not being in poſſeſſion.—Poſtea to the plaintiff.

Taylor *v.* Whitehead, Tr. Ter. 21 Geo. 3. B.R. 2 *Doug.* 744.

It is not a good juſtification in treſpaſs that the defendant has a right of way over part of the plaintiff's land, and that he went upon the adjoining land beauſe the way was impaſſable from being overflowed by a river.—Treſpaſs for breaking and entering the cloſe of the plaintiff, at the pariſh of Otley, in Yorkſhire. The defendant pleaded; 1ſt, The general iſſue; 2dly, A right of way, by preſcription, through a lane of the plaintiff's contiguous to the *locus in quo*, to Otley bridge, on the river Wharfe; *that the tenants and occupiers of the* locus in quo *were, from time whereof, &c. by reaſon of their tenure, bound to repair the lane, and the banks thereof next to the river*; that, at the ſeveral times when, &c. the lane was out of repair and overflowed with water, ſo that the defendant could not uſe the way without imminent danger of the loſs of his life and goods; and that he *neceſſarily* went into, through, and over, the *locus in quo*, as near to his ſaid way as he poſſibly could, as it was lawful for him to do for the cauſe aforeſaid: 3dly. That the *locus*, &c. lay contiguous to a lane of the plaintiff's, and that the ſaid lane was adjoining to the river Wharfe; that the defendant had a right of way by preſcription, through and over the lane; and that becauſe the lane and way were *overflowed with water from the ſaid river*, ſo much that the defendant *could not*, at the ſeveral times, &c. *paſs or repaſs*, he did *neceſſarily* go out of the ſaid way, as near to the ſaid way as he poſſibly could, into, through, and over, &c. The plaintiff having traverſed the preſcription to repair, laid in the firſt ſpecial plea, and the right of way laid in the laſt, the cauſe came on to be tried, and the jury found for the plaintiff, on the general iſſue and the firſt ſpecial plea, and for the defendant on the laſt. A rule was obtained, to ſhew cauſe why there ſhould not be a new trial on the iſſue found for the defendant, as having been found againſt evidence, which rule was, upon argument, diſcharged. Afterwards a rule was obtained to ſhew cauſe why the plaintiff ſhould not be at liberty to enter up judgment on that iſſue, as well as the others, notwithſtanding the finding of the jury, on the ground, that, in point of law, although the defendant had the right of way through the plaintiff's cloſe, he was not entitled to go upon the adjoining land of the plaintiff, when the way was out of repair. It was then objected, that it had been applied for too late, for that it was in the nature of a motion in arreſt of judgment; and the practice was ſtated to be, that ſuch a motion could not be made after a new trial had been moved for, unleſs the Court, upon granting the rule for a new trial, ſhould have given leave, if that ſhould be diſcharged, to follow it by a motion in arreſt of judgment.

judgment. After ſome conſideration, and conference with the maſter, THE COURT declared their opinion, that a motion in arreſt of judgment may be made at any time before judgment is entered up, and that the preſent motion, being of the ſame nature, was not too late. It now appeared, that the officer, by miſtake, had entered a verdict for the defendant on all the iſſues; upon which it became neceſſary for the plaintiff's counſel to move for a rule to ſhew cauſe, why the *poſtea* ſhould not be amended, from the judge's notes, agreeably to the finding of the jury; and that the rule then before the Court ſhould, in the mean time, be enlarged. The *poſtea* was afterwards amended, and, this day, the queſtion on the validity of the laſt plea was argued: and, for the defendant, it was argued, that it is clear law, eſtabliſhed by a number of caſes, particularly that of *Abſor* v. *French*, in *Shower*, *B. R. M.* 30 *Car.* 2. 2 *Show.* 28. *Lev.* 234. and *Henn*'s caſe, 8 *Car.* 1 Sir *W. Jones*, 296. that, where a common highway is out of repair, by the overflowing of a river, or any other cauſe, paſſengers have a right to go upon the adjacent ground. Lord MANSFIELD mentioned, that *Blackſtone*, in his commentaries, expreſſes an opinion, that the law of England correſponds with the Roman law, on this point, extending the right of going on the adjoining ground, when a road is out of repair, to private as well as public ways, 3 *Bl. Comm.* p. 36. and that *Comyns*, in his Digeſt, ſeems to have entertained the ſame opinion, *Com. Dig.* Tit. *Chimin. D.* 6.—Lord MANSFIELD, Ch. J.—The queſtion is upon the grant of this way. Now it is not laid to be a grant of a way, generally, over the land; but of a preciſe ſpecific way. The grantor ſays, "you may go in this particular line, but I do not give you a right to go either on the right or left." I entirely agree, that by common law, he who has the uſe of the thing ought to repair it. The grantor *may* bind himſelf; but here he has not done it. He has not undertaken to provide againſt the overflowing of the river; and, for ought that appears, that may have happened by the neglect of the defendant. Highways are governed by a different principle. They are for the public ſervice, and if the uſual tract is impaſſable, it is for the general good that people ſhould be entitled to paſs in another line.—WILLES, J. and ASHHURT, J. of the ſame opinion.—BULLER, J. If this had been a way of neceſſity, the queſtion would have required conſideration, but it is not ſo pleaded. It does not appear that the defendant had no other road. There can be no ground for a repleader, for the plea is ſubſtantially bad; there is no fact alleged in it, which could ſerve any purpoſe to deny, or go to iſſue upon.—Rule abſolute.

Juſtices have power to ſtop up roads under the general highway act, in caſes only where a new road is ſet out.—Page, eſq. v. Howard, Mic. Ter. In 23 Geo. 3. B.R. *Cald.* 228.

In 1774 a road in the parish of Cobham, in the county of Surrey, leading towards the parish of Ockham, in the said county, was lawfully diverted and turned by an order of two justices of the said county, by virtue of the powers given by 13 *Geo.* 3. c. 78. s. 19 (1). In June, 1782, another road, the place in which the said trespass was committed, in the said parish of Cobham, leading towards the parish of Ockham, and also towards Chertsey, Byfleet, and other places, was stopped up by an order of one of the said justices, and another justice for the said county, under the powers given by s. 22. (2) of the said act. A gate was erected by the plaintiff across the road so stopped under the last order of 1782, and the said gate locked up; and the defendant broke down the same.—THE QUESTION was, Whether the justices under the said act, s. 22. had a power to make the said order for stopping the road, where the said trespass was committed? If they had, the verdict for the plaintiff was to stand—if not, to be entered for the defendant. The question upon this case was, Whether the justices who made the last order for stopping the road, in the place where the trespass was alleged to have been committed, and who were not both of them the same as those who made the first order, were, under s. 22. of the act, empowered to make such order?—Lord MANSFIELD, Ch. J. This is not a general power, but tied up to a particular case. The power to shut up roads is given only, where there is a new road to be set out. This shews, that it was meant to be one entire act of the magistrates: that the two clauses make one provision, and that the powers under them were to make but one transaction. The clauses

(1) When it shall appear, upon the view of any two or more of the said justices of the peace, that any public highway may be diverted, so as to make the same nearer, or more commodious to the public, &c. and the owners of the lands through which, &c. shall consent, &c. it shall and may be lawful, by order of such justices, at some special sessions, &c. to divert, turn, and stop up, and enclose, sell, and dispose of, such old highway, &c. and to purchase the ground and soil for such new highway, &c. by such ways and means, &c. in all respects, &c. as hereinbefore mentioned, with regard to highways to be widened or diverted. *Vide* s. 17.

(2) If in any parish, &c. where any highway shall be diverted and turned by virtue of this act, it shall appear to the justices, who are hereby authorized to view or enquire into the same, that there are other highways within such parish, &c. besides that so to be diverted and turned, which may, without inconvenience to the public, be diverted into such new highway hereby authorized to be made, or into any other highway or highways within such parish, &c. and the charge of repairing such highway or highways may be thereby saved to such parish, &c. it shall and may be lawful for such justices to order such highway or highways which shall appear to them unnecessary, to be stopped up, and the soil thereof sold, &c.

are ſo connected that they cannot be ſeparated.—BULLER, J. The wording of the latter clauſe is deciſive, that theſe powers are to be exerciſed at the ſame time. It enacts, that if the juſtices authoriſed to enquire, &c. think, that beſides the roads ſo to be diverted and turned, other roads may be diverted, &c. they may ſtop them. The orders for this purpoſe are plainly intended to be made at the ſame time and by the ſame magiſtrates who were acting under the former clauſe.—WILLES and ASHHURST, J. concurring.—Poſtea to the defendant.

*Preſentment of a highway.*]—A preſentment of a highway being out of repair, by a juſtice of peace, upon his own view, is traverſable generally.—A rule to ſhew cauſe why a writ of *mandamus* ſhould not iſſue, directed to the juſtices of the peace for the county of Wilts, commanding them to *receive and proceed upon a traverſe to a certain preſentment* made by a juſtice of peace *upon view*, againſt the inhabitants of the tything of Connock, in the ſame county, for not repairing a highway within the ſaid tything. The cauſe ſhewn was, that as this affair was a preſentment in the ſeſſions made by a juſtice of peace, upon his own knowledge, "that the high-"way was out of repair," a *general traverſe* could not be admitted; for though ſuch a preſentment, by a juſtice of peace, upon view, be traverſable, as to all other points, yet it is concluſive ſo far as the view and knowledge of the juſtice goes; and the fact of its being out of repair cannot be diſputed; conſequently, though a ſpecial traverſe ought to be received, a general one ought not.—Mr. Juſtice WILMOT ſaid, that a notion had long prevailed, and ſeemed to be countenanced by the old books, "that a preſentment, "made by a juſtice of peace, purſuant to 5 *Eliz.* c. 13. ſ. 9. "of a highway's being out of repair, could not be contro-"verted as to the fact of its being out of repair;" and he knew that the late Mr. Juſtice *Abney* was of that opinion, and thought "that the ſtatute had truſted the eye of the "juſtice with the view of the repair:" but he did not know, he ſaid, of any judicial determination that way. And he had always underſtood, that for about 30 years paſt, the notion and practice had been contrary; and, for his own part, he underſtood ſuch a preſentment to be as traverſable as an indictment. And the act of parliament puts it upon the ſame foot: for the word "adjudged," by the oath of twelve men, means nothing more than "found by a "grand jury." The words of this act can only apply to the repair: and the traverſe puts the fact of its ſufficiency immediately in iſſue.—Mr. Juſtice YATES obſerved, that there is no juriſdiction in this kingdom, where a defendant

Rex v. juſtices of peace for Wiltſhire, Tr. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1530. 1 *Black. Rep.* 467.

can be convicted unheard (1). And Lord MANSFIELD, Ch. J. thought the reasons for its being traversable to be very strong.—The rule was enlarged.—And Lord MANSFIELD, Ch. J. now declared (generally, and without saying more), "That they were all of opinion, that a *mandamus* should go, "commanding the justices to receive and admit a general "traverse."—Rule absolute.

The King v. the inhabitants of St. Michael, &c. Southampton, Tr. Ter. 10 Geo. 3. B.R. 2 *Black.* 718.

A presentment by two justices of a highway as being out of repair; being traversed and issue joined thereon, a *venire* was awarded on the record, for twelve jurors to try the issue. And afterwards the record states, "*That the jurors by the sheriff* "*aforesaid being called and impanelled for this purpose come,*" and find a verdict for the crown. It was objected, that there were no jurors named in the record; nor that they were twelve in number; which it was stated, was absolutely necessary to appear on the record; and for this were cited *Lamb. Eiren.* 400. edit. 1614. (383. edit. 1602). 2 *Hal. P. C.* 296. *Cro. Eliz.* 654. 2 *Hawk, P. C.* 296. 1 Inst. 157.—THE COURT were of this opinion, and therefore reversed the judgment.

Rex v. inhabitants of Hartford, Tr. Ter. 14 Geo. 3. B.R. *Comb.* 111.

This was error from a judgment of the quarter-sessions upon a presentment by a justice of the peace, that from time whereof, &c. there was, and yet is, a common highway leading from the town of Witton in the county of H. to the village or town of Hartford, in the said county, for all his majesty's subjects to pass and repass on foot *over a certain drain or ditch between the ancient inclosures*, within the parish of Witton, and the town of Hartford; but the same is in decay, &c.—The objection was, that this road was not laid to be in the parish of Hartford, or in any other parish, but over a ditch between inclosures, within the parish of Witton and the town of Hartford.—PER CURIAM: It must be alleged to lie in the parish: otherwise, the parish is not bound to repair, and therefore, this presentment is clearly bad.—Judgment reversed.

The King v. the inhabitants of Gamlingay, Hil. Ter. 30 Geo. 3. B.R. 3 *Wm. Rep.* 509.

This was an indictment for not repairing a highway: and it stated that "from time whereof, &c. there was, and yet is, "a common and ancient king's highway leading FROM the "parish of Hatley, St. George, in the county of Cambridge, "TOWARDS AND UNTO the parish of Gamlingay, in the "county aforesaid, for all the liege subjects, &c. and that a "certain part of the same king's common highway, called "Hatley-way, situate, lying, and being in the said parish "of Gamlingay, containing in length, &c. on, &c. was, and

(1) V. Rex v. *Roupel*, Tr. 1776. 16 G. 3. B.R. presented at a leet, for keeping a bawdy-house, *ante*, vol. II. p. 531.

"yet

"yet is in great decay," &c. After verdict for the profecutor, it was moved in arreſt of judgment, becauſe it was not ſtated in the indictment that the road out of repair was in the pariſh of Gamlingay; on the authority of a caſe in 2 *Ro.* Abr. title "Indictment," m. pl. 19. where an indictment for ſtopping a way at D. leading FROM D. to S. was quaſhed, becauſe it was alleged to be from D. which excludes it.—PER CURIAM: The queſtion is, Whether the pariſh of Gamlingay are bound of common right to repair the road which is deſcribed. Now they are only ſo bound, if the road lies within their pariſh. But the road is deſcribed as leading from Hatley unto Gamlingay, which excludes Gamlingay.—There was a ſimilar queſtion ariſing on the conſtruction of a turnpike act ſome years ago, reſpecting the road leading through Battel to Haſtings, when this Court held that the words "from" and "to" were both excluſive, Vide 1 *Burr.* 376. And though it is to be lamented that a judgment is to be arreſted on account of the inſufficiency of the indictment, after a verdict has been obtained againſt the defendants, yet we ought not to countenance any negligence in thoſe whoſe buſineſs it is to draw indictments; and if a defect in an indictment of this ſort were to be overlooked, it might be expected that the ſame indulgence ſhould be extended to all others. The whole of the road deſcribed by the former part of the indictment is excluded by the terms "from" and "unto;" and the latter part is a contradiction in terms to the former allegation. In *Latch*, 183, the ſecond point expreſsly determines that the principal objection is a valid one. There the indictment was quaſhed, becauſe the road was deſcribed to lead from London to Kenſington, which excluded Kenſington. And it is there mentioned, that afterwards another indictment was quaſhed on the very ſame ground.—Rule abſolute.

*Indictment of Highways.*]—Indictments for not repairing highways were formerly taken ſtrictly, but of late greater latitude has been allowed. This indictment ſet forth that there was, and yet is, a certain ancient and common king's highway leading from the hamlet of Roxeth in the pariſh of Harrow, in the county of Middleſex, towards and unto the ancient market-town of Brentford, in the county aforeſaid; and that a certain part of the ſaid king's highway, ſituate, lying, and being in the pariſh of Harrow aforeſaid, in the ſaid county of Middleſex, leading from Roxeth-place Houſe, in the ſaid hamlet of Roxeth, unto a certain place called the Stroud-gate, in the ſame hamlet, in the ſaid pariſh of Harrow, &c. was out of repair. A motion was made, on behalf of the defendants, in arreſt of judgment; and the objections were, 1ſt, That it is ſaid as a king's highway leading from a hamlet: but a hamlet is

Rex *v.* the inhabitants of Harrow, Ea. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2091.

is leſs than a vill, or town. It ought to be laid as leading from one town to another. *Palm.* 389. *Bole*'s caſe, and 1 *Hawk.* P. C. c. 76. p. 201. ſ. 1.—2dly, That this is an indictment for not repairing a road leading from the hamlet of Roxeth to the town of Brentford: yet it deſcribes the defective part as being part of a road leading from Roxeth-place-houſe, in the hamlet of Roxeth, to the town of Brentford. Therefore, the hamlet itſelf is excluded, by the former expreſſion of "leading from it:" but the latter deſcription includes it, or at leaſt part of it. 2 *Ro.* Abr. title Indictment, letter M. pl. 19. is in point.—THE COURT over-ruled the objections. They held it ſufficiently deſcribed by ſaying "that it led from a hamlet:" and they ſaw no inconſiſtency in the deſcription of the part out of repair. It was obſerved that the place out of repair is not deſcribed to be in the hamlet. The objection proceeds wholly upon a miſtake. The indictment does not ſay "that the part of the way which "is out of repair is in the hamlet of Roxeth:" it ſays that it is "in the pariſh of Harrow." The place where they take up the road from its beginning, is indeed deſcribed to be in the hamlet; and ſo is the place where they leave it: but it may go through other parts and places which are not within the hamlet. It does not follow, that becauſe the beginning is in the hamlet, and the end in the hamlet, therefore, no intermediate part of it can be out of the hamlet. The hamlet of Roxeth is excluded, even upon the very principles inſiſted on by the counſel for the defendants. For, the words from Roxeth-place-houſe to Stroud-gate, which are both of them in the hamlet, exclude both thoſe places, and, conſequently, exclude the hamlet in which they are ſituated. So that here is no inconſiſtency or repugnancy upon the face of the record. —Rule diſcharged.

The King v. William and John Stead, Hil. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 142

Upon an indictment for erecting a wall acroſs a highway, not ſtating the nuiſance to be continuing, there need not be judgment to abate it: but it is otherwiſe where it is ſtated in the indictment as an exiſting nuiſance.—The indictment ſtated, that from time whereof, &c. there was, and yet is, a certain common and ancient pack and prime way, leading from A. to B. for all the king's ſubjects, and that the defendants on, &c. unlawfully erected *a certain ſtone wall upon and acroſs the ſame pack and prime way*, there leading through a certain wood called, &c. whereby the ſaid pack and prime way was totally obſtructed and ſtopped up, to the great obſtruction and delay of the king's ſubjects going and returning over and along the ſaid highway, and againſt the peace, &c. On this indictment, the defendants were found guilty at the general quarter-ſeſſions, which Court afterwards at an adjourned ſeſſions directed a precept to the ſheriff to abate the nuiſance, and afterwards at the next general ſeſſions, the ſame Court adjudged

judged that the defendants for the ſaid nuiſance in the indictment mentioned, be fined ſix-pence each, and be diſcharged. And now, upon a writ of error brought on that judgment, it was aſſigned for error that the Court below had not ordered by the ſaid judgment *that the nuiſance* whereof the defendants were indicted and convicted ſhould be abated as by law is required.—Lord KENYON, Ch. J. When a defendant is indicted for an exiſting nuiſance, it is uſual to ſtate the nuiſance and its continuance down to the time of taking the inquiſition; it was ſo ſtated in *R.* v. *Pappineau*, 2 *Strange*, 686. "*et adhuc exiſtit*;" and in ſuch caſes, the judgment ſhould be that the nuiſance be abated. But in this caſe it does not appear in the indictment that the nuiſance was then in exiſtence, and it would be abſurd to give judgment to abate a ſuppoſed nuiſance which does not exiſt. If, however, the nuiſance ſtill continue, the defendant may be again indicted for continuing it.—Judgment affirmed.

A perſon indicted for not repairing roads *ratione tenuræ* ſhall pay the coſts of the proſecutor.—On an indictment for not repairing a road *ratione tenuræ*; and its being moved that the defendant might ſubmit to a ſmall fine on a certificate, that the road was repaired; without payment of the proſecutor's coſts.—*The Court* refuſed to ſet a ſmall fine, unleſs the defendant paid the proſecutor's coſts. It was ſaid, that the reaſon of not uſually giving coſts in theſe caſes was, becauſe the ſtatute of *Will.* 3. directs the fine to go to the repair of the road; but the Court held that this did not extend to repairs *ratione tenuræ*; the fine in this caſe being to be paid to the ſurveyor of the pariſh-highways.

The King *v.* Wingfield, Tr. Ter. 6 Geo. 3. B.R. 1 *Black.* 602.

The ſtat. 13 *Geo.* 3. c. 78. ſ. 64. enacts, that it ſhall be lawful for the Court before whom any indictment or preſentment ſhall be tried for not repairing highways to award coſts to the proſecutor, to be paid by the perſons ſo indicted or preſented, *if it ſhall appear to the Court that the defence made to ſuch indictment or preſentment was frivolous.* And in this caſe, the judge, inſtead of awarding the coſts, had merely certified on the back of the record, that the defence was frivolous.—THE COURT were clearly of opinion that, as there was no preciſe form of words to be uſed, this certificate was in effect an awarding of the coſts.

The King *v.* the inhabitants of Clifton, Tr. Ter. 35 Geo. 3 B.R. 7 *Ter. Rep.* 344.

But the coſts can only be awarded by the Court before whom the indictment is had.—It was moved for a rule on *Pitford*, the proſecutor of this indictment, to compel him to pay to the defendants their coſts, on the ground that this was a vexatious proſecution, under the ſtat. 13 *Geo.* 3. c. 78. ſ. 65, which "enables the Court before whom an indictment is tried, for not repairing highways, to award coſts to the perſon indicted to be paid by the proſecutor, if it appear to the ſaid court that ſuch proſecution was vexatious." An affidavit was

The King *v.* the inhabitants of Chadderton, Ea. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 273.

was produced containing the grounds of the application; and it was contended, that as the indictment had been removed here by *certiorari*, and there had been no profecution below, this was the proper court to award coſts. And a caſe was mentioned before *Nares*, J. on the Oxford circuit, in which that learned judge, thinking he had a diſcretion under the ſtatute 8 and 9 *W.* 3. c. 11. either to certify or not that the treſpaſs was wilful, did not certify; but that afterwards the court of Common Pleas, on an application to them, held that the ſtatute was compulſory.—SED PER CURIAM: The ſtatute only gives the Court, "before whom the indictment is tried," power to award coſts. An application ſhould therefore have been made to the judge at *niſi prius*, who might have awarded coſts to the defendants: but we have no ſuch power. In the caſe alluded to, although the Court above thought that the ſtatute of *W.* 3. was imperative on the judge at *niſi prius* to certify, they did not think that they had any authority to grant the certificate themſelves.—Rule refuſed.

Fairtitle *ex dim.* Mytton, *et al. v.* Gilbert *et al.* Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 169.

*Turnpike Roads.*]—The truſtees of a public turnpike act, which empowers them to erect toll-houſes and mortgage the tolls, and which declares that there ſhall be no priority among the creditors, have no power to mortgage the toll-houſes or gates: and if in fact they have made ſuch a mortgage, and an ejectment is brought againſt them by the mortgagee, they are not eſtopped by their deed from inſiſting that the act gives them no ſuch power.—The defendants were nominated truſtees under the 11th *Geo.* 3. c. 87. for repairing and widening the road between Cheadle and Leek, in the county of Stafford, and for other purpoſes therein mentioned. The truſtees are authorized by the act to erect turnpikes and toll-houſes: and the right and property thereof, and all the materials of the ſame, are thereby veſted in them. And ſeven or more of them are enabled by writing under their hands and ſeals to *leaſe the ſaid tolls*. And they are further authorized *to take up at intereſt any ſum upon the credit of the ſaid tolls, and to aſſign over and convey the ſaid reſpective tolls* to any perſons who ſhall advance their money thereon. It is further enacted, that *no preference* ſhall be given to the perſon lending money on the credit of the ſaid tolls, *in reſpect of the priority of advancing ſuch ſum*; but that all perſons to whom ſuch reſpective mortgages or aſſignments ſhall be made, ſhall be in their ſeveral proportions, creditors on the ſaid reſpective tolls in equal degree one with another; and this is to be deemed a public act. The truſtees having occaſion to raiſe a certain ſum, advertiſed according to the act, and the leſſors of the plaintiff having offered to ſupply them, mortgages were executed to the leſſors of the plaintiff of the tolls, AND ALSO OF THE TOLL-HOUSES AND TOLL-GATES, by a ſufficient number

number of the truſtees, ſome of theſe very defendants having joined in executing thoſe conveyances. *This ejectment was brought to recover poſſeſſion of the toll-houſes and toll-gates, purſuant to the terms of the mortgage to* Mytton. At the trial it was objected, on behalf of the defendants, that *the act did not warrant them to mortgage the* TOLL-GATES, *but only the* TOLLS, for which an ejectment would not lie; and that the act expreſsly directed that no preference ſhould be given to any of the creditors above the reſt: and the judge being of that opinion, nonſuited the plaintiff. A motion was made to ſet aſide this nonſuit, on two grounds; 1ſt, That ſome of the defendants, having joined in executing the conveyance, were eſtopped from taking that objection.—2dly, That the toll-gates are a part of and appurtenant to the tolls, and virtually included in a grant of the latter.—PER CURIAM: It is clear that the truſtees under this act of parliament had no power to mortgage the *toll-houſes* or the *turnpike-gates*. The act expreſsly gives the truſtees power to mortgage the tolls; but the reaſon why it does not give them a farther power is, becauſe no creditor is to have a preference. Now if any creditor had a power to enter and take poſſeſſion of the toll-gates, he would gain a priority which the act has denied. And it is very fit that this ſhould not be taken out of the hands of the truſtees; becauſe they are truſtees for all the creditors, and were conſidered by the legiſlature as the moſt proper perſons to have the whole management of every thing to be done in purſuance of the act. It was foreſeen that the whole ſum wanted would not be advanced by any one perſon; and therefore, for the encouragement and ſecurity of all perſons who were willing to advance money, it was neceſſary that the collection of the tolls ſhould remain with the truſtees. As then the truſtees had no power to mortgage the toll-houſes, the next queſtion is, Whether they are eſtopped to ſay ſo? In general, the party granting is eſtopped by his deed to ſay he had no intereſt: but that general principle does not apply to this caſe, where the truſtees were not acting for their own benefit, but for *the benefit of the public*; and it would be hard that other creditors who are not parties to the deed, ſhould loſe the benefit which the act has given them. Beſides, there is a ſtill farther reaſon why the truſtees ſhould not be eſtopped; for this is a public act of parliament, and the Court are bound to take notice that the truſtees under this act had no power to mortgage the toll-houſes. This deed, therefore, cannot operate in direct oppoſition to an act of parliament, which negatives the eſtoppel.—Rule diſcharged.

By ſtat. 35 *Geo.* 3. c. 154. to enlarge the term and powers of two acts, 29 *Geo.* 2. and 16 *Geo.* 3. for repairing and widening certain turnpike roads, power is given to five truſtees, to widen, divert, and turn any part of the ſaid roads, The King *v.* J. Bagſhaw, eſq. and four others, Tr. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 363.

roads, and to vary the roads through any private grounds, making ſatisfaction to the perſons intereſted: power is alſo given to the truſtees, to contract and agree with the owners of ſuch lands, &c. The ſtatute then enacts, "that if any perſons intereſted, UPON NOTICE TO HIM OR THEM GIVEN, ſhould, for the ſpace of twenty days next after ſuch notice, neglect or refuſe to treat, or ſhould not agree, &c. then the ſaid truſtees ſhould cauſe ſuch damage to be aſcertained by a jury, &c; and the money aſſeſſed to be paid to the ſaid owners, according to the verdict or inquiſition of ſuch jury, &c." Under this power the truſtees turned a road, and made the new road through four cloſes of land belonging to the five defendants. A jury aſſeſſed the damage at 100l.; *upon which the truſtees made their order or adjudication, in which it was recited, that a diſpute had ſubſiſted between the truſtees and the defendants, reſpecting the damage ſuſtained by the latter, and the recompence due to them, and that under the powers of the act they had cauſed a jury to be ſummoned, impanelled, and ſworn, &c. who, having viewed the premiſes, and heard counſel and evidence thereon, had aſſeſſed the damage and recompence at the ſum of* 100*l. and in which the truſtees ordered, adjudged, and determined the ſaid ſum of* 100*l. to be paid to the defendants, according to their reſpective eſtates, &c.* The proceedings having been removed here by certiorari, it was moved that the verdict, inquiſition, and aſſeſſment of damages, and alſo the order and adjudication of the truſtees, might be quaſhed, FIRST, becauſe it did not appear that the truſtees acted within their juriſdictions, *no notice* appearing to have been given to the defendants; in which caſe only the truſtees had juriſdiction to make the order. AND THE COURT ſaid, that notice to the parties intereſted was the foundation of the whole proceedings below, and that, therefore, it ſhould have been ſtated; for, if no notice were given, the truſtees had no juriſdiction.—Rule abſolute.

## Holydays.

Figgins v. Willie, Ea. Ter. 18 Geo. 3. C.B. 2 *Black.* 1187.

IT was moved that *Samuel Rogers*, the deputy comptroller of the ſeal office, and *Samuel Jarvis*, the deputy ſealer, ſhould reimburſe the plaintiff the debt and coſts in this action, which the plaintiff had loſt by their refuſing to ſeal a writ on St. *Barnabas'* day, without the payment of 10s. for opening the ſeal, and which the plaintiff's attorney had refuſed to pay, on the ground that St. *Barnabas* was not a legal holyday;

holyday; the ſum of 10s. had been uniformly taken, for an extraordinary fee, over and above the ordinary fee of 7d. for ſealing a writ on this day, for thirty-five years together, and before the preſent officers came into office. *De Grey*, Chief Juſtice.—The public offices ought to be open, and juſtice ſhould be unbought. But this is not the proper ſubject of a ſummary application to the Court. The attorney ſhould have paid the fee, and got his writ regularly ſealed, and then brought his action againſt the officer to try the right, or have complained to the Court of the extortion. But he, knowing the practice (whether legal or otherwiſe), obſtinately neglects to have his writ ſealed, and unadviſedly ſuffers his client to loſe his debt and coſts by this irregularity. *Gould*, Juſtice.—The officer ought always to attend and ſeal writs, *ſedente curiâ*. This Court always ſits on St. *Barnabas*, which ſhews it is no holyday for the ſeal. But we cannot interfere upon motion, to reimburſe the plaintiff his damages. *Blackſtone*, J.—This ſeems an unwarrantable practice, contrary to *Magna Charta: nulli negabimus, nulli vendemus, nulli differemus juſtitiam.*" But we cannot give damages in this ſummary way. The party muſt be left to his action. *Nares*, J. agreed.—Rule diſcharged.

It was now moved, that the deputy ſealer of writs under the Duke of *Grafton*, ſhould ſhew cauſe why he kept his office ſhut on Friday, the 11th of June, 1779, and ſhould not repay to the plaintiff's attorney 10s. which he had exacted for ſealing a writ on that day. *De Grey*, Ch. J.—There can be no *preſcriptive* right to keep this as a holyday; the 10s. fee is not claimed to be due by *preſcription*, but merely as a *gratuity* for opening the ſeal. The claim muſt be to keep the office ſhut, if any thing; and if the officer has a right ſo to do, he may ſet his own price on opening it. By the ſtatute of 5 & 6 *Edw.* 6. c. 3. it is ordained, that no holydays be kept, but ſuch as are mentioned in that act; among which the feaſt of St. *Barnabas* is *not* one. It is not eſtabliſhed by any other act of parliament, as the 5th of November, the 30th of January, &c.; nor is it a ſtate holyday, as the king's acceſſion-day or birth-day; though, probably, the obſervance of it aroſe from its being conſolidated with the king's acceſſion-day, during part of the reign of his late majeſty.—The boards of revenue, the cuſtom-houſe, exciſe, &c. may act as they pleaſe, and pay ſuch compliments to their officers and ſervants as they ſhall judge expedient, by remitting more frequently the very hard labour of their clerks. But they are no example or rule for a court of law, where juſtice ought always to be open.—The office is open all vacation, except on particular days; and it is abſurd that it ſhould be ſhut in term-time, when buſineſs peculiarly preſſes. On the whole, I ſee no reaſon for allowing this holyday to be kept.

Sparrow v. Cooper, Tr. Tw. 19 Geo. 3 C.B. 2 *Black.* 1314.

kept. *Gould*, Juſtice:—Though I ſhall imitate my Lord Chief Juſtice, in giving a decided opinion only upon St. *Barnabas'* day, yet the reaſons of my opinion extend to all holydays. The keeping of the office ſhut, while the officer lies in wait withinſide, in order to extort an exorbitant fee, is a matter that affects all the ſubjects of England. There is no ground or pretence for it, except a paltry modern encroachment, directly in the face of an act of parliament of the 5th and 6th *Edw.* 6. I think it a groſs impoſition, inſolently kept up, ſince the Court gave ſtrong hints of their opinion on the former caſe; and that the rule ſhould be made abſolute with coſts. *Blackſtone*, Juſtice: I know not how to confine myſelf to this particular day, as my reaſons extend to all holydays kept in term-time; for, as to the *vacation*, I deliver no opinion about it; but in term-time, I take it that this officer (like all others), is ſuppoſed to be every day in court, ſitting at the feet of the Chief Juſtice, and affixing the ſeal of the Court to all judicial writs, which are witneſſed at Weſtminſter in the name of the Lord Chief Juſtice. The ſuffering him to do this in a private chamber is a mere indulgence, convenient to the Court, the ſuitor, and the officer, and, therefore, connived at; but the ſuppoſition of law is otherwiſe. Of courſe, upon all days when the courts ſit at Weſtminſter, he ought to be ready to execute his duty at all convenient hours. There are only three days in the year, Candlemas, the Aſcenſion, and St. *John* the Baptiſt, when the Court adjourns over, and does not ſit at all, if thoſe days happen to be in term-time, as two of them conſtantly are. I have ſeen tables of fees, preſented by juries of attorneys (as was formerly the cuſtom), as old as the reign of Queen *Elizabeth*; and I find the fee of 7d. for ſealing the writ in all of them; but this fee of 10s. for opening the ſeal is not to be found in any. It were well if the ſpirit of the old rule of court, 35 *Hen.* 6. ſect. 1. and ſect. 6. were duly obſerved: "that all officers attend in their places, unleſs "by the leave of the Chief Juſtice, and do give attendance "in their own perſons, or by their ſufficient deputies at all "convenient times, that writs may be taken out for proceſs, "and other neceſſary cauſes, without any money paying "therefore." As to coſts, though it appears by the affidavit that the officer behaved pertly upon this occaſion, yet, as he has now been better adviſed, is new in his office, and had ſome colour of right from the uſage of his predeceſſor, I think he may for once be excuſed.

Pater *v.* Croome, Tr. Ter. 37 Geo. 3. B R. 7 *Ter. Rep.* 336.

Neither is the 29th of May a holyday in any of the law-offices.—A rule was obtained, calling on Mr. *Allen*, the ſealer of the writs, to ſhew cauſe why he ſhould not return to the plaintiff 10s. which he had taken for ſealing a writ of enquiry on the 29th of May, as an extraordinary fee, beſides the uſual

usual fee of 7d. on the ground that it was a holyday. *The Court* were of opinion, on the authority of the foregoing case, that the extraordinary fee ought not to have been taken, and, therefore, they made the—Rule absolute.

## Horse-Races.

On the trial of an action for money had and received, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case: "On the 17th of August, "1786, an advertisement appeared in the Racing Calendar, "giving notice, that on the 29th of that month, a gentleman's "subscription purse of 50l. would be run for in Northamp- "ton-field, by any horse, &c. *to pay 5s. entrance*, and if a "subscriber to pay one guinea, *or a non-subscriber to pay* "*three guineas into the hands of the clerk of the course* (the "defendant), or double at the post, &c.—*The entrance money* "*each day to the second-best horse, and to run according to such* "*articles as shall be produced at the time of entrance.*—No less "than *three* reputed running horses to start each day; if "but one horse enter for the gentleman's purse, to have "10l.; if two, eight guineas each. If but one enter for "the town purse, to have ten guineas; if two, five guineas "each, *and their entrance money again: the winner each day* "*to pay two guineas to the clerk of the course*, &c."—In consequence of this advertisement, the plaintiff sent a horse to be entered. At the time of the entrance, the articles for the regulation of the course were referred to, which, amongst other things, directed the horses "to carry weights, and *observe every article expressed in the advertisement*; *the second-best horse to have the stakes, being the crowns paid for entrance.*" Three other horses were entered besides that of the plaintiff, and the owner of each paid at the entrance 5s. and three guineas into the hands of the defendant, as clerk of the course. The race was run, and the plaintiff's horse was second-best, whereupon the defendant tendered him 1l. as the entrance-money, being 5s. for each horse. But the plaintiff insisted, that he was entitled to the twelve guineas paid into the hands of the defendant, *i. e.* three guineas for each horse. This depended on the construction of the articles for the regulation of the course, as applied to the stat. 13 *Geo.* 2. c. 19. which in the second section enacts, that "no plate, &c. "shall be run for by any horse, &c. unless such plate, &c. "shall be of the full, real, and intrinsic value of fifty pounds, "or upwards;" and in the 7th section, "that *all and every* "*sum*

Dowson v. Scriven, Ea. Ter. 29 Geo. 3. C.B. 1 *Hen. Black.* 218.

" *ſum or ſums of money to be paid for entering* of any horſe, " &c. to ſtart or run for any plate, &c. ſhall go and *be paid* " *to the ſecond-beſt horſe*, &c. which ſhall ſtart or run for ſuch " plate, &c." Lord LOUGHBOROUGH.—The plaintiff in this caſe founds his right to recover on the advertiſement, by the terms of which each horſe was to pay 5s. entrance, and one guinea if a ſubſcriber; if a non-ſubſcriber three guineas. This advertiſement refers to certain articles which are called in to explain it; but the validity of them depends on the act of parliament; the parties cannot put a ſenſe on the articles repugnant to the law. I do not think it a queſtion of grammatical conſtruction: by whatever name the money is called, it was in fact entrance-money, ſince it was neceſſary to be paid, in order to enable the horſe to ſtart. Now the act directs that the entrance-money ſhall be paid to the ſecond-beſt horſe; but the act would be evaded, if this were holden not to be entrance-money, and the articles were to give a different ſenſe to the advertiſement.—GOULD, J. of the ſame opinion. HEATH, J. of the ſame opinion.—If the three guineas in the advertiſement were explained by the articles, not to be entrance-money, there would be a fraud on the act, which has been conſtrued ſo ſtrictly, that where a cup of 50l. value was to be run for, it was holden, that the value muſt be excluſive of the workmanſhip. Beſides, the ſecond-beſt horſe was to have a prize; but, if this were not entrance-money, the prize would be, that he would pay three guineas, and win only twenty ſhillings. WILSON, J.—If we conſtrue theſe articles to mean, that the three guineas for each horſe were to be deducted from the ſubſcription, to make up the 50l. plate, we ſhould make the parties liable to penalties, to the amount of 200l.; we muſt, therefore, take it, that they intend to do what the law allowed.—Poſtea to the plaintiff.

See title GAMING.

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## Incloſure Acts.

Townley *v.* Gibſon, *et al.* Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 701.

WHERE by the terms of an incloſure act, for incloſing the waſtes of a manor, a certain portion was to be made to the lord in lieu of his right and intereſt in the ſoil, and the reſidue was to be allotted to the ſeveral tenants in fee, diſcharged from all cuſtomary tenures, &c. a ſaving clauſe, reſerving to the lord all ſeignories incident to the manor, and all rents, fines, ſervices, &c. and all other royalties and manerial juriſdictions whatever, will not reſerve mines under thoſe allotments to the tenants, though it appear there was a ſubſiſting

ſiſting leaſe of ſuch mines at the time the act paſſed, granted by the lord of the manor.—Mrs. *Sarah Gibſon*, under whom the defendants derived title, was, at the time of paſſing the act, 17 *Geo.* 3. c. 79. for incloſing certain waſte lands, ſeiſed in her demeſne as of fee of the manor of *Yealands*, and of all the waſte lands lying within the manor, ſubject to certain rights of common. Many tenements within the manor were formerly enfranchiſed; but there were nine cuſtomary tenements ſtill remaining unenfranchiſed, lying diſperſedly in different parts of the manor, and containing in the whole about three or four acres of land. Several leaſes reſerving rent have been made by former lords, of the waſtes, and the mines and the minerals thereunder; the laſt of theſe, by which the mines only were demiſed, was granted on the 28th of February, 1757, to hold from the 25th of the enſuing March, for twenty-one years. Upon the granting of the laſtmentioned leaſe to one *Tiſſington*, the mines were worked, and continued to be ſo till ſome time in the year 1759; but from that period the leſſee diſcontinued the works. In the year 1777, an act paſſed, for dividing and incloſing the common and waſte grounds, which amongſt other things contained the following clauſes, viz. "that the commiſſioners ſhall ſet out, allot, and "aſſign, unto the ſaid *Sarah Gibſon*, twenty ſtatute acres of "the ſaid common and waſte grounds, IN LIEU OF, AND "AS A COMPOSITION FOR, HER RIGHT AND INTEREST "IN AND TO THE SOIL OF THE RESIDUE OF THE SAID "COMMON AND WASTE GROUNDS reſpectively. And then "the ſaid commiſſioners ſhall allot and aſſign the reſidue of "the ſaid common and waſte grounds unto, for, and "amongſt, the ſaid *Sarah Gibſon*, for and on account of "her meſſuages, tenements, lands, and hereditaments, within "the ſaid manor, in reſpect whereof ſhe is entitled to right "of common upon the ſame common and waſte grounds, "and the ſaid *George Townley*, *George Gray*, and the ſeveral "other perſons, and bodies politic and corporate, having "right of common or other right, intereſt, property, or pri-"vilege, thereon, and to her heirs, aſſigns, and ſucceſſors, "reſpectively, for ever, according and in proportion to their "ſeveral and reſpective rights, &c." A ſubſequent clauſe directed, that "all and every the allotments, &c. to be made "under the act, ſhould be veſted in fee-ſimple in the ſeveral "and reſpective perſons, &c. to whom the ſame ſhould be "ſet out or allotted, and their heirs, aſſigns, and ſucceſſors, "reſpectively, for ever, abſolutely *freed and diſcharged of and "from all cuſtomary tenures, rents, fines, boons, and ſervices, "whatſoever*; and that the ſeveral ſhares or allotments, ſo to "be ſet out as aforeſaid, ſhould be in lieu of, and in full "compenſation and ſatisfaction for, all rights of common, "and other former property, privilege, right, &c.; and that

" all right of common, together with all former rights, in-
" tereſts, profits, &c. in and upon the ſame, ſhould, from and
" immediately after that time, ceaſe, and be for ever barred
" and extinguiſhed. Provided always, and it was further
" enacted, that *nothing in that act contained ſhould extend to*
" *prejudice, leſſen, or defeat the right, title, or intereſt, of the ſaid*
" *lady of the ſaid manor, her heirs or aſſigns, of, in, or to the*
" *ſeigniories incident or belonging to the ſaid manor*; but that
" ſhe and they, and every of them, ſhould and might, at all
" times thereafter, hold and enjoy all rents, fines, ſervices,
" courts, perquiſites, and profits of courts, goods, and chat-
" tels, of felons and fugitives, felons of themſelves and put in
" exigent, deodands, waifs, eſtrays, forfeitures, and *all other*
" *royalties and manerial juriſdictions whatſoever*, in and upon
" the ſaid common and waſte grounds, thereby intended to
" be incloſed as aforeſaid, to the ſaid manor, or the lord or
" the lady thereof for the time being, incident, appendant,
" belonging, or appertaining, and the ſame in as full, ample,
" and beneficial manner, to all intents and purpoſes, as ſhe
" or they might or could have held and enjoyed the ſame, in
" caſe this act had not been made." At the time of paſſing the act, the term in *Tiſſington*'s leaſe was unexpired. Allotments were alſo made to the ſaid *Sarah Gibſon*, in purſuance of the ſaid act.—THE QUESTION was, Whether the lord of the manor be entitled to the mines under the clauſe of reſervation in the act, allotting the incloſures to the ſeveral tenants of the manor? PER CURIAM: Private acts of parliament are to be conſtrued according to the intention of the parties; but then that intention muſt be collected from the words uſed by the legiſlature, without doing violence to their natural meaning. The defendant's counſel has ſuppoſed, that mines are a diſtinct right from the right to the ſoil: but that cannot be, where they are under the land of the lord of the manor. In caſes of copyholds, a lord may have a right under the ſoil of the copyholder: but, where the ſoil is in the lord, all is reſolvable into the ownerſhip of the ſoil; and a grant of the ſoil will paſs every thing under it. The only word in the ſaving clauſe, which affords any ground for argument, is the word "*rents*;" but, when we ſee how that word is uſed with the others in that part of the act, it cannot be taken to include mines. At the time of paſſing this act of parliament, the mines under the waſte ground were in the lady of the manor, as part of the demeſnes; ſhe intended to give up ſeveral rights to the tenants, for which ſhe has reſerved a ſatisfaction. Then how do the tenants hold their allotments under the act? They could not take as copyholders, unleſs the act of parliament had ſo directed: but they take their allotments as freehold eſtates of inheritance. *It is extremely clear, that no new tenure can be created, unleſs*

by

*by the authority of parliament, since the statute of* quia emptores, 11 *Ed.* 1. c. 1. (1) nor can any person reserve to himself a right of escheat. Then it was urged by the defendant's counsel, that the act of parliament could not affect the lease, which was in existence when it passed; it certainly would not; neither would it have been affected, if the lady had sold her estate in the manor, but the alienee would have become the landlord, and entitled to the beneficial interest reserved by the lease; so here the lease will remain valid, but the right to the rents of the mines will pass to the person in whose favour the allotment was made under the act; for we cannot narrow the words of this act, and that transfers all the right in the soil to the several tenants. There is no doubt but that the mines might have been reserved: if it had been so intended, it would have been by express words; but there is no such reservation here; and, when the legislature have made some exceptions, we cannot imply others which they have not made. The word "rents" is explained by the other words used; but those rights which are reserved are mere badges of royalty, incorporeal rights, and other fruits of tenure of the like sort. The saving clause only amounts to what, perhaps, the law would otherwise have reserved without such a clause; for, as the rights reserved are of an incorporeal nature, they would still have remained in the lady, because there is nothing in the act to divest her; but they have nothing to do with the soil or freehold, in which mines are included. We do not agree with the defendant's counsel, that the lord may, unless restrained by custom, dig for mines on the copyholder's lands: but it is not necessary to consider that question here.—Postea to the plaintiff.

No technical form is necessary in the awards of commissioners of inclosure; but, if they substantially pursue their powers in shutting up old roads, those roads effectually cease. —In trespass, for breaking and entering the plaintiff's closes at Sherburn, in Yorkshire, and destroying his fences. The defendant justifies, as an inhabitant of South Milforth, in the parish of Sherburn, for a prescriptive right of a burial way on foot, from the village of South Milforth to the parish-church of Sherburn, through and over the closes in question. The plaintiff replies, that the said way, by virtue of a private act of parliament of the 10 *Geo.* 3. for inclosing the common fields, &c. of Sherburn, and the award of the commissioners thereupon (1) ceased and was determined; and that their only burial way is now along the Ferrybridge and Leeds road after mentioned. To which the defendant demurs. Before the making of the act, the inhabitants of South Milforth had their choice of two burial ways to the church of Sherburn;

Pick v. Clarkson, Ea. Ter. 19 Geo. 3. C.B. 2 *Black.* 1318.

(1) See vol. II. p. 615.

the one over the closes in question, and the other along a common highway, called the Ferrybridge road, leading from the north end of South Milforth over the common fields of Sherburn, northward, to the town of Sherburn, and along Sherburn street, and then turning westward along another public highway, called the Leeds road, over the said common fields to Sherburn church.—The commissioners under the act *were empowered to set out and appoint all such public and private roads and ways over the said common fields as they should think necessary and convenient*, so as all public roads should be made sixty feet wide, and all private roads of such breadth as the commissioners should think sufficient. And that, *after such new roads should be so set out and made, no other public or private way should be used over any part of the lands to be inclosed, otherwise than should be directed and allowed by the commissioners* by their award, to be inrolled in the registry of the west-riding of Yorkshire.—The commissioners, by their award, allotted the closes in question (being part of the said common field), to the plaintiff, and those under whom he claims, to be fenced and inclosed on all sides, and set out and appointed all such public highways over the said common fields as they thought necessary and convenient, and particularly the said Ferrybridge road and Leeds road, of the breadth of sixty feet each.—The said roads were before only of the breadth of forty feet, and ready made, but were widened to sixty feet; and the said roads, and also the road through Sherburn-street, were ready made, and convenient for the inhabitants of South Milforth, for the purpose of the said burial way. THE DEFENDANT OBJECTED, that the commissioners had not pursued the powers vested in them by the act of parliament; *that the roads to be by them appointed ought to be new roads, over the lands to be inclosed, in lieu of those taken away; that they could not assign an old road, which like this had been used time immemorial*; that the road ought to be *made* under the powers of the act, but that this is stated to be *ready made*; that the roads to be assigned by the commissioners ought to be *wholly* over the land which is the subject of inclosure; whereas the Ferrybridge and Leeds roads, as set out, are two distinct uncommunicating roads, and only connected by the road through Sherburn-street, which is out of the limits of the act, and is not stated in the pleadings to be (nor, indeed, is in fact) of the breadth of sixty feet. PER CURIAM: It is admitted, that the commissioners *may change one road for another*; and the very idea of an *exchange implies a right to shut up* that which is taken away. One principal object of all these acts is to shut up such roads as are unnecessary, but which have been gradually established by the inattention of the owners of the land (while it lay open and common), and the roving disposition, or sometimes a slight degree of convenience, of the traveller.—The intent to shut

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up the way in question is equally clear; and *the great question therefore is, Whether the commissioners have legally executed those powers and that intent?* In acts of this kind, a confidence is reposed in the commissioners, who are, in the nature of arbitrators, named by the parties, and are sworn to be indifferent and impartial. The parties, therefore, ought not hastily to retract that confidence, and revolt against their decisions, unless in the modes prescribed by the act.—There is no technical form necessary for declaring the road to cease, or for ordering it to be shut up; nor is the award of the commissioners, if substantially good, to be scanned and construed with all the nicety of special pleading.—We do not apprehend it is necessary, in all cases, to give a new road *in lieu* of that which is shut up; for then the number of ways would not be lessened, but only their places changed. If one way will serve instead of two, it is the intention of the act to shut up that which is supernumerary; and the commissioners are to judge in that respect.—Neither need it be over the same grounds, for then the inconvenience to the farmer will be only shifted, and not taken away; nor need it be entirely a *new* road, or one that must be necessarily *new made*, or totally over the new inclosures. If the commissioners can avail themselves of an *old* road, convenient for the purpose, and *ready made*, they do their duty in giving that the preference. An appropriation of an old way to a new purpose is (in the eye of reason and good sense) setting out a new way; nor is it material, that part of such old established highway is out of the limits of their act of parliament. They do not make or establish it as a way, but, finding it already made and established by the general law, they, by their award, lead the proprietors of Sherburn to and from it.—If it be said, that the inhabitants of South Milforth, not being proprietors of Sherburn, and not benefited by this inclosure, ought not to lose their right of way, without some equivalent or benefit; the answer is, that the convenience of these roads is not now in question, but is admitted by the demurrer. Had they been inconvenient, or had that inconvenience been material, the defendant might have taken issue upon it. But he knew that such issue would be immaterial, for the convenience is left by the act to the discretion of the commissioners, from whose judgment there lies an appeal to the sessions, by the universal mode of framing these inclosure acts. If Milforth was aggrieved, it might have appealed in due time, before the inclosures were finally settled.—The powers given by the act to the commissioners is *not* to shut up old ways, and set out new, but "to set out all such ways as they "shall judge convenient;" and that no other shall be used but those. It is, therefore, no objection, that the commissioners have not, in terms, declared that the way in question

ſhall *ceaſe* and be *ſhut up*, or that the roads aſſigned ſhall ſerve for the burial way. They have proceeded according to their powers, have aſſigned *all* ſuch roads as they thought neceſſary and convenient, and have paſſed over in ſilence the reſt, among which the way in queſtion is one. Till the award made, the inhabitants of South Milforth had their choice of two burial ways; the award retains one, and the operation of the act ſhuts up the other. The commiſſioners have ſubſtantially purſued their powers.—Judgment for the plaintiff.

## Indictment.

Rex *v.* Higginſon, Tr. Ter. 1 Geo. 3 B.R. 2 *Burr.* 1232.

*For what an indictment will lie.*]—An indictment, charging that he, the defendant, did *keep and maintain*, and yet doth keep and maintain, a certain common, ill-governed, and diſorderly houſe; and in the ſaid houſe, for his own lucre and profit, certain evil and ill-diſpoſed perſons, of ill name and fame, and of diſhoneſt converſation, to frequent and come together, then and on the ſaid other days and times, there unlawfully and wilfully did cauſe and procure, and the ſaid perſons in the ſaid houſe, then and on the ſaid other days and times, there to be and remain, FIGHTING OF COCKS, BOXING, PLAYING AT CUDGELS, AND MISBEHAVING THEMSELVES, unlawfully and wilfully did permit, and yet doth permit, was, on a motion in arreſt of judgment, held to be a good indictment.

Rex *v.* Riſpal, Tr. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1320. 1 *Black. Rep.* 368.

An indictment, charging the defendants that they wickedly and maliciouſly deviſing and intending unjuſtly to vex and aggrieve one *John Chilton*, and to deprive him of his good name, fame, credit, and reputation, on, &c. at, &c. wickedly and unlawfully did, among themſelves, *conſpire*, *combine*, *confederate*, and *agree*, falſely, and without any reaſonable or probable cauſe, to charge and accuſe the ſaid *John Chilton*, "that he, the ſaid *John Chilton*, had then lately before taken "out of a bag a quantity of human hair, which bag was "contained in a bale, which conſiſted of five bags of hair, "of the goods and chattels of the ſaid *Antoine Riſpal*," was held good (1).

The King *v.* Sir Joſeph Mawbey, bart. James Liptrott, clerk, Ralph Leiceſter, eſq. and the Rev. Edward Cooper, Ea. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 619.

A certificate by juſtices of the peace, that a highway (indicted) is in repair, is a legal inſtrument, recognized by the courts of law, and admiſſible in evidence after conviction, when the Court are about to impoſe a fine; and, conſequently,

(1) Vide vol. II. p. 591.

quently, it is illegal to conſpire to pervert the courſe of juſtice, by producing a falſe certificate in evidence, to influence the judgment of the Court.—In ſtating ſuch a crime in an indictment, it is not neceſſary to ſet forth, that the defendants knew, at the time of the conſpiracy, that the contents of the certificate were falſe; it is ſufficient that, for ſuch purpoſes, they agreed to certify the fact as true, without knowing that it was ſo. Alſo, where ſeveral defendants are tried at the ſame time for a miſdemeanor, and ſome are acquitted and ſome convicted, the Court may grant a new trial as to thoſe convicted, if they think the conviction improper.—An indictment was preferred againſt the defendants at the general quarter-ſeſſions, which ſtated, that at the ſummer aſſizes, 1791, a bill of indictment was preferred and found againſt the inhabitants of the pariſh of Windleſham, in Surrey, for not repairing parts of a certain highway, &c. &c. &c.; that afterwards the pariſh pleaded guilty, and the two defendants, *Mawbey* and *Liptrott*, juſtices of the peace in and for the county of Surrey, and the other two defendants, *Cooper* and *Leyceſter*, inhabitants of the pariſh of Windleſham, *conſpiring, combining, and confederating together, to obſtruct and pervert the due courſe of juſtice, and to deceive and impoſe on the Court*, and unjuſtly to have it underſtood and believed by the ſaid Court, that thoſe parts of the highway had been ſufficiently repaired by the inhabitants, after the preferring of the ſaid indictment, and thereby unjuſtly to influence in favour of the inhabitants of Windleſham, the judgment to be given upon the ſaid indictment; and alſo before the making of ſuch inquiry as aforeſaid, to wit, on the 24th of July, 1792, at, &c. unlawfully *did conſpire, combine, confederate, and agree, to produce and exhibit in evidence* unto the Court, a *certain paper-writing*, under the hands and ſeals of the ſaid Sir *Joſeph Mawbey* and *J. Liptrott*, dated the 24th of July, 1792, *as and for a true certificate* in writing, by and under their hands and ſeals, as ſuch juſtices, touching and concerning the ſaid parts of the ſaid highway ſo alleged to be out of repair, &c. [ſetting out the tenor of the certificate, which was in the common form, certifying the road to be in ſufficient repair] whereas the highway was, at the time of making ſuch inquiry, &c. and alſo at the time when the defendants exhibited in evidence the certificate, &c. ruinous and in great decay, &c. *and ſo the defendants knew, at the time of their producing and exhibiting the ſaid paper-writing in evidence*, to the great obſtruction of public juſtice, &c.—There were four other counts ſimilar to the foregoing.—Upon the trial, the defendants, *Cooper* and *Leyceſter*, were acquitted, and the other two defendants, *Mawbey* and *Liptrott*, were found guilty. In Eaſter term, a rule was obtained to ſhew cauſe why a new trial ſhould not be granted upon the merits, as to the two defendants who were

were convicted. BUT THE COURT ſuggeſted a difficulty, whether a new trial could be granted, as to ſome of the defendants on the record, and not as to others; and they deſired this matter might be firſt argued, before the merits of the queſtion were ſpoken to.—After the argument, reſpecting the power of the Court to grant a new trial had been gone through, the counſel were proceeding to ſpeak to the merits of the caſe, when the affidavits of *Cooper* and *Leyceſter*, the two acquitted defendants, were offered to be read in favour of the other two. THE COURT directed the affidavits to be read.—The counſel were afterwards heard on the merits; but before that diſcuſſion took place, another rule was obtained, calling on the proſecutor to ſhew cauſe WHY THE JUDGMENT SHOULD NOT BE ARRESTED, which was firſt argued at the deſire of the Court, becauſe, if the indictment could not be ſupported (they ſaid), it would be unneceſſary to determine the other point, relative to the granting of the new trial. THE GROUNDS ALLEGED FOR ARRESTING THE JUDGMENT WERE: 1ſt, *becauſe no ſpecific crime was laid in the indictment, the certificate of the magiſtrates not being an inſtrument from whence any legal conſequence could be derived, not being upon oath, nor binding on the Court to receive it, but being in its nature traverſable*; 2dly, *becauſe if ſuch a certificate were the ſubject of a conſpiracy, for which an indictment might have been framed, the crime was not properly charged in this indictment*; 3dly, by the acquittal of the other two defendants, no judgment as for a conſpiracy can be given on this record; 4thly, the ſeſſions had no juriſdiction as to thoſe counts which charge a conſpiracy; 5thly, the other counts which do not charge a conſpiracy, do not ſet forth any offence which is a breach of the peace, and, conſequently, it is not within the juriſdiction of the court of quarter-ſeſſions, where this indictment was preferred. Lord KENYON, Ch. J.—Notwithſtanding the arguments that have been urged on behalf of the defendants, it appears to me that the conſpiracy is ſufficiently charged in the indictment. The firſt count alleges that, pending the proſecution againſt the inhabitants of the pariſh of Windleſham for not repairing a road, theſe two defendants, together with two other perſons, conſpired to obſtruct the due courſe of juſtice; that, after the pariſh had pleaded not guilty, and before they had withdrawn that plea, the defendants conſpired and agreed to produce in evidence a certain paper-writing, as and for a true certificate under the hands and ſeals of theſe two defendants as juſtices, ſtating that the road was in repair; that afterwards, in purſuance of this conſpiracy, they produced to the Court, &c. the ſaid paper-writing, as and for a true certificate; but that, in truth, the road was out of repair, and ſo the defendants knew at the time of producing it in evidence. It has been ingeniouſly

niously argued, that the indictment ſhould have alleged that, *at the time of the conſpiracy*, the defendants knew that the road was out of repair. But I think that they ſhould have known that the road was in repair before they agreed to certify that it was ſo. If at that time they did not know whether or not the road was in repair, and yet agreed to certify to the Court that it was, that is ſufficient to conſtitute the delinquency of the defendants. Therefore, it ſeems to me, that the conſpiracy is properly charged in the indictment.—I cannot adopt the argument uſed by the defendant's counſel, that theſe two defendants were not competent to conſpire, on the ground that this muſt be taken only to be the act of one perſon. It is widely different from the inſtance put of huſband and wife, to which it was compared, where the wife is not ſuppoſed to have an opinion of her own: but here neither of theſe magiſtrates was ſo ſubjected to the other, as to be incapable of judging and acting for himſelf; they were free agents, independent the one on the other, and, conſequently, were in a condition to conſpire.—Another objection was, that it does not belong to the ſituation of theſe defendants, as juſtices, to certify that the road was in repair, and that ſuch a certificate is not a legal inſtrument of which a court of law can take cognizance. How or when theſe certificates originated, it may, perhaps, be difficult to aſcertain, but it is not neceſſary now to trace their origin. The practice of receiving theſe certificates is now become too inveterate to be overturned; perhaps they are received as coming from perſons who are conſidered in the law *fide digni*, though I am not ſure that it would not be an indictable offence in other perſons, not juſtices of the peace, to take upon themſelves to make a falſe certificate, under an agreement and conſpiracy, to miſlead a court by giving them falſe information. I admit that it is a voluntary act in the magiſtrates to certify; but if they do undertake to make a certificate, they ought to know that its contents are true; therefore, on the beſt conſideration that I have been able to give to the caſe, I am of opinion, that this is an indictable offence, and that it is ſufficiently charged in the indictment. ASHHURST, J.—The practice of receiving certificates ſigned by magiſtrates, reſpecting highways, is very general, and of ancient date. I can ſpeak to this practice ever ſince I have known the profeſſion; and a practice that has been recognized in courts of law for ſuch a length of time, would go a great way to convince me that it was a legal practice: but this does not reſt merely on the practice which has obtained; the authorities referred to in ſupport of the proſecution carry the point ſtill farther. Then the principal queſtion is, Whether a conſpiracy to pervert the courſe of juſtice, by producing in evidence a falſe certificate, be or be not a crime? It ſeems to me, that a greater

greater offence can hardly be ſtated, than that of obſtructing or perverting the courſe of juſtice, on which the lives and properties of all the ſubjects depend. And with regard to the manner in which the conſpiracy is charged in the indictment, I think that all the requiſites are ſufficiently alleged. GROSE, J.—I agree with the counſel for the defendants, that in order to conſtitute a conſpiracy more than one perſon muſt be concerned. It is ſaid, however, that theſe two defendants are to be conſidered only as one perſon; but it might as well be ſaid, that if all the juſtices of the county had agreed to do the thing that was done in this caſe, it might be taken to be only the act of one perſon. Another objection was, that it was not ſtated in the indictment, that the defendants knew, at the time of the conſpiracy, that the road was out of repair: I do not think that that is the giſt of the offence; for if two perſons, with an intent to obſtruct the courſe of juſtice, conſpire to ſtate a fact at all events as true, which they do not know to be true, it is criminal; they are bound to know that the fact is true, which they agree to certify as ſuch. In many caſes, an agreement to do a certain thing has been conſidered as the ſubject of an indictment for a conſpiracy, though the ſame act, if done ſeparately by each individual, without any agreement among themſelves, would not have been illegal. As in the caſe of journeymen conſpiring to raiſe their wages; each may inſiſt on raiſing his wages, if he can, but if ſeveral meet for the ſame purpoſe, it is illegal, and the parties may be indicted for a conſpiracy. It is laid down in ſome of the caſes, that an attempt to perſuade another not to give evidence in a court of juſtice is indictable; then it cannot be doubted but that an attempt to miſlead the Court by miſrepreſentation is equally criminal. Now we find that, as far as can be traced, it has been uſual for the judges, before they aſſeſs a fine on a pariſh for not repairing a road, to enquire into the actual ſtate of the road, and to receive a certificate of magiſtrates for that purpoſe. This was the courſe of the Court in the time of *Charles* the Second, as appears in Sir *T. Raym.* 215; and if the courſe of the Court, it muſt have been the law of the Court. The courſe of juſtice is perverted, if the certificate of the juſtices be falſe. If they agree to certify, that a road is in repair, for the purpoſe of perverting the courſe of juſtice, it is a crime, and indictable; and it is not neceſſary that they ſhould know, at the time of ſuch agreement, that the road is out of repair; it is ſufficient that they did not know that the fact which they certified to be true was true. LAWRENCE, J.—The objections made on the part of the defendants may be reduced to two: 1ſt, That the indictment has not ſufficiently charged a conſpiracy by the defendants: 2dly, That if properly charged in point of form, it is not a charge

charge of such an act as can have any effect, and, therefore, that it is not criminal to conspire to do that act. The answer that has been already given to the first is decisive. It is not necessary that the defendants should have known that the road was out of repair. They are charged with conspiring to pervert the course of justice by producing in evidence a certificate that the road was in repair; and if this charge be established in fact, it is an offence of considerable magnitude against the administration of the justice of the country. This is not unlike the case of perjury, where a man swears to a particular fact, without knowing at the time whether the fact be true or false; it is as much perjury as if he knew the fact to be false, and equally indictable. Then the next question is, Whether a conspiracy to do an act, from which the public may receive any damage, be, or be not, indictable? At first I thought this a very doubtful case, because it struck me that this was an act by which the public would not suffer, as the Court at the assizes were not bound to receive the certificate of the defendants, it not being upon oath. But, on examination, it appears, that the practice of receiving the certificates of magistrates, respecting the state of roads, has existed as far as the memory of living persons extends; and the books carry it still farther back. In the reign of *Charles* the First, in *Leyton*'s case, it appears that a certificate of some kind was in use; and the case of *R. v. Randall*, in 1 *Keble*, 256. shews that it was a certificate by justices of the peace, "else the justices must certify that it is no encroachment." It was said, in answer, that all the cases on this point, except that in Sir *T. Raymond*, were applications to the favour of the Court, in a summary way, to quash the indictment; but, in addition to the case in Sir *T. Raymond*, there is another in 6 *Mod.* 163. where, after verdict, "the Court, before they would set a fine, would be certified by some of the justices of the peace of the neighbourhood that the way was sufficiently repaired; which they did." I have not been able to discover how, or when, the practice of receiving these certificates arose: but a practice that has been adopted in the Courts at least as long back as the reign of *Charles* the First goes a great way to shew what the law is upon the subject. And this is not the only instance of receiving certificates in evidence; certificates of bishops, with respect to marriages, are received (1); the customs of London are certified by the recorder (2); so formerly were certificates received from the captain of Calais (3); and, in *Cro. Eliz.* 502—3. this Court said they would give credit

(1) Vid. *Co. Lit.* 74. a. 9 *Rep.* 31. b. (2) Ib. (3) Ib.

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to the certificate of the judges in Wales reſpecting the practice of their Court, and that the cuſtom of a Court is a law in that Court.—Rule to arreſt the judgment diſcharged.

THE COURT on this day diſcharged the rule for a new trial on the merits, ſaying, at the ſame time, that if the conviction of the two defendants had appeared to them improper, they might have granted a new trial: and they gave the following reaſons. Lord KENYON, Ch. J.—It was contended, on behalf of the proſecutor, that as two of the defendants had been acquitted, the record could not be ſent down again to another trial without putting their guilt or innocence again into a ſtate of enquiry, and that inaſmuch as defendants who have been acquitted in criminal caſes cannot be tried a ſecond time, the neceſſary conſequence was, that in this caſe we could not grant a new trial even though we were clearly of opinion that the other two defendants had been improperly convicted. If ſuch were the rule, it would bear extremely hard on particular perſons accuſed; for then, however unjuſt the verdict againſt ſome of the defendants might appear to be, and though it ſhould turn out, beyond all contradiction, that the verdict had been obtained by the groſſeſt perjury, the guilt of thoſe defendants muſt neceſſarily ſtand on record, provided one defendant, perhaps included in the indictment for the very purpoſe, were acquitted. But I think that the rule was correctly ſtated by the counſel for the defendants, that *in granting new trials the Court know no limitations (except in ſome excepted caſes) but they will either grant or refuſe a new trial as it will tend to the advancement of juſtice.* In one claſs of offences, indeed, thoſe greater than miſdemeanors, no new trial can be granted at all. But *in miſdemeanors there is no authority to ſhew that we cannot grant a new trial in order that the guilt or innocence of thoſe who have been convicted may be again examined into.* And if we conſider this on principle, no doubt can be entertained. If an indictment be found againſt ſeveral, the defendants may ſever in their challenges in caſes where challenges are allowed; or one may be ready for trial, and the others not taken, and there may be different trials on the ſame record. Now the ſame principle ſtrongly applies to this caſe. *Fern*'s caſe was referred to as an authority; and it is in point: but even without the aſſiſtance of that caſe I ſhould have no doubt but that, for the advancement of juſtice, and to prevent the manifeſt injuſtice that would otherwiſe enſue, the Court might, on principles of common ſenſe and law, grant a new trial in a caſe circumſtanced like the preſent. I have ſtudiouſly gone out of the way, in order to expreſs my opinion on this point, an opinion formed on great deliberation, leſt the public ſhould be miſled by the arguments uſed on behalf of

of the proſecution, and imagine that manifeſt injuſtice muſt be effected in this caſe, becauſe the forms of law cannot yield to ſubſtantial juſtice. ASHHURST, J. Of the ſame opinion. GROSE, J. alſo agreed. LAWRENCE, J. From the inſtant it was admitted that a new trial might be granted in criminal caſes, where only one defendant is indicted, it ſeemed to me to follow as a conſequence, that we might grant a new trial in this caſe in favour of thoſe who have been convicted, if they have been improperly convicted, unleſs the Court were entangled in the ſtrict forms of proceeding. Arguments drawn from civil caſes are not applicable to the preſent; becauſe in thoſe there is only one venire on the record, and one aſſeſſment of damages: but that is not ſo in criminal caſes. But the difficulty that ſtruck me was, that as the firſt venire muſt appear on the record for the benefit of the two defendants who were acquitted, a ſecond venire could not be awarded for the other two defendants who were convicted. Two modes were ſuggeſted in order to obviate this difficulty; the one was to alter the firſt venire; the other, to make an entry on the record, that the verdict againſt two of the defendants was improperly given, and then to award a new trial as far as reſpected them. I do not know that the firſt mode is objectionable. In civil actions no notice at all is taken on the record of the firſt venire, when a new trial is granted: and if we were to grant a new trial in this caſe, in reſpect of two of the defendants, I ſee no objection to altering the firſt venire as to them, and to let it ſtand as to the other defendants who were acquitted. The ſecond mode ſuggeſted has already been adopted: it was ſo in *R.* v. *Robins*, *Hil.* 10 *Geo.* 2. "after great conſideration; where "the Court made an entry, that it appeared to them that the "verdict was unduly given, therefore the verdict is, by the "Court, ſet aſide; and the ſheriff is commanded to ſummon "a new jury." And that was in the caſe of a criminal proceeding.—Rule for a new trial diſcharged.

The defendant having been convicted *on an indictment charging him with entering a certain burying ground, and taking a coffin out of the earth, from which he took a dead body,* and carried it away for the purpoſe of diſſecting it: it was moved, in arreſt of judgment, on the ground that the offence was not cognizable in any court of criminal juriſdiction; and that if it be any crime, it is of eccleſiaſtical cognizance. —THE COURT ſaid, that the offence was cognizable in a criminal court, as being highly indecent, and *contra bonos mores*; at the bare idea alone of which nature revolted. That the purpoſe of taking up the body for diſſection did not make it leſs an indictable offence. And that as it had been the regular practice of the Old Bailey, in modern times, to try charges of this nature, many of which had induced puniſh-

The King v. Lynn, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 732.

ment,

ment, the circumſtance of no writ of error having been brought to reverſe any of theſe judgments was a ſtrong proof of the univerſal opinion of the profeſſion upon this ſubject. They, therefore, refuſed even to grant a rule to ſhew cauſe, leſt that alone ſhould convey to the public an idea that they entertained a doubt reſpecting the crime alleged. But inaſmuch as this defendant might have committed the crime merely from ignorance, no perſon having been before puniſhed in this Court for this offence, they only fined him five marks.

The King *v.* Smith, *et al.* Tr. Ter. 29 Geo. 3. B.R. 2 *Doug.* 441.

It is an offence at common law to obſtruct the execution of powers granted by a ſtatute, and an indictment for ſuch offence need not, and ought not, to conclude "*contra formam* "*ſtatuti.*"—This was an indictment againſt the defendants, for obſtructing the mayor and commonalty of the city of London, in making a horſe towing-path on the ſoil of the river Thames, under powers veſted in them by the ſtatutes of 14 *Geo.* 3. c. 91. and 17 *Geo.* 3. c. 18. At the trial a verdict was found for the king, ſubject to the opinion of the Court on the following caſe: "The city of London, under the "powers ſuppoſed to be delegated to them under the act of "parliament of 14 *Geo.* 3. c. 91. and by the 17th of the "ſame king, entituled, &c. c. 18. erected piles on the bed "of the river, near Richmond, within the high-water mark, "about the diſtance of 29 feet from the ſhore, for the pur-"poſe of making a towing-path for horſes, adjoining and "contiguous to a wharf in the poſſeſſion, and the property of "the defendants, or of thoſe under whom they claim. The "defendants cut down one of thoſe piles, which is the ſub-"ject of the preſent indictment, and which was proved to "have been erected between the high and low-water mark, "oppoſite to the ſaid wharf. No acts of ownerſhip were "proved, *on either ſide*, in the ſpot in queſtion; but it was "proved, that the *ait* in the middle of the river was Mr. "*Price*'s. It was proved, that immemorially, at the time of "low-water, perſons uſed to paſs on foot between the high "and low-water mark, for the purpoſe of towing barges "and other veſſels. The queſtion ſubmitted to the Court "is, 'Whether (this being a navigable river) the right "to the ſoil in the bed of the river, *uſque ad filum* "*atquæ*, is in the owners of the ground adjoining to the "river'?" For the defendants it was inſiſted, 1ſt, That the ſtatutes did not mean to veſt in the city the power of making towing-paths by *embankment*; 2dly, That the ſoil belonged to the defendants, and they were, therefore, protected by the 16th ſection of the ſtatute, by which it is provided, "That "the powers granted to the city ſhould not extend to autho-"rize them to make any *new* towing-path, over, upon, or "through, any garden, orchard, *yard*, park, paddock, in-"cloſed lawn, or planted avenue, to any houſe, without the "conſent

" conſent of the owner thereof :" for that the ſoil muſt have ſome owner; the city had no claim to it; and, as to the right of the crown, a diſtinction was to be made: that right was only in navigable rivers, as far as the ſea ebbs and flows. That did not depend alone on the circumſtance of the river being navigable. Some rivers were ſo immemorially, by nature, and from the flux and reflux of the ſea; others were kept in a navigable ſtate by the effects of art. That the Thames might be conſidered as falling under the firſt deſcription up to London bridge. From thence upwards, it was preſerved in a navigable ſtate by art. 3dly. That ſuppoſing it uncertain to whom the ſoil belongs, the city had not complied with the terms preſcribed by the ſtatutes to entitle them to make a horſe towing-path.—Lord MANSFIELD ſaid, the diſtinction between rivers navigable, and not navigable, and thoſe where the ſea does or does not ebb and flow, was very ancient: but that what was contended for, viz. a diſtinction between the caſe of the tide occaſioned by the flux of ſea-water, or by the preſſure backwards of the freſh water of a river, ſeemed to be entirely new, and that there were no facts ſet forth in the caſe which let in the conſideration of that diſtinction. That the caſe did not ſtate, whether the water, when the tide riſes at Richmond, is freſh or ſalt, but that it rather took it for granted that it is ſalt, deſcribing the Thames generally, as a navigable river. That as to the firſt and third objections, there was no queſtion made by the caſe, on the authority of the city to embank, or whether they had purſued the directions preſcribed by the legiſlature.—The verdict of guilty was ordered to be entered; and, afterwards, it was moved, that the judgment might be arreſted, on three grounds; 1ſt. That the offence (if at all indictable) was for obſtructing the execution of the ſtatute, and, therefore, the indictment ought to have concluded (which it did not), that the defendants had acted "*againſt the form of the ſtatute.*" 2dly. That the proſecutors ought to have ſtated, that they had purchaſed the ſoil, according to the proviſion for that purpoſe in the ſtatute. 3dly. That as there are a great variety of powers given by the act, and adapted to a multiplicity of different caſes, the indictment was too general and uncertain, not ſetting forth under what particular clauſe or power the city had acted.—WILLES, J. Only two of the powers in the act, which are various, are neceſſary to be obſerved upon here, viz. the power to improve the navigation, and the power to compel a purchaſe. Now, if they are conſidered together, it will appear, that the improvements are to be carried on without purchaſing, where there is no occaſion to purchaſe; and nothing is ſtated here to ſhew, that this was a caſe where purchaſe was neceſſary. *The indictment ſets forth, that the proſecutors were interrupted in the due exe-*

*cution of the act; and that is found by the verdict.* I see no foundation for arresting the judgment.—ASHHURST, J. of the same opinion. He said, there was no sort of doubt on the first point.—BULLER, J.—As to the first point, it was very properly given up; *the indictment would have been wrong if it had concluded contra formam statuti.* I think, on the face of the indictment, we must take the soil of the spot in question to be in the crown; for, though not necessarily, yet, *primâ facia*, the soil of a navigable river belongs to the king. The fact of the obstruction is sufficiently averred.—Rule discharged.

Jones v. Clay, Hil. Ter. 38 Geo. 3. C.B. 1 *Pul. & Bos.* 191.

If a party proceed against a defendant by action and indictment for the same assault, the Court will not compel him to make his election.—It being moved for a rule to shew cause why the plaintiff, who had proceeded against the defendant by action and indictment for the same assault, should not be directed to make his election to pursue either the one or the other, THE COURT refused the rule, saying, the defendant might apply to the Attorney-general for a *nolle prosequi*, if there was any thing vexatious in the proceeding by indictment; afterwards it was stated, that the Attorney-general having been applied to for the above purpose, had informed the defendant's agents, that since he had been in office it had been a rule with him never to grant a *nolle prosequi* in such cases (1).—THE COURT doubted if such an application had ever been allowed, saying, that the fine to the king, and the damages to the party, were perfectly distinct in their nature, and that if they did what was desired of them in this instance, they must lay it down as a general rule, that parties must always make their election.—Rule refused.

The King v. Wheatley, Hil. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1127. 1 *Black. Rep.* 273.

*In what cases an indictment will not lie.*]—An indictment will not lie for delivering less beer than contracted for as the due quantity.—Defendant was indicted, *for that he, being a common brewer, and intending to deceive and defraud one* Richard Webb, *delivered to him sixteen gallons, and no more, of amber beer, for, and as, eighteen gallons, which wanted two gallons of the due measure contracted to be delivered*; and received 15*s.* for the same; to the evil example, &c. and against the peace, &c. After conviction it was moved, in arrest of judgment, that this was not an indictable offence, being merely a breach of civil contract, and not a selling by false measure.—Lord MANSFIELD, Ch. J. The Court may use a discretion, "whether it be right to quash upon motion, or "put the defendant to demur;" but, after verdict, they are

(1) Vid. tam. *Rex* v. *Fielding*, esq. 2 *Burr.* 719. where it appears to have been considered by the Court of K. B. as the usual course.

obliged

obliged to arreſt the judgment if they ſee the charge to be inſufficient. And, in a criminal charge, there is no latitude of invention, to include any thing more than is charged: the charge muſt be explicit enough to ſupport itſelf. Here the fact is allowed; but the conſequence is denied: the objection is, that the fact is not an offence indictable, though acknowledged to be true as charged. And that the fact here charged ſhould not be conſidered as an indictable offence, but left to a civil remedy, by an action, is reaſonable and right in the nature of the thing: becauſe it is only an inconvenience and injury to a private perſon, ariſing from that private perſon's own negligence and careleſſneſs in not meaſuring the liquor upon receiving it, to ſee whether it held out the juſt meaſure or not. The offence that is indictable muſt be ſuch a one as affects the public. *As if a man uſes falſe weights and meaſures, and ſells by them to all or to many of his cuſtomers, or uſes them in the general courſe of his dealing: ſo, if a man defrauds another under falſe tokens.* For theſe are deceptions that common care and prudence are not ſufficient to guard againſt. So, if there be a conſpiracy to cheat: for ordinary care and caution is no guard againſt this. Thoſe caſes are much more than mere private injuries: they are public offences. But here, it is a mere private impoſition or deception: no falſe weights or meaſures are uſed; no falſe tokens given; no conſpiracy; only an impoſition upon the perſon he was dealing with, in delivering him a leſs quantity inſtead of a greater; which the other careleſsly accepted. It is only a non-performance of his contract: for which non-performance he may bring his action. The ſelling an unſound horſe, as and for a ſound one, is not indictable: the buyer ſhould be more upon his guard. In M. 6 *Geo.* 1. B.R. *Rex* v. *Wilders*, a brewer: he was indicted for a cheat, in ſending in, to Mr. *Hicks*, an ale-houſe keeper, ſo many veſſels of ale marked as containing ſuch a meaſure, and writing a letter to Mr. Hicks, aſſuring him that they did contain that meaſure; when, in fact, they did not contain ſuch meaſure, but ſo much leſs, &c. This indictment was quaſhed on argument, upon a motion: which is a ſtronger caſe than the preſent: therefore the law is clearly eſtabliſhed and ſettled; and, I think, on right grounds; but, on whatever grounds it might have been originally eſtabliſhed, yet it ought to be adhered to, after it is eſtabliſhed and ſettled. Therefore (though I may be ſorry for it in the preſent caſe, as circumſtanced), the judgment muſt be arreſted. DENISON, J. concurred. This is nothing more than an action upon the caſe turned into an indictment. It is a private breach of contract. And if this were to be allowed of, it would alter the courſe of the law; by making the injured party a witneſs upon the indictment, which he could not be (for himſelf)

ſelf) in an action, In the caſe of the *Queen* v. *Maccarty et al.* 6 *Mod.* 301. 2 Lord *Raym.* 1179. there were falſe tokens, or what was conſidered as ſuch. In the caſe of the *Queen* v. *Jones*, 1 *Salk.* 379. 2 Lord *Raym.* 1013. and 6 *Mod.* 105. S. C. the defendant had received 20l. pretending to be ſent by one who did not ſend him—ET PER CURIAM: "It is "not indictable, unleſs he came with falſe tokens: we are "not to indict one man for making a fool of another; let "him bring his action." If there be falſe tokens, or a conſpiracy, it is another caſe. The *Queen* v. *Maccarty*, 6 *Mod.* 302. was a conſpiracy, as well as falſe tokens. *Rex* v. *Wilders* was a much ſtronger caſe than this; and was well conſidered: that was an impoſition in the courſe of his trade; and the man had marked the veſſels, as containing more gallons than they did really contain, and had written a letter to Mr. *Hicks*, atteſting that they did ſo. But the preſent caſe is no more than a mere breach of contract: he has not delivered the quantity which he undertook to deliver. FOSTER, J. alſo agreed. WILMOT, J. concurred. This matter has been fully ſettled and eſtabliſhed, and upon a reaſonable foot. The true diſtinction that ought to be attended to in all caſes of this kind, and which will ſolve them all, is this—that in *ſuch impoſitions or deceits, where common prudence may guard perſons againſt the ſuffering from them, the offence is not indictable, but the party is left to his civil remedy for the redreſs of the injury that has been done him:* but where falſe weights and meaſures are uſed, or falſe tokens produced, or ſuch methods taken to cheat and deceive, as people cannot, by any ordinary care or prudence, be guarded againſt, there it is an offence indictable. In the caſe of *Rex* v. *Pinkney*, *P.* 6 *Geo.* 2. B.R. upon an indictment "for ſelling a ſack "of corn (at Rippon market) which he falſely affirmed to "contain a Wincheſter buſhel, *ubi re verâ et in factо plu-*"*rium deficiebat, &c.*" the indictment was quaſhed upon motion. In the caſe now before us, the proſecutor might have meaſured the liquor, before he accepted it: and it was his own indolence and negligence if he did not. Therefore common prudence might have guarded him againſt ſuffering any inconvenience by the defendant's offering him leſs than he had contracted for. This was the caſe of *Rex* v. *Pinkney*; and it was there ſaid, that if a ſhop-keeper, who deals in cloth, pretends to ſell ten yards of cloth; but, inſtead of ten yards bought of him, delivers only ſix; yet the buyer can not indict him for delivering only ſix; becauſe he might have meaſured it, and ſeen whether it held out as it ought to do, or not. In this caſe of *Rex* v. *Pinkney*, and alſo in that caſe of *Rex* v. *Combrun*, a caſe of *Rex* v. *Nicholſon*, at the ſittings before Lord *Raymond* after Michaelmas term, 4 *Geo.* 2. was mentioned; which was an indictment for

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selling six chaldron of coals, which ought to contain 36 bushels each, and delivering six bushels short: Lord *Raymond* was so clear in it, that he ordered the defendant to be acquitted.—Judgment arrested.

So in this case, an indictment for delivering less oats than the quantity contracted for, as the due quantity, was, on motion, also quashed: without argument. Rex v. Dunnage, Hil. Ter. 3 Geo. 3 B.R. 2 *Burr.* 1130.

So on shewing cause against quashing an indictment *for selling, as two chaldron of coals, a quantity defective by so many bushels* (in the indictment specified) *of that quantity which a bushel ought by law to contain.* It was argued, that this is tantamount to an indictment for selling *by false measure*; and was to be distinguished from the cases in 1 Sir *J. S.* 497. *Rex* v. *Gibbs.* 1 Lord *Raym.* 442. *Rex* v. *Flint*, and 2 *Salk.* 687. S. C. Lord MANSFIELD—A man may be indicted for *selling by false measure*: but this is not so charged. If it had been charged, "that he sold by false measure; by a "bushel which contained but so much, whereas the legal "bushel ought to contain so much;" it had been another thing. WILMOT, J. and YATES, J. both concurred. The latter said, it was only a declaration turned into an indictment. The former mentioned *Rex* v. *Lewis*, Ea. Ter. 1755. 28 *Geo.* 2. in this Court, which was an indictment for selling as gum-senega, what was not gum-senega; and that judgment was arrested: which was a very strong case, he said. Lord MANSFIELD—If there be no doubt of this indictment being bad, it is better for the prosecutor to quash it on motion. And I take it, that it ought to be expressly charged, "That the defendant sold them by false measure:" whereas here, it is not expressly charged, but only left to be collected by implication. ASTON, J. thought that this selling short measure, instead of full measure, was worthy the attention of the legislature; although it might not be indictable at common law, unless charged to be by false measure. He agreed, that this indictment had not the proper averments. WILMOT, J.—The reason why this is not indictable, is, because it is in every body's power to prevent this sort of imposition: whereas a false measure is a general imposition upon the public, which cannot be well discovered.—Indictment quashed. Rex v. Osborn, Tr. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1697.

An indictment against the defendant for converting his house into an hospital for taking in and delivering lewd, idle, and disorderly unmarried women; who, after their delivery, went away, and deserted their children, whereby the children became chargeable to the parish, was quashed, on motion.—Lord MANSFIELD: By what law is it criminal to deliver a woman when she is with child?—PER CURIAM: This is not indictable. Rex v. Felix Mac Donald, Hil. Ter. 5 Geo. 3 B.R. 3 *Burr.* 1645.

Rex v. John Storr. Tr. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1698.

An indictment will not lie for a mere civil injury.—On a motion to quash an indictment, being (as was said) for private injury only; though laid "*vi et armis*." It appeared that it was for unlawfully entering the prosecutor's yard, and digging the ground, and erecting a shed; and unlawfully, and with force and arms, putting out and expelling one Mr. *Sweet*, the owner, from the possession, and keeping him out of the possession of it. It was objected, "That this is only "an action of trespass converted into an indictment." Lord MANSFIELD, Ch. J. Nothing but the *vi et armis* implies force. Every force and violence is a breach of the peace. But it does not seem to me that any case has laid down any such rules as "That *vi et armis* alone im- "plies such a force as will, of itself, support an indict- "ment." In the case of *Rex* v. *Bathurst*, Ea. Ter. 28 *Geo.* 2, the fact itself naturally implied force: it was turning and keeping the man out of his dwelling-house; and done by three people. Three of the judges lay a stress upon that circumstance, of its being an entry into a dwelling-house: and the parties who framed the indictment plainly had a view to indict for a forcible entry. As at present advised, I should think the present case within those that justify the quashing. Coming with a pistol, though possible, is not to be supposed. If there be no doubt upon it, there is no reason to put the defendant to more expence. WILMOT, J. thought that it ought to appear to be an indictable offence: for, otherwise, in cases where there was no malice, the defendant might be put to a great expence without remedy or satisfaction. The cases cited shew, "that such indictments have been quashed:" and that of *Rex* v. *Bathurst*, being an entry into a *dwelling*-house makes that case no authority in this. But this case stands indifferent, "Whether the offence is indictable or "not:" whereas it ought to appear, upon the face of the indictment, "that it is indictable." YATES, J. concurred. *Rex* v. *Bathurst* was determined upon a right principle: but there, the nature of the offence appeared; and evidence might be given to shew the offence to be indictable. It was a forcible entry into a man's private dwelling-house, by three people (1). But in ordinary common cases laid *vi et armis*, we are not to suppose and presume swords and pistols, or any thing criminal and indictable, unless it be charged. Here is no outrage or violence charged or probable. ASTON, J.

(1) WILMOT, J. In four of the counts in *Rex* v. *Bathurst, et al.* "*Manu forti*" (which was in the first) was omitted: and it was holden, "That any sort of force sufficient to support it, might have been given "in evidence, by virtue of the words *vi et armis*; though, if no such "evidence should be given upon the trial, the defendant ought to be ac- "quitted." ASTON, J. mentioned, that he took Mr. Justice *Denison* to have said, that, *Vi et armis* was *primâ facie*, as good as *manu forti*.

likewise

likewiſe concurred. A man cannot be indicted for a bare treſpaſs. In a caſe of *Rex* v. *Jopſon* and five others, *P.* 25 *Geo.* 2. B.R. All the caſes of this ſort were cited: and the Court refuſed to quaſh it on motion. The diſtinction there taken was, "That there were numbers of perſons unlawfully aſſembled, and actual force charged;" and therefore that indictment was not quaſhed (1). In *Rex* v. *Bathurſt*, the ruling reaſon was, "that it was a dwelling-houſe:" and there would have been no occaſion to have recourſe to that reaſoning, if *vi et armis* alone had been ſufficient. The degree of force ought to appear upon the indictment. It was a matter of property, it ought to be civilly tried: as was done in a caſe of *Rex* v. *Wightwick*, *temp.* Lord *Hardwicke*: ſo in another of *Rex* v. *Fry*, for pulling down a houſe at Tunbridge.—Indictment quaſhed.

So in this caſe: an indictment for pulling off the thatch of a man's dwelling-houſe, he being in peaceable poſſeſſion of it, was quaſhed. And the like was done in *Rex* v. *Gillet*, Tr. Ter. 5 *Geo.* 3. B.R. 3 *Burr.* 1707. Rex v. Atkins, Tr. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1706.

This was an indictment for *(vi et armis)* breaking and entering a cloſe (not a dwelling-houſe); and unlawfully and unjuſtly expelling the proſecutors, and keeping them out of poſſeſſion; and it was objected, "that this was an indictment "for a mere treſpaſs, for a civil injury; not a public, but "a private one; a mere entry into his cloſe, and keeping "him out of it." WILMOT, J. No doubt an indictment will lie at common law, for a forcible entry; though they are generally brought on the acts of parliament. On the acts of parliament, it is neceſſary to ſtate the nature of the eſtate; becauſe there muſt be reſtitution: but they may be brought at common law. Here the words "force and arms" are not applied to the whole: but if they were applied to the whole, yet it ought to be ſuch an actual force as implies a breach of the peace, and makes an indictable offence. And this I take to be the rule, "that it ought to appear upon the face of the indictment to be an indictable offence." Here, indeed, are 16 defendants. But the number of the defendants makes no difference, in itſelf: no riot, or unlawful aſſembly, Rex v. Bake, *et al.* Tr. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1731.

(1) It was an indictment againſt *John Jopſon*, and five others, therein named, charging that they, and ſeveral other perſons, to the jurors unknown, unlawfully aſſembled to diſturb the peace of the king; and, being ſo aſſembled, the ſix defendants particularly named, with force and arms, at, &c. the mine of black lead of *J. B.* and *J. S.* eſquires, did unlawfully break and enter, and 60 pounds weight of black lead, &c. of the goods and chattels of the ſaid *J. B.* and *J. S.* did unlawfully take and carry away; againſt the peace, &c.——THE COURT thought it to be ſuch a ſort of offence, that they ought not to quaſh the indictment upon motion: the defendants might demur, if they thought proper. And they were unanimous in diſcharging the rule.

or any thing of that kind, is charged. It ought to amount to an actual breach of the peace indictable, in order to support an indictment. For, otherwise, it is only a matter of civil complaint. And this ought to appear upon the face of the indictment. YATES, J. concurred. Here is no force or violence shewn upon the face of the indictment, to make it appear to be an actual force indictable: nor is any riot charged; or any unlawful assembly. Therefore the mere number makes no difference. ASTON, J. concurred: the rule is, "That it ought to appear upon the face of the indictment to be an indictable offence.—Indictment quashed.

Rex v. Bower, Tr. Ter. 15 Geo. 3. B.R Cowp. 323.

An indictment does not lie against *a private person* for knowingly exposing to sale, and selling, wrought gold under the sterling alloy, as and for gold of the true standard weight; which is indictable in goldsmiths. The defendant, who was *a pawnbroker*, was indicted for making, and causing to be made, one gold watch-chain, weighing 15 dwts. 9 gr. of worse gold than it ought to be made; to wit, of gold no way agreeing with the standard; but being according to the rate of 12 carats and two grains, in the pound weight troy, worse than the standard: and for that he, the said *William Bower*, the said gold chain so falsely made, &c. afterwards falsely and *knowingly*, to one *William Black*, did *expose to sale*, and sell, *as and for a thing wholly made of gold and agreeing with the said standard*, in contempt, &c.—It was moved, in arrest of judgment, on the ground that this was not an indictable offence, and moreover, that it did not appear at the trial that the defendant knew whether the chain was of the standard weight, or not; for the sale was by the servant; who, upon being asked by the plaintiff if it was real gold, answered in the affirmative, that it was. Lord MANSFIELD, Ch. J. *The knowing it to be under the standard*, is an inference of law; but the selling, by his servant, was certainly his *exposing it to sale*.—THE QUESTION is, Whether the exposing wrought gold to sale under the standard is indictable at common law? There are two precedents in *Tremaine*'s entries, one for making, the other barely for exposing to sale. The statutes upon the subject relate only to goldsmiths.—It is certainly an imposition; but it is one of those frauds only, which a man's own common prudence ought to be sufficient to guard him against; and which, therefore, is not indictable; but the party injured is left to his civil remedy. ASTON, J. This is a private cheat: it is not selling by *false measure*, it is only selling under the standard. Selling coals *under measure* is not an indictable offence, but selling them by *false measure* is. *Rex* v. *Lewis*, *Rex* v. *Wheatley*, delivering *sixteen gallons* of beer, as and for *eighteen*, is only a private fraud, and not indictable. WILLES, J. agreed.—Judgment arrested.

This

This was an indictment at common law charging that "the "defendant deceitfully intending by crafty means and devices "to obtain poſſeſſion of certain lottery tickets, the property "of *A.* pretended that he wanted to purchaſe them for a "valuable conſideration, and delivered to *A.* a fictitious order, "&c. purporting to be a draft upon a banker for the amount, "which he knew he had no authority to draw, and that it "would not be paid, by virtue of which he obtained poſſeſ- "ſion of the tickets and defrauded the proſecutor of the "value."—The defendant having been convicted, it was moved in arreſt of judgment:—1ſt, That this indictment being for a fraud at common law, there muſt be ſome extrinſic token, beſides the bare aſſertion of the defendant, charged to have been uſed by him in order to effectuate his fraudulent intent, ſuch as common prudence would not be ſufficient to guard againſt.—2dly, That the fraud muſt be relative to ſomething of a public nature, and not a mere private concern between the parties.—Lord KENYON, Ch. J. The caſe of the *King* v. *Wheatley*, ſeems to have clearly eſtabliſhed the true boundary between thoſe frauds that are, and thoſe that are not indictable at common law. Mr. J. *Deniſon* there ſaid, *there muſt either be a falſe token or a conſpiracy.* And Mr. J. *Wilmot* mentioned a caſe where an indictment for ſelling a ſack of corn which the defendant falſely affirmed to contain a Wincheſter buſhel was quaſhed. Now in this caſe, where is the falſe token, or what was uſed by the defendant to gain credit beyond his own aſſertion? He ſat down and drew a check on a banker; but it would be ridiculous to call that a falſe token; that left his credit juſt where it was before. What the defendant did was immoral and highly reprehenſible: but as he uſed no falſe token to accompliſh his deceit, the judgment muſt be arreſted.—GROSE, J. The diſtinction taken by *Hawkins* is plain; ſpeaking of deceits he ſays (b. 1. c. 71. ſ. 1.), it is an indictable offence to defraud another of his known right by means of ſome artful device; and in ſect. 2. "that the deceitful receiving of money from one man to another's uſe, upon a falſe pretence of having a meſſage and order to that purpoſe, is not puniſhable by a criminal proſecution, becauſe it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie." In this caſe, in order to make it ſomething more than a bare naked lie, it is ſaid that the defendant uſed a falſe token, for that he gave a check on his banker: but that was only adding another lie. If we were to determine that this was indictable, I do not know how to draw the line; for it might equally be ſaid that every perſon who overdrew his banker uſed a falſe token and might be indicted for it.—LAWRENCE, J. It is admitted that a mere falſe aſſertion unaccompanied by a recommendation is not indictable, and I think there is nothing in

The King v. B Lara, Hil Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 565.

in this case beyond the defendant's own false assertion. In *Nehuff's* case, *Salk.* where the defendant borrowed 600l. of a *feme covert*, and promised to send her fine cloth and gold dust as a pledge, and sent no gold dust but some course cloth worth little or nothing; the Court said "It was not a matter criminal, but it was the prosecutor's fault to repose such a confidence in the defendant (1)."—Rule absolute.

The King v. J. Sharples, Tr. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 777.

The defendant was indicted for exercising his trade, as a farrier, at Lancaster, being a foreigner, and not having made any composition with the mayor and bailiffs of the borough, for his freedom within the borough, contrary to the laws, customs, and constitutions of the borough, and against the peace, &c. On the removal of the indictment into this Court, he demurred to it; and *The Court*, without argument, were clearly of opinion, that this was not an indictable offence, it not being an offence contrary to the general laws of the land, and gave—Judgment for the defendant.

Rex v. Webb, Ea. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1469.

*Quashing an indictment.*]—A motion on behalf of a prosecutor, "for leave to quash his own indictment," is by no means a motion of course; more especially, if the defendant has been put to expence, or there has been unnecessary or affected delay; and *Wilmot*, J. cited the case of *The King* v. *Moore*, in 2 Sir *J. S.* 946, where an indictment for perjury having been removed by *certiorari*, and the defendant having paid costs for not going on to trial, the prosecutor afterwards moved to quash it; which the Court refused, unless he would submit to pay costs.

Rex v. Crookes, Hil. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1841.

Upon a motion to quash an indictment, found at the quarter-sessions for selling by false weights. THE COURT said, they were not obliged to quash on motion; and as this was an indictment for such an offence, they might demur to it.

Rex v. Sutton, Tr. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2116.

The Court refused to quash an indictment for a *nuisance* in keeping a house (near Epsom), for inoculating for the small-pox, and said, You must demur; we do not of course quash indictments for *nuisances*, upon motion. We have thought of this; we are not bound to quash this indictment on motion.

Rex v. Feildhouse, Tr. Ter. 15 Geo. 3. B.R. *Cowp.* 325.

It was moved, on the part of the prosecutor, to quash an indictment against the defendant, consisting of two counts; one for a *riot*, the other for an assault; and the exception

(1) *Rex* v. *Lockett*, O. B. June, 1772, and afterwards decided by all the judges in Trinity Term, 1774. Upon an indictment for forging an order for payment of money, being in truth a draft upon a banker, drawn in the name of a fictitious person; they held it immaterial whether such person existed or not; it being sufficient that the order on the face of it imported a right on the part of the drawer to direct such a transfer of his property. M. S. and *Leach.* 89. S. C.

was,

was, that the grand jury had only found it a true bill, as to the count for an aſſault, and indorſed *ignoramus* on the count for the riot; whereas they ſhould have found the whole to have been a true bill, or rejected the indictment in *toto*; and for this were cited, 2 *Hawk.* 210. *Yelv.* 99, 100. *Rex* v. *Ford.*—SED PER CURIAM: This caſe certainly does not come within the doctrine of that caſe; the doctrine there laid down relates only to caſes where the grand jury take upon themſelves to find part of the ſame indictment to be true, and part falſe: in that caſe it is held that the whole is void, and the reaſon ſeems to be, becauſe the jury do not affirm the fact ſubmitted to their enquiry. But where there are two diſtinct counts, as in this caſe, the finding *billa vera*, as to one count only, and rejecting the other, leaves the indictment as to the count, which the jury affirm, juſt as if there had originally been only that one count.

An indictment was quaſhed, becauſe ſeveral defendants were joined in it.—The defendant, and eleven others, had been indicted in the ſame indictment, which was for unlawfully exerciſing the trade or myſtery of tanning leather, contrary to the ſtatute of 1 *Jac.* 1. c. 22. § 5. concerning cutting and tanning leather. And it was moved, on behalf of the defendants, to quaſh the indictment, 1ſt, that this is not an indictable offence; for the proſecutor ought to purſue the penalty annexed to the offence, which is ſpecified in one and the ſame clauſe of the act, viz. forfeiture of the leather tanned, or the juſt value thereof; and, 2dly, that ſeveral defendants cannot be joined in one and the ſame indictment. And the counſel for the proſecutor ſaid, he thought he could ſupport the indictment upon the firſt objection, but he could not upon the ſecond.—Whereupon, the rule was made abſolute (for quaſhing the indictment). Rex *v.* John Tucker and eleven others, Ea. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2046.

And the Court may impoſe terms on a proſecutor before they allow him to quaſh the indictment.—The defendant was indicted for perjury, which indictment was removed by *certiorari* into the King's Bench, at the inſtance of the proſecutor.—After notice of trial had been given, a freſh indictment was preferred and found againſt the defendant, and alſo removed by *certiorari*.—Upon which it was moved to quaſh the firſt indictment; and it was contended, that by the rule and practice of the Court, a proſecutor had a right, by his counſel, to quaſh his own indictment, without diſcloſing his name. SED PER CURIAM: There can be no ſuch rule, that, when a man is indicted for an infamous offence, the proſecutor is entitled to come into Court, and quaſh his indictment as often as he pleaſes; it may be, *in infinitum*. The Court will ſee, that no miſchief or oppreſſion enſues, before they grant leave for that purpoſe; therefore, let the firſt indictment be quaſhed, the counſel for the proſecution The King *v.* Webb, Ea. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1468. 1 *Black. Rep.* 460.

cution conſenting, that the ſecond ſhall ſtand, to all intents and purpoſes, in the ſame plight and condition as the firſt would have done: and, after ſuch evident delays, the counſel muſt be called upon to name the proſecutor. *John Wilkes*, eſq. was then named as the proſecutor, who, having abſconded from juſtice at the times when both the indictments were preferred, *the Court* demanded, by what authority that declaration was made. To which it was anſwered by the inſtructions of *James Philips*, the ſolicitor, in this proſecution.

The King *v.* John Fearnley, Tr. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 316.

Upon a demurrer to an indictment, found in an inferior court, objections may be taken, as well to the *juriſdiction* of ſuch court, as to the *ſubject-matter* of ſuch indictment. And where the caption of the indictment ſtates the court of quarter-ſeſſions, where ſuch indictment was found, to have been held on an impoſſible day, it is fatal.—This was a demurrer to an indictment: the caption was as follows:

Weſt-Riding of Yorkſhire, to wit. } At the general quarter-ſeſſions of the peace of our lord the king, holden at Knareſborough, in and for the weſt-riding of the county of York, on Tueſday, the 4th day of October, in the 25th year, &c. before, &c. that ſame ſeſſions of the peace is adjourned by the juſtices aforeſaid, until Thurſday, the 6th day of July aforeſaid, in the year aforeſaid, at ten of the clock in the forenoon of the ſame day, to be holden at Leeds, in and for the riding aforeſaid, to do farther as the Court there ſhall conſider, &c. And on the ſaid Thurſday, the 6th day of October aforeſaid, in the year aforeſaid, the ſame general quarter-ſeſſions of the peace is holden by the adjournment aforeſaid, at Leeds aforeſaid, in and for the ſaid riding, before, &c. at which ſaid general quarter-ſeſſions of the peace, continued and holden by the adjournment aforeſaid, at Leeds aforeſaid, in and for the ſaid riding, on the ſaid Thurſday, the 6th day of October aforeſaid, in the year aforeſaid, before the juſtices laſt named, on the oaths of, &c. It was preſented as followeth, that is to ſay [ſetting forth the indictment].—In ſupport of the demurrer, the objections taken were, 1ſt, that every caption of an indictment muſt ſhew that it was taken before a court having a competent juriſdiction. 2 *Hawk.* P.C. 253.; that the caption of this indictment ſtates, that the ſeſſions were held on Tueſday, the 4th of October, in the 25th year of the reign, &c. and then it ſtates that the ſame ſeſſions were adjourned till Thurſday, the 6th day of July aforeſaid; therefore the Court, before which this indictment was found, was held without an adjournment, and had not a competent juriſdiction. It was anſwered that this being a demurrer to an indictment, no advantage could be taken of any want of form in the caption; BUT THE COURT were of opinion that this was a good objection, becauſe,

becauſe, by the caption of the indictment, it appeared that the court of quarter-ſeſſions had no juriſdiction. Upon a demurrer to an indictment, the Court muſt look to the whole record, to ſee whether they are warranted in giving judgment on it; and, therefore, it is open to objections, as well to the juriſdiction of the Court where the indictment is found, as to the ſubject matter of the indictment.—Judgment for the defendant.

Rex. *v.* Lookup, Ea. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1901.

*Arreſt of judgment.*]—The offence being alleged in the indictment to have been committed in the time of *the late king*, and charged to be *againſt the peace of the now king*, is fatal, and renders the indictment inſufficient.—This was a conviction upon an indictment for wilful and corrupt perjury, in an anſwer to a bill in Chancery. And ſentence of the pillory and tranſportation had been pronounced. Eight or nine days after the ſentence had been ſo pronounced, it was moved to ſtay the entry of the judgment, in order to give him an opportunity of moving in *arreſt* of judgment; a fatal miſtake having been ſince diſcovered, viz. "that the fact was charged to have "been committed in the time of the *late* king," whereas the indictment concludes, "againſt the peace of the *preſent* king:" and his counſel urged, that he was within time, as the motion was made during the ſame term in which the ſentence was pronounced, and the entry-roll of the record was not made up. BUT THE COURT denied this motion; they thought, that in *ſuch* a caſe, and upon *ſuch* an objection, they were not bound or warranted to let in a motion in arreſt of judgment, after ſentence pronounced: that his regular remedy was by writ of error.—The next day it was moved to adjourn his ſtanding in the pillory, on an affidavit (made by his phyſician) of his illneſs, and that his ſtanding in the pillory, in the open air, for an hour, would probably endanger his life. And the rule for ſetting the defendant in the pillory was enlarged until the 17th day of December, or as ſoon afterwards as the ſame could be done, without danger from the defendant's indiſpoſition. —The next day the Court were urged, on behalf of the defendant, to reconſider their judgment, that is to ſay, their ſentence; and for this were cited, 1 *Salk.* 78. The *Queen* v. *Darby*, and *Farreſley* (7 *Mod.* 100. S. C. and 2 *Hale*'s Hiſt. P. C. 379. where Lord Ch. J. *Hale* ſays, "If, by any "miſtake or overſight, the Court ſhould give judgment "againſt a clerk convicted of a felony within clergy; yet they "may, and (as I think) ought to allow him his clergy, after "his attainder."—And it was further urged, that as the judgment of the Court ought to have been *quod caſſetur*, it was not only in their power to ſet it right now, but they were even bound *ex officio* to do ſo.—But the Court perſiſted in not doing this, without ſome precedent. They ſaid, the citation from *Hale*'s H. P. C. was not parallel to the preſent caſe. There

There the judgment would only be corrected; this is a motion to arreſt it. That was a capital caſe too; here you are limited to a time. And even in capital caſes, you have no inſtance of ſuch a motion as this, after the expiration of the limited time.—Motion denied.—Whereupon, the defendant brought a writ of error returnable in parliament; and the following queſtion was put by the lords to the judges—"Whether the perjury being alleged in the indictment to "have been committed in the time of the late king, and "charged to be againſt the peace of the now king, is fatal, "and renders the indictment inſufficient?" The Lord Chief Baron delivered the unanimous opinion of the judges, in the affirmative. And upon this point, the judgment of the King's Bench was reverſed. Two days after, it was moved, on his behalf (but without his being brought up into court), that he might be diſcharged. And, the order of reverſal being produced and read, the Court ordered him to be diſcharged.

The King *v.* Mathews, Hil. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 162. *Nolan*, 202.

The indictment ſtated that the defendant, late of Woolhampton, in the county of Berks, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, made an aſſault on *J. W.* &c. concluding againſt the form of the ſtatute in ſuch caſe made and provided. It was moved in arreſt of judgment: 1ſt, Becauſe no proper *venue* was laid. The indictment only ſtated it to be at the pariſh aforeſaid, no pariſh having been before mentioned, Woolhampton not being deſcribed as a pariſh, *Latch.* 194. *Man*'s caſe, 1 *Rol.* Rep. 223.—2dly, Becauſe the offence is laid to be againſt the form of the ſtatute, and it is only an offence at common law: for which, *Cholmley*'s caſe, *Cro. Car.* 464.—THE COURT ſaid, there was clearly no foundation for the laſt objection. It had been frequently over-ruled, and determined that the words "againſt the form of the ſtatute" might be rejected as ſurpluſage (1). But as to the firſt point, they inclined to think the objection fatal. They ſaid they could not intend any thing concerning Woolhampton, becauſe there was no occaſion at the trial to prove what place it was. But there ought on the face of the record to appear ſome certain *venue*; whereas, here the offence was only laid at the pariſh aforeſaid, and no pariſh was before mentioned.—Judgment reverſed (2).

The King *v.* Myddleton, Tr. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 739.

The defendant was indicted for that he, within twelve months next before the taking of this inquiſition, viz. on the 2d of March, 36 *Geo.* 3. with force and arms, at the pariſh of St. George's, Bloomſbury, in the county of Middleſex, un-

(1) Vid. 2 *Hawk.* P.C. c. 25. ſ. 115, 116. *R.* v. *Bathurſt*, *Say.* 225. and *R.* v. *Kettleworth*, E. 32 *Geo.* 3. B.R. S.P.

(2) Vide *Hawk.* P.C. lib. 2. c. 23. ſ. 92. and 1 *Rol.* R. 21 and 27.

lawfully

lawfully did contract with one *John Miles*, he the ſaid *John Miles* then and there being a manufacturer, workman and artificer of Great Britain, in the manufacture of weaving linen cloth, then and there being a manufacture of Great Britain, to go out of this kingdom of Great Britain *into a certain foreign country called America, ſuch foreign country not then being within the dominion of, or belonging to the crown of Great Britain*, in contempt, &c. and againſt the form of the ſtatute, &c.—It was moved in arreſt of judgment, 1ſt, That the words in the indictment were in the copulative "workman and artificer," whereas in the ſtatute they are in the disjunctive "or;" but this was abandoned on ſhewing cauſe. 2dly, That the manufacture mentioned in the indictment was not one of thoſe enumerated in the 23 *Geo.* 2. c. 13. on which the indictment was founded: this was alſo abandoned, the ſtatute ſaying "*or any other manufacturer*, &c.—3dly, That the indictment charged America *generally to be out of the king's dominions*, which is notoriouſly otherwiſe; and that the Court will take notice that ſome parts of America are within the dominions of the crown. It ought to have ſtated to what country in America the manufacturer was enticed.—Anſwer. This was a fact for the jury; or the name of the foreign country may even be rejected as ſurpluſage.—PER CURIAM: There is no ground for any of the objections. It is alleged in the indictment and found by the jury, that the defendant contracted with the manufacturer to go to a foreign country called America, not being within the dominions of the crown. *Non conſtat* but that there may be ſome place called America, beſides the continent of America. The verdict is concluſive.—Rule diſcharged.

## Infant.

A CONVEYANCE of an infant mortgagee is binding, and cannot be avoided by entry during infancy.—This was a ſpecial caſe in ejectment: and the queſtion was, "Whether an infant's conveyance by leaſe and releaſe was abſolutely void, or only voidable?"—The ſpecial caſe was in ſubſtance as follows: *John Bicknell*, ſeiſed in fee, by indentures of leaſe and releaſe, 24th and 25th of March, 1750-51, conveyed the lands in queſtion, to *William Cook* and his heirs, by way of mortgage, for 280l. *William Cook* died, leaving *John Lamb Cook* an infant his ſon and heir, and his widow and ſaid *John Lamb Cook*, his executors and reſiduary legatees. *John Bicknell*, the mortgagor, afterwards brought the title deeds to one *Williams*, an

Zouch *ex dim.* Abbot and Hallet *vs.* Parſons, Mic. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1794. 1 *Black.* 575.

an attorney, to procure 400l. to pay off the ſaid mortgage, and for other purpoſes; who procured it of the leſſors of the plaintiff: and, by leaſe and releaſe, 29th and 30th of June, 1761, the ſaid *John Lamb Cook* (then an infant between 16 and 17) and *Elizabeth Cook* the widow, in conſideration of the 280l. and ſaid *Bicknell*, in conſideration of 120l. releaſed and confirmed the premiſes, to the leſſors of the plaintiff and their heirs, to ſecure ſaid 400l. *Williams*, when he drew the deed, apprehended the whole 280l. to remain due to the *Cooks*; but, in fact, only 109l. thereof remained undiſcharged, the reſidue having been paid off, in the life-time of *William Cook*. *Bicknell* continued in poſſeſſion, from the time of his mortgage to *William Cook*, and in 1756 mortgaged the ſame to *Thomas Thorne*, for a term of years, to ſecure 200l. and *Thomas Thorne*, in March, 1762, aſſigned the ſame to the defendant *Parſons*, in conſideration of 228l. the principal and intereſt then due. But, before the ſaid aſſignment, *Williams*, the attorney for the leſſors of the plaintiffs, gave notice to the defendant, of their mortgage in fee. On the 27th of March, 1764, two days before the aſſizes, *John Lamb Cook* (being ſtill an infant under 20 years of age) made an entry on the premiſes, in order to avoid the ſaid leaſe and releaſe of 1761, to the leſſors of the plaintiffs.—THE QUESTION was, Whether the leſſors of the plaintiffs had a right to recover the premiſes?—After the caſe had been very elaborately argued, Lord MANSFIELD, Ch. J. now delivered the reſolution of the Court to the following effect. The merits of this cauſe turn upon two general queſtions: 1ſt, Whether this conveyance is good, and binds the infant?—2dly, If it does not bind the infant, whether the defendant can take advantage of the infancy, and on that account object to it?—As to the firſt, miſerable muſt the condition of minors be; excluded from the ſociety and commerce of the world, deprived of neceſſaries, education, employment, and many advantages; if they could do no binding acts. Great inconvenience muſt ariſe to others, if they were bound by no act. The law therefore, at the ſame time that it protects their imbecility and indiſcretion from injury through their own imprudence, enables them to do binding acts, for their own benefit; and, without prejudice to themſelves, for the benefit of others. To mention a rule or two; the reaſons of which are applicable to the preſent caſe. If an infant does a right act which he ought to do, which he was compellable to do, it ſhall bind him: as if he makes equal partition; if he pays rent; if he admits a copyholder, upon a ſurrender. But there is no occaſion to enumerate inſtances: the authorities are expreſs; and the reaſon, deciſive.—"Generally, whatſoever an infant "is bound to do by law, the ſame ſhall bind him, *albeit*, he "doth it without ſuit of law." *Co. Litt.* 172. 2.—The 2d reſolution

reſolution in *Conny*'s caſe, 9 *Co.* 85. b. is, "That although "the infant in the caſe at bar was not compellable to attorn, "becauſe the manor was not conveyed by fine; yet, becauſe "by a mean, he was compellable to attorn. *ſcilicet*, if a fine "had been levied, the attornment is good." *Forteſcue* lays it down larger, 18 *H.* 6. fo. 2. a.—He did but that "which he ought to do: therefore the attornment is good. "The attornment of an infant to a grant by deed is good "becauſe it is a lawful act: albeit, he be not, upon that "grant by deed, compellable to attorn," *Co. Litt.* 315. a. The reaſon is manifeſt—A right and lawful act is not within the reaſon of the privilege: which is given, to protect infants from wrong. His being compellable by any mean, or in any way to do it, proves the act to be ſubſtantially what he ought to do. To what end ſhould the law permit a minor to avoid an act, which, in any way, through any mean, by any juriſdiction, he might be compelled to do over again, after it was undone? it would be aſſiſting him to vex and injure others, without the leaſt benefit to himſelf. Another rule, which may be collected from the books, is "That the acts of an "infant, which do not touch his intereſt, but take effect "from an authority which he is truſted to exerciſe, are "binding:" as, where an infant-patron preſents; an infant-executor duly receives and acquits, pays and adminiſters the aſſets; an infant-head of a corporation joins in corporate acts; an infant-officer does the duty of an office which he may hold. A third rule deducible from the nature of the privilege, which is given as a ſhield, and not as a ſword, is, "That it never ſhall be turned into an offenſive weapon of "fraud or injuſtice." As where tenant for life and infant in remainder levied a fine, the infant reverſed the fine, as to himſelf, for the inheritance, for nonage: yet he ſhall be bound by his aſſent to the fine and joining in it, not to enter for the forfeiture. And the fine was held good, as to the eſtate or tenant for life; and reverſed *quoad* the infant only. *Pigot* v. *Ruſſel*, 2 *Leon.* 108. *Cro. Eliz.* 124. S. C. To ſee whether the reaſons of theſe rules are applicable in the preſent caſe, it is neceſſary to aſcertain what is in truth the nature of this tranſaction. Part of the perſonal eſtate of *William Cook* conſiſted of 109l. due from *John Bicknell*, ſecured by a mortgage in fee. His widow and infant ſon were joint-executors, and reſiduary legatees; and as ſuch, entitled to this money. The fee which deſcended to the ſon was merely as a pledge for the money: beſides the money, the infant had no beneficial intereſt in the land whatſoever. Upon payment, he was bound to convey, as the mortgagor ſhould direct. Conveying is no more than delivering up a ſecurity when it is ſatisfied. The money here was paid to the proper hand. An adult, under the ſame circumſtances, would have been guilty of a

breach of truſt; if he had refuſed, he would have been compelled to do it, and would have been condemned in coſts for refuſing. By act of parliament, 7 *Ann.* c. 19. ſ. 2. the infant was compellable to do it, during his minority. It is much ſtronger here, that the money was paid by the plaintiffs; who, upon the faith of this conveyance, and the title deeds produced by *Bicknell* the mortgagor, advanced more money. The whole beneficial eſtate belonged to *Bicknell*, after paying the 109l. The infant's conveyance was matter of form, and in the nature of an authority, executed by *Bicknell*'s direction, in favour of a third perſon who ventured his money upon the faith of it. It would be iniquitous in the infant, to avoid it: it would be unjuſt to ſet up the privilege, to make an innocent man loſe his money, circumvented by his confidence in the infant's concurrence. But it could not even have that effect. It would be nugatory, and without any effect. For, if it was avoided, he muſt make the ſame conveyance over again: he would be compelled to do it. A conveyance to the defendant would be a breach of truſt. It is clear, that the infant was expreſsly a truſtee for the plaintiffs. He was paid by them: upon the faith of the fee being in him, they advanced more money. If the fee was in a ſtranger, the plaintiffs have the prior equity. If *Thorne* had been prior; his letting the mortgagor have the title-deeds, might be ſufficient to poſtpone him. And the defendant had expreſs notice. There can be no doubt that the infant was compellable to do what he has done. UPON THE FIRST QUESTION, WE ARE ALL OF OPINION, "THAT THIS CONVEYANCE BINDS THE "INFANT." But ſuppoſing it not binding againſt him, or thoſe who may ſtand in his place.—THE SECOND QUESTION is, "Whether the defendant can take advantage of the "infancy; and, on that account, object to the conveyance?" This depends upon two points: 1ſt, "Whether this con-"veyance be void, or voidable only?" 2dly, If voidable only, "whether the infant, by his entry before the aſſizes, had ab-"ſolutely avoided it?" It is not ſettled, what is the true ground upon which an infant's deed is voidable only. Whether "the ſolemnity of the inſtrument is ſufficient;" or "it depends upon the ſemblance of benefit to the infant, "from the matter of the deed upon the face of it." As to the firſt, the ſolemnity of the inſtrument—We think the law is, as laid down by *Perkins*, Sect. 12. that "All ſuch gifts, "grants, or deeds, made by infants, which do not take effect "by delivery of his hand, are void: but all gifts, grants, or "deeds, made by infants, by matter in deed or in writing, "which do take effect by delivery of his hand, are voidable "by himſelf, by his heirs, and by thoſe who have his "eſtate." The words "*Which do take effect*" are an eſſential part of the definition; and exclude letters of attorney, or deeds which

which delegate a mere power and convey no intereſt. In *Bro.* Abr. title "*Dum fuit infra ætatem*," pl. 1. (which cites 46 *Edw.* 3. 34.) it is noted "That a *dum fuit infra ætatem* "was admitted to lie of a rent: and yet, by ſome, the grant "of an infant was void and not voidable." But (ſays the book), "It is not ſo: for then this action would not lie. "And beſides, the delivery of a deed cannot be void: but only voidable." There is no difference in this reſpect, between a feoffment and deeds which convey an intereſt. The reaſon is the ſame.—The delivery of the deed muſt be in the preſence of witneſſes, as much as the livery of ſeiſin; the ceremony is as ſolemn. The preſumption "that the witneſſes would not atteſt, if they ſaw him an infant," holds equally as to both. *Littleton*, who writes with great accuracy and preciſion, puts them both upon the ſame foot. He ſays, ſect. 259. "If before the age of 21, any deed or feoffment, grant, "releaſe, confirmation, obligation, or other writing, be made "by any of them, &c. all ſerve for nothing, and may be "avoided." In 2 Inſt. 673. a bargain and ſale enrolled by an infant is denied to be matter of record which the infant muſt avoid during his minority; but the book ſays, "He may "avoid it when he will." An infant, or they who ſtand in his place, cannot plead "*non eſt factum*," and give the infancy in evidence; but they muſt plead the infancy ſpecially, to avoid the deed: and that plea avoids it, by relation back to the delivery. The reaſon of this is, becauſe it has an operation from the delivery; and not becauſe it has the form of a deed. The deed of a *feme covert* has the form, but ſhe may plead "*non eſt factum*;" becauſe it has no operation.—The diſtinction between the deeds of *femes covert*, and of infants, is important; the firſt are void, the ſecond voidable. *Perkins*, ſ. 154. title "Faites," p. 32. ſays, "And it is to be "known, that a deed cannot have and take effect at every "delivery, as a deed; for, if the firſt delivery take any effect, "the ſecond is void. As in caſe an infant makes a deed, and "deliver the ſame as his deed, &c. and afterwards, when he "comes of full age, delivers it again as his deed; this ſecond "delivery is void. But if a married woman deliver a bond "unto me, or other writing, as her deed; this delivery is "merely void: and therefore, if after the death of her "huſband, ſhe, being ſingle, deliver the ſame again unto "me as her deed; the ſecond delivery is good and effectual (1)." Two objections were made at the bar to this propoſition, at leaſt, in its extent.—1ſt, That leaſes by an infant, by deed, upon which no rent is reſerved, are abſolutely void; therefore, the criterion, "Whether the deed is void or

(1.) Vide vol. II. p. 310.

voidable," does not depend upon the delivery, but upon the matter and contents.—" Whether it may poſſibly be for the " infant's benefit."—2dly, A ſurrender by an infant, by deed, is abſolutely void, therefore all deeds are not voidable only. As to the firſt, there are many obiter ſayings; but there is no ſufficient authority clearly to outweigh the reaſons againſt this poſition: I cannot find a caſe adjudged ſingly upon this ground. What looks the likeſt to an authority, is the opinion of *Wray* and *Southcote* againſt *Gawdy*, in *Humphreſton's* caſe, 16 *Eliz. Moore*, 105, and 2 *Leon.* 216. *Benlo.* 195. *Owen*, 64. *Dyer*, 337. a. 1 *And.* 40. but there the judgment was upon the right and merits of the caſe, and not upon the point of the leaſe. The queſtion, as to the leaſe, aroſe upon the fictitious leaſe to try the infant leſſor of the plaintiff's title in ejectment. The two *(Wray* and *Southcote)* held " That, no rent being " reſerved, there was no ſemblance of benefit to the infant." Whereas, in truth, it was greatly for his benefit. The objection was turning his own privilege of infancy againſt him, to bar his recovering. Beſides, the leaſe was by parol.—But reaſon ſoon prevailed; and it has been long ſettled, " That " an infant may make a leaſe, without rent, to try his title." Very prejudicial leaſes may be made; though a nominal rent be reſerved: and there may be moſt beneficial conſiderations for a leaſe though no rent be reſerved. What ſeems deciſive is, " That the leſſee can, in no caſe, avoid the leaſe, on account " of the infancy of the leſſor;" which ſhews it not to be void, but voidable only. And it is better for infants, that they ſhould have an election. As to the ſecond, the authority of *Lloyd* v. *Gregory* was cited (1):—And ſayings arguendo, in *Thompſon* v. *Leach* (2).—The caſe of *Lloyd* v. *Gregory* was determined upon the ſpecial verdict, by three judges; of whom, Sir *William Jones* and *Croke* were two.—Sir *William Jones* reports, " That the ſecond leaſe being void made an end of " the queſtion; and that the judges gave no opinion upon the " other points." The note in *Croke, Jac.* 302. does not ſay a word of the only ground of the judgment; but rather ſuppoſes the ſecond leaſe good, by arguing, " That there " being no increaſe of term, or diminution of rent, it had no " ſemblance of benefit." *Croke*'s note might be confounded with what paſſed upon the trial at bar: for *Roll* ſtates ſayings to that effect upon the trial at bar, 1 *Ro.* Abr. 728. pl. 3. But

(1) *Lloyd* v. *Gregory* is reported in *Cro.* Car. 502. and Sir *William Jones*, 405. and is abridged in 2 *Ro.* Abr. 24. title " Faites," letter I. pl. 6. and 495. title " Surrender," letter F. pl. 7. and in *Ro.* Abr. 728. title " Enfants," letter B. pl. 2 and 3.

(2) 3 *Lev.* 284. 2 *Ventr.* 198, 199. 3 *Mod.* 296. 301. 2 *Salk.* 618. Parliament Caſes, 150. 1 *Shower*, 296. *Comberb.* 438. 468. *Carthew*, 211. 435. Equity Caſes abridged, p. 278. pl. 3. 3 *Salk.* 300. 12 *Mod.* 173. and *Holt*, 357, 623.

Sir

Sir *William Jones* is certainly right: for the ſecond leaſe was void. And no ſurrender, expreſs or implied, in order to, or in conſideration of a new leaſe, would bind; if the new leaſe is abſolutely void, for the cauſe, ground, and condition of the ſurrender fails. In *Thompſon* v. *Leach* (which was a moſt favourable caſe for the plaintiff), much is ſaid in argument, "To prove the ſurrender of an infant or lunatic to be void;" to get rid of ſome doctrine laid down in *Whittingham*'s caſe, 8 *Co.* 43. *H.* 45. *Eliz.* "That the remainder-man, injured by "the act, could not avoid it." But more is ſaid to overturn that doctrine. There is no difference, in this reſpect, between the heir in tail and the remainder-man; neither claims under him whoſe act is in queſtion; but both claim *per formam doni*. In *Palmer*, 254. *Dodderidge* denies the doctrine; and ſays, "He in remainder, and the donor, ſhall take "advantage of infancy;" which is agreeable to *Littleton*'s reaſoning, ſ. 635. it ſhould ſeem againſt reaſon, that a feoffment made by an infant ſhould grieve or hurt another, to take from them their entry, &c. Suppoſe the compariſon between an infant and a man *non compos* juſt (which it is not), the point of "The ſurrender being void or voidable" was not neceſſary to the judgment in that caſe. I know of no judgment, upon the ground "That ſuch a ſurrender is void." Moſt undoubtedly, the other party cannot ſay ſo. If an infant was to ſurrender an unprofitable leaſe; and, after acceptance, the premiſes ſhould be burnt, overflowed, or otherwiſe deſtroyed; the leſſor never could ſay the ſurrender was void. There is no inſtance where the other party to a deed can object, on account of infancy. Conſequently, the infant may let the ſurrender ſtand, or avoid it, which proves it to be voidable only. If a new caſe ſhould ariſe, where it would be more beneficial to the infant, "That the deed ſhould be "conſidered as void;" if he might incur a forfeiture, or be ſubject to damages, or a breach of truſt, in reſpect of a third perſon, unleſs it was deemed void; the reaſon of the privilege would warrant an exception in ſuch caſe, to the general rule. Powers of attorney are an exception to the general rule, as to deeds: and a power to receive ſeiſin is an exception to that. The end of the privilege is "To protect infants." To that object, therefore, all the rules and their exceptions muſt be directed. But be the point upon the ſolemnity of the delivery, as it may (for there are reſpectable ſayings the other way), it is not neceſſary to our determination. For we are all of opinion, "That the 109l. received, and the other "circumſtances of the tranſaction, ſhew a ſemblance of "benefit, ſufficient to make it voidable only, upon the matter "of the conveyance."—If it be voidable only, THE SECOND POINT is, "Whether the infant, by his entry before the "aſſizes (which appears to be during his minority), has

" avoided it." At the common law, the only conveyance *in pais*, of the freehold and inheritance of land, with tranſmutation of poſſeſſion, was by feoffment. If it was tortious, the diſſeiſee was obliged to enter, to reveſt his poſſeſſory title: and then he might bring an action of treſpaſs. So, in the caſe of feoffments by an infant; he might enter during his minority, to reveſt his poſſeſſory right, for the ſake of the profits; but ſtill the feoffment was voidable only: and he might elect to confirm it, when he attained his full age. The reaſon why an infant cannot bring any writ analogous to a *dum fuit infra ætatem*, during his minority, is, " That his election may not " be bound by the judgment." Whether an entry be of any uſe in the preſent caſe, is not material; it is ſufficient, that it cannot have any larger effect, than in the caſe of a feoffment. The infant is alive, ſtill a minor. The defendant cannot elect for him; he is a mere ſtranger in every view, and has no eſtate affected by the conveyance. We are all of opinion, " That the plaintiffs ought to recover." And it is well for the defendant, we are of this opinion. He would get nothing by defeating the plaintiffs here; for, finally, in another mode of proceeding, the conveyance muſt be confirmed; and the defendant would be to pay all the coſts here and there.—It is fortunate for the ſuitors on both ſides, when conſiſtent with rules and forms of proceedings, that juſtice which muſt be the final determination of the queſtion may be done in the firſt ſtage of the litigation.—Poſtea to the plaintiffs.

Keane *v.* Boycott, Ea. Ter. 35 Geo. 3 B.R. 2 *Hen. Black.* 511.

An infant ſlave in the Weſt-Indies, executed an indenture, by which he covenanted to ſerve *B.* for a certain term of years as his ſervant, and *B.* covenanted to do certain things on his part; *B.* then came to England with the ſlave. In an action againſt *A.* who had ſeduced him from the ſervice of *B.* *A.* was not permitted to allege that the contract was void, as being made by an infant and a ſlave, and therefore, that the declaration, which ſtated him to have been retained as a ſervant for a term of years, was not proved; for the Court held that the effect of ſuch a contract might be the manumiſſion of the ſlave: and, conſequently, that it was for his own benefit; and being for his own benefit, that it was, at moſt, only voidable by the infant himſelf, and not by a ſtranger.—This was an action on the caſe, for enticing the plaintiff's ſervant to leave his ſervice: the firſt count of the declaration ſtated that, *on the 2 d of April*, 1764, a certain perſon called Toney, *was retained to ſerve the plaintiff for five years from that day.*—The facts were, that a negro boy, called *Toney*, a ſlave in the iſland of St. Vincent, about 16 or 17 years old, there executed an indenture, by which he bound himſelf to ſerve the plaintiff who was coming to Europe as a ſervant for five years, and the plaintiff covenanted to find him food, lodging and clothing, and medical aſſiſtance in caſe of ſick-

neſs.

neſs. The plaintiff ſoon after arrived in this country with the boy as his ſervant, and went to Cheltenham, where the defendant, who was a captain in the army on a recruiting party, enticed the boy away. On this evidence, the jury found a general verdict for the plaintiff. Afterwards, a rule was obtained to ſhew cauſe why there ſhould not be a new trial, and one objection taken by the defendant was, that the boy being both an infant and a ſlave when the indenture was entered into, it was clearly void, and that therefore the contract was not binding.—EYRE, Ld Ch. J. The ſervant executed indentures, by which he contracted to ſerve the maſter for five years. But he was both an infant and a ſlave of his maſter at the time when he entered into the contract; he was very young and entirely in the power of the maſter. From theſe circumſtances doubts aroſe whether the contract would bind him, and if it would not bind him, whether it would avail any thing as againſt the defendant. My brother *Heath* brought this queſtion into the right train, by ſuggeſting that the effect of this contract, by analogy to the law between lord and villein, might be to emancipate the ſlave (1), and, therefore, that it was for the benefit

(1) The reporter in this place has added the following note: "With the greateſt deference to the high authority which ſtarted, as well as to that which purſued this ingenious conjecture, it is to be obſerved that it is inconſiſtent both with the general policy, and local inſtitutions of the Britiſh iſlands in the Weſt Indies, to ſuppoſe that a ſlave can be manumitted by implication. The hiſtories of thoſe iſlands and their ſtatute books ſhew that manumiſſion can only be effected by ſome act of the maſter, done expreſsly for that purpoſe, and accompanied with the ſettlement of an annual proviſion on the ſlave ſo manumitted. On this ſubject the law of the iſland of St. Vincent is particularly ſtrict. In the edition of the ſtatutes of that iſland publiſhed in 1788, page 46, the 24th clauſe of the act, entitled "An act for making ſlaves real eſtate, and the better government of ſlaves and negroes," directs, "That no perſon or perſons whatſoever ſhall hereafter manumit or ſet free any ſlave or ſlaves, except he, ſhe, or they, or the repreſentatives of ſuch perſon or perſons, previous to ſuch manumiſſion, pay into the public treaſury of this iſland, one hundred pounds current money, for the uſe of the ſaid iſland; and the receipt of the treaſurer for the time being ſhall be tacked to the deed of manumiſſion and be an authority for the ſame; and the treaſurer for the time being is hereby authoriſed and directed to pay half yearly to any ſlave ſo manumitted, out of the public treaſury, four pounds current money, for the maintenance of ſuch ſlave, during the natural life of ſuch ſlave, and the receipt of ſuch ſlave, or a certificate from a juſtice of the peace of the payment of ſuch money in his preſence (which every juſtice is hereby required to give when thereto required or applied to for the purpoſe), ſhall be a diſcharge to the ſaid treaſurer for all ſuch money as he ſhall from time to time pay to ſuch ſlave or ſlaves; and any manumiſſion made in any other manner than aforeſaid, ſhall be void." This being ſo, the foundation of the argument, namely, that the effect of the maſter entering into a contract with the ſlave might be to enfranchiſe him

benefit of the infant, which might remove the objection of infancy and ſlavery. This leads to the conſideration of what contracts may be entered into by infants, whether they can contract by deed, whether their contracts are void or only voidable, and if only voidable, who ſhall take advantage of the infancy to avoid them. In *Litt.* ſ. 259. it is ſaid, "If before ſuch age (*i. e.* 21) any deed or feoffment, grant, releaſe, confirmation, obligation, or other writing, be made by any of them, &c. or if any within ſuch age be bailiff or receiver to any, &c. all *ſerves for nothing and may be avoided.*" But this is certainly not correct; and Lord *Coke*'s obſervation on it is, "Here, by this, &c, are implied ſome exceptions out of this generality; as an infant may bind himſelf to pay for his neceſſary meat, drink, apparel, neceſſary phyſic, and ſuch other neceſſaries, and likewiſe for his good teaching or inſtruction, *whereby he may profit himſelf afterwards*; but if he bind himſelf in an obligation, or other writing, with a penalty for the payment of any of theſe, that obligation ſhall not bind him." And in *Cro. Eliz.* 920. it was holden, that an obligation from an infant for his neceſſary meat and drink, in the very ſum diſburſed on that account was good, but not in double the ſum. The concluſion is, that for thoſe things which the Court can pronounce to be neceſſary for the infant, he may bind himſelf even by deed. If this queſtion were between the maſter and the ſervant himſelf, the Court would hardly heſitate to ſay, that a contract to ſerve for five years having the effect of emancipation from ſlavery, was a contract for neceſſaries, in the enlarged ſenſe of the word as extending to all the caſes enumerated in *Co. Lit.* But it is not neceſſary to go the whole length of that propoſition, as this is not a caſe between the maſter and the ſervant. We have ſeen that ſome contracts of infants, even by deed, ſhall bind them. Some are merely void: namely, ſuch as the Court *can pronounce to be to their prejudice.* Others, and the moſt numerous claſs, of a more uncertain nature as to benefit or prejudice, are voidable only, and it is in the election of the infant to affirm them or not. In *Rol.* Abr. title "Enfants," 1 *Rol.* Abr. 728. and *Com. Dig.* 3. *Com. Dig.* 619. 8vo. under the ſame title inſtances are put of the three different kinds of good, void, and voidable contracts. Where the contract is by deed, and not apparently to the prejudice of the infant, *Comyns* ſtates it as a rule, that the infant cannot plead *non eſt factum*, but muſt plead his infancy:

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him in the iſland of St. Vincent where it was made, evidently fails. The queſtion, whether ſuch would be the effect of the contract in this country, could not ariſe, becauſe as ſoon as a ſlave arrives here, the yoke of ſlavery is diſſolved by operation of law, whether he has previouſly entered into any contract or not, and whatever may be his ſituation with reſpect to the ſervice of his maſter.

it is his deed, but this is a mode of disaffirming it. He indeed states the rule generally, but I limit it to that case, in order to reconcile the doctrine of void and voidable contracts. Upon the distinction between those two species of contracts, we certainly are not warranted to decide, that a contract which may have the effect of emancipation, and which certainly puts the infant in no worse condition than he was in before, is so prejudicial to him as to be merely void. If it be a contract voidable only, the infant may affirm it: and that is sufficient to decide this case. *For this is the case of a stranger and a wrong doer interfering between the master and servant, and now seeking to take advantage of the infant's privilege of avoiding his contracts, a privilege which is personal to the infant, and which no one can exercise for him.* Suppose the case of a stranger disseising the feoffee of an infant, the entry tolled, and a writ of right brought by the feoffee; should the tenant be permitted to object the infancy of the feoffor? In *Whittingham*'s case, 8 *Co.* 42. b. it was holden, that a privity in law, not in blood or estate, did not entitle a third person to avoid the act of an infant. That was the case of an escheat, and several other cases are put in our books, where if the infant himself does not take advantage of infancy, no one else shall, and which are cases where the party who would take advantage of the infancy has a direct interest in the subject to which the act done by the infant has relation. *The defendant, in this case, had no concern in the relation between the plaintiff and his servant, he dissolved it officiously.*—Rule discharged.

Trueman v. Hurst, Mic. Ter. 26 Geo. 3. B R. 1 *Ter. Rep.* 40.

*Assumpsit* on an account stated does not lie against an infant.—Action of *assumpsit*. The first count in the declaration was on a promissory note for 10l. given by the defendant to the plaintiff *for board and lodging, and for teaching and instructing the defendant in the business of hair-dressing*. There were other counts *for meat, drink, washing, lodging, and other necessary things*; for work and labour, money paid, laid out, and expended; and on an account stated. Plea, infancy. Replication, for necessaries. To this there was a general demurrer, and joinder in demurrer. The exceptions taken for the defendant were: 1st, An infant cannot bind himself by a promissory note, even for necessaries.—2dly, There is no good consideration for this note; or for the premises in the 4th and 5th counts, which were for work and labour.—3dly, An infant is not liable to an action of *assumpsit* on an account stated.—Lord MANSFIELD, Ch. J. The authorities are all one way, that this action will not lie. What is an account stated? It is an agreement by both parties, that all the articles are true. This was formerly conclusive; but a greater latitude has of late prevailed in order to remedy the errors which may have crept into the account in surcharging the items. But an infant cannot bind himself by stating an account;

account; therefore, on the reaſon of the caſe, and on the authorities, I think there ſhould be judgment for the defendant. —WILLES and ASHHURST, J. concurred.—BULLER, J. The caſe of *Bartlett* v. *Emery*, Hil. 2. *G.* 2. B.R. upon a writ of error out of the court of *Litchfield*, ſetties this caſe. There, this Court were unanimouſly of opinion, that an action would not lie on an account ſtated againſt an infant. *Sharp* v. *Ray*, Tr. 30 *G.* 3. B.R. S.P. The ground is this, the only conſideration for the promiſe is the ſtating of the account: now if an infant cannot ſtate an account, the conſideration does not hold, and the promiſe is void.—The plaintiff had liberty to amend on payment of coſts.

Bainbridge v. Pickering, Mic. Ter. 30 Geo 3. C.B. 2 *Black.* 1325.

An infant who lives with, and is properly maintained by the parent, cannot bind himſelf to a ſtranger for neceſſaries.—It was moved to diſcharge the defendant on a common appearance, being held to ſpecial bail for 30l. debt to a milliner, for feathered caps and other ornamental apparel; and it being proved by a copy of the pariſh regiſter, that the defendant was now under twenty years of age, and the debt was of two years ſtanding: ſhe living all the time with her mother. It was oppoſed on the ground, that theſe things might be neceſſary for her ſtate and ſituation in life.—SED PER CURIAM: If an infant lives with her parent, who provides ſuch apparel as appears to the parent to be proper, ſo that the child is not left deſtitute of clothes, or other real neceſſaries of life, the child cannot bind herſelf to a ſtranger even for what might otherwiſe be allowed as neceſſaries: for no man ſhall take upon him to dictate to a parent what clothing the child ſhall wear, at what time they ſhall be purchaſed, or of whom. All that muſt be left to the diſcretion of the father or mother. And as there is not here any pretence but that the child was decently provided for by the mother, we ſhould give no countenance to ſuch perſons, as inveigle young women into extravagance under the pretext of furniſhing them with neceſſaries, without the previous conſent of the parent.—*Blackſtone* and *Nares*, Juſtices of the ſame opinion.—Rule abſolute.

Motteux v. St. Aubin, *et al* Hil. Ter. 17 Geo. 3. C.B 2 *Black.* 1133.

A joint warrant of attorney, to confeſs judgment by an infant and another, may be vacated againſt the infant only.—It was moved to ſet aſide the judgment againſt Sir *John St. Aubin* only, and to ſtrike his name out of the warrant of attorney to confeſs this judgment, which was entered againſt Sir *John*, and one *William Davis*, his ſurety; it being proved by the affidavits of his mother and relations, that Sir *John* was only eighteen years old, and that this judgment was obtained from him by advancing him money in order to ſupply his extravagance at Weſtminſter School.—PER CURIAM: This is not a reverſal of the judgment by writ of error, but the vacating the warrant of attorney, as againſt the infant, for impoſition; after which, the judgment drops of courſe.

Lord

Lord *Hardwicke* in the King's Bench held, that relief might be given upon warrants of attorney, if unduly obtained, and the Courts have always followed that opinion. The Court acts herein upon the ſame principle, as in vacating a fine for non-age. The caſe of *Jackſon* and *Moſley*, T. 3 *Geo.* 1. C.B. is cited by the Court in *Stra.* 1043. as that of vacating a judgment on account of infancy of the defendant, who executed the warrant of attorney, to confeſs judgment.—Rule abſolute.

A warrant of attorney given by an infant, is abſolutely void, and the Court will not confirm it, though the infant appear to have given it (knowing that it was not valid), for the purpoſe of colluſion.—The defendant being an infant, joined with his brother in giving a warrant of attorney to the plaintiff, to confeſs a judgment, which was accordingly entered up, and the defendant taken in execution. In order to procure his diſcharge, he alone gave a ſecond warrant of attorney, on which judgment was again entered, and he again taken in execution. On this, a rule was granted to ſhew cauſe, why the laſt judgment ſhould not be ſet aſide, and the warrant of attorney cancelled, on the ground, that the defendant was an infant at the time of giving it. On ſhewing cauſe, ſome circumſtances of colluſion between him and his brother were mentioned, and it was ſaid, that as this application was made to the equitable juriſdiction of the Court, it was to be remembered, that in equity the acts of an infant are often confirmed; ſuch as an agreement to ſettle an eſtate, and the like. BUT THE COURT ſaid. Such acts of an infant as are only voidable, are allowed in equity to be confirmed, but not ſuch as are actually void. A warrant of attorney is of the latter deſcription, which the Court cannot make good, though there appear circumſtances of fraud on the part of the infant.—Rule abſolute without coſts.

Saunderſon *v.* Marr, Mic. Ter. 29 Geo. 3. C.B. 1 *Hen. Black.* 75.

An infant is not eligible to the office of a burgeſs in a corporation, where the charter does not expreſsly authorize the corporation to grant incohate rights.—This was an information, in the nature of a *quo warranto*, againſt the defendant, to ſhew by what authority he claimed to exerciſe the office of burgeſs of the borough of Portſmouth, which THE INFORMATION alleged was "a place, *office*, and *franchiſe*, of great truſt and pre-eminence within the ſaid borough, touching the rule and government of the ſaid borough, and the adminiſtration of juſtice. THE PLEA admitted the above allegation, and *(inter alia)* ſtated, that within the ſaid borough there have been, and of right ought to be, an *indefinite* number of burgeſſes. That, by a charter of 3 *Car.* 1. the mayor, aldermen, and burgeſſes, were incorporated, and power was given to the mayor and aldermen, &c. to name ſuch perſons to be burgeſſes as they ſhould pleaſe, and to the ſaid burgeſſes ſo

Rex *v.* Carter, Mic. Ter. 15 Geo. 3. *Cowp. Rep.*

choſen

choſen to adminiſter an oath for their faithfully executing the ſaid office of burgeſs. That the defendant, *on the 18th day of May, 1751, was elected* by the major part of the mayor and aldermen; *and that*, before he took upon himſelf to exerciſe the place, office, and franchiſe, of ſuch burgeſs, he was duly, and according to the uſage of the ſaid borough, ſworn into the ſaid office. THE REPLICATION ſet forth certain parts of the charter: and, laſtly, that the defendant, at the time of his ſuppoſed election to be a burgeſs, &c. was of the age of five years and ten months, and no more. *Rejoinder:* that, at the time the defendant was ſworn into the place, office, and franchiſe, of one of the burgeſſes, &c. he was of the full age of twenty-one years: to this the plaintiff DEMURRED. Upon this record three queſtions were argued; 1ſt, Whether the office of burgeſs is a judicial or a miniſterial office? 2dly, If judicial, whether an infant, ſuch as the defendant was, is eligible to ſuch an office? 3dly, If miniſterial, whether an infant, ſuch as the defendant was, is eligible to ſuch an office?—Lord MANSFIELD (after argument) ſaid, that the true queſtion was, Whether the defendant in this caſe, being elected at the age of five years old, and ſworn in at twenty-one, is duly elected, according to the terms of the charter? This is a corporation, which derives its conſtitution under a charter from the king, and their whole power ariſes from it: it follows, therefore, that they are bound to act according to the powers and directions which it contains. It has been ſaid, there may be incohate rights, to be completed when the parties are of age; and caſes have been alluded to, of children born with a right to be admitted at twenty-one, on payment of a ſum of money, and alſo titles by ſervitude or marriage; clearly, there may be ſuch incohate rights to infants: but the queſtion is, Whether the king has, by this charter, given the corporation a power to grant incohate rights to infants, to be put in execution upon their attaining the age of twenty-one? If he has not, there is an end of the defendant's title.—Now, by the charter, the king enables the mayor and aldermen, or the greater part of them, to chooſe as many burgeſſes as they ſhall think proper, and to adminiſter to them the oath of office, and, *till ſworn*, they are not complete burgeſſes. Upon an information, they muſt be ſworn in: did the king mean, when he directed they ſhould be ſworn in, that they ſhould ſwear in ſucking infants? It is ſaid, a corporation may chooſe abſent members: if fairly and conſiſtent with their charter they may; but they cannot chooſe an abſent member colluſively. There is no more in that caſe than this, that the king has given them a power to chooſe and ſwear in burgeſſes; and the queſtion is, Whether he gave them a power to grant an incohate right, when no oath could be adminiſtered to them? I am clearly of opinion, that no ſuch power is given by the charter.

ASTON,

Aston, J.—The queſtion does not depend upon the capacity or incapacity of infants to take, but whether this corporation are impowered by their charter to grant incohate rights to infants. In moſt charters, the direction, as to the election of burgeſſes, is, that the mayor, &c. ſhall chooſe one or more of the diſcreet men of the borough to be a burgeſs, or burgeſſes. But can it be ſaid, that an infant of ſix years of age is, or can be ſuppoſed to be, ſuch a diſcreet perſon? The words of the preſent charter are, that "*they may*, as often as it ſhall appear "to them *to be fit and neceſſary*, elect *ſo many and ſuch perſons* "to be burgeſſes, as they ſhould pleaſe, and to ſuch perſons ſo "choſen, ſhall *adminiſter an oath* faithfully to execute the "office." This ſuppoſes the mayor and aldermen, &c. to exerciſe their judgment in electing perſons to be burgeſſes; and in reſpect of the oath, *the election and ſwearing* are clearly intended to be *ſimul et ſemel:* but what is the preſent caſe? not an election, but a contingent nomination, which, perhaps, might never have taken effect, becauſe the party might not have lived. Other perſons might, at ſuch a diſtance as ſixteen years, be to ſwear him in; diſputes might ariſe, as to his being the ſame perſon, beſides involving many other inconveniences. I am clearly, therefore, of opinion, upon the true conſtruction of this charter, that the act muſt be the act of the corporation for the time being, to be executed perſonally by them; and that it was not intended they ſhould have a power to nominate for many years to come; ſuch nomination to be completed, if the party ſhould, at ſuch future time, happen to be *in eſſe*, and diſpoſed to take the office upon him.—Willes, J. agreed. Ashhurst, J.—The words that they may, as often as it ſhall appear to the mayor, aldermen, &c. to be *fit and neceſſary:* mean, fit and neceſſary for the preſent purpoſes of the corporation; and the perſons intended, ſuch as are capable of taking upon themſelves the immediate execution of the office, not perſons to be nominated only, and who might or might not act, or be capable of acting in future, as circumſtances and events might turn out.—Judgment for the king.

## Information.

### *When it Lies.*

An information being moved for againſt the defendants, it appeared, that the charge againſt them was, "that the de- "fendants had joined in an unlawful combination and con- "ſpiracy to remove this girl, an infant of about eighteen, out "of

Rex *v.* Sir Francis-Blake Delaval, William Bates, and John Fraine, Tr. Ter. 3 Geo. 3. B.R.

3 *Burr.* 1434. 1 *Black Rep.* 410, 439.

" of the hands of the defendant, *Bates* (a muſician), to whom " ſhe was bound an apprentice by her father (a gentleman's " coachman), without the knowledge or approbation of the " ſaid *Catley*, her father, and to place her in the hands of Sir " *Francis*, *for the purpoſe of proſtitution.*" The facts uncontroverted were theſe: A female infant, then about fifteen, was bound apprentice by her father to the defendant, *Bates*, a muſic-maſter, the girl appearing to have natural talents for muſic. The father became bound to the maſter in the penalty of 200l. for his daughter's performance of the covenants contained in the indenture. She became eminent for vocal muſic, and thereby gained a great profit to *Bates*, her maſter. During her apprenticeſhip, being then about ſeventeen, ſhe is debauched by Sir *Francis Delaval*, whilſt ſhe reſided in the houſe of *Bates*'s father; as *Bates* himſelf was a ſingle man and no houſekeeper. In April laſt, *Bates*, her maſter, indirectly aſſigns her to Sir *Francis*, as much as it was in his power to aſſign her over: and this is done, plainly and manifeſtly, for bad purpoſes. *Bates* at the ſame time releaſes the penalty to the father, but without the father's application or even privity; and receives the 200l. from Sir *Francis*, by the hands of his taylor; who is employed to pay it to *Bates*, and alſo enters into a bond to *Bates*, to ſecure to him the profits ariſing from the girl's ſinging this ſummer at Marybone. And then ſhe is indentured to Sir *Francis Delaval* to learn muſic of him: and ſhe covenants with him, both in the uſual covenants of indentures of apprenticeſhip, and likewiſe in ſeveral others (as "*not to quit even his apartments*"), &c. Theſe articles between the parties are ſigned by all but the father: and a bond is drawn from him, in the penalty of 200l. for his daughter's performance of theſe covenants (which he never executed). And the girl goes and lives, and ſtill does live, with Sir *Francis*, notoriouſly as a kept miſtreſs.—Lord MANSFIELD, Ch. J. I remember a cauſe in the court of Chancery, wherein it appeared, that a man had formally aſſigned his wife over to another man: and Lord *Hardwicke* directed a proſecution for that tranſaction, as being notoriouſly and groſsly againſt public decency and good manners. And ſo is the preſent caſe. It is true that many offences of the incontinent kind fall properly under the juriſdiction of the Eccleſiaſtical Court, and are appropriated to it. But, if you except thoſe appropriated caſes, this Court is the *cuſtos morum* of the people, and has the ſuperintendency of offences *contra bonos mores*; and upon this ground, both Sir *Charles Sedley* and *Curl*, who had been guilty of offences againſt good manners, were proſecuted here. However, beſides this, there is, in the preſent caſe, a conſpiracy and confederacy amongſt the defendants: which are clearly and indiſputably within the proper juriſdiction of this Court. And in the conſpiracy they

they were all three concerned. *Bates*, the maſter, clearly knew of the connexion between Sir *Francis* and his apprentice. *Bates*, therefore, ought clearly to be included in the rule for an information. Then as to *Fraine*, the attorney, he has certainly acted inconſiſtently with the duty of his profeſſion, and that chaſtity of character which is incumbent upon an attorney always to ſupport. He has drawn and prepared all theſe inſtruments; and the indentures whereby this girl, already bound to *Bates*, binds herſelf apprentice to Sir *Francis Delaval*, to be taught muſic by him; and all the covenants contained in it; and was privy to the compenſation that *Bates* received from Sir *Francis*. So that it was impoſſible for him to be ignorant of the real intention of this tranſaction: he could not imagine that ſhe really bound herſelf to Sir *Francis*, to be taught muſic by him; but muſt undoubtedly have been conſcious of the true purpoſe for which theſe deeds and writings were calculated. He therefore ought likewiſe to be included in the abſolute rule for an information. Then as to Sir *Francis* himſelf, there can remain no doubt.—Rule abſolute.

An information was granted *for attempting to bribe a privy counſellor to procure a reverſionary patent of an office grantable by the king, under the great ſeal.*—An information for a miſdemeanor, at the private proſecution of the Duke of *Grafton* (then firſt lord of the treaſury), was moved for againſt the defendants. An affidavit of the Duke of *Grafton*'s was produced, proving a letter to be received by him from the defendant, *containing an offer of paying* 5000l. *into the hands of Mr.* Henry Newcombe, *to be delivered by him to the perſon who ſhould procure a patent of the reverſion of the office of clerk of the ſupreme court of the iſland of Jamaica*, for the lives of Mr. *Vaughan*'s three ſons, or the lives of three other perſons to be named by him. Affidavits to authenticate the handwriting of Mr. *Vaughan* were alſo produced. Mr. *Vaughan* ſent a caſe alſo to the duke, deſiring his peruſal of it at his leiſure; which caſe related to the nature, &c. of this office. It was accompanied by a letter to his grace, incloſing an affidavit; which affidavit Mr. *Vaughan* ſays, "will ſhew the "propoſal; which will be enlarged if neceſſary." The letter offers to "leave ſecurity in Mr. *Henry Newcombe*'s hands, "to anſwer paying the 5000l. to the order of the perſon who "ſhould procure the ſaid patent." And it concludes—"I will "take an opportunity of waiting upon your grace; hoping "the honour of a conference; otherwiſe, to receive back this "affidavit, in order to deſtroy the ſame." The affidavit incloſed in this letter was made before the lord-mayor of London. It repreſented this to be a matter that required the utmoſt ſecreſy: and it is thereby ſworn (beſides what is abovementioned), "that this whole affair is an entire ſecret "to

Rex *v.* Samuel Vaughan, Mic. Ter. 10 Geo. 3. B.R. 4 *Burr.* 2494.

" to every one but Mr. *Henry Newcombe;* and that, whether " his preſent propoſal ſhall prove efficacious, or be rejected, " he never will diſcloſe it to any perſon whatſoever."—Lord MANSFIELD: If theſe tranſactions are believed to be frequent, it is time to put a ſtop to them. A miniſter truſted by the king to recommend fit perſons to offices would betray that truſt, and diſappoint that confidence, if he ſhould ſecretly take a bribe for that recommendation. A terrible conſequence would reſult to the public, if every thing that ſuch an officer is concerned in adviſing the diſpoſal of, ſhould be ſet up to ſale. I am, therefore, for making the rule abſolute. He may demur, or move in arreſt of judgment, or appeal to a higher judicature. *I am clear, that this is a miſdemeanor, and puniſhable as ſuch.* But, nevertheleſs, I ſhall be open to hear arguments on a demurrer, or in arreſt of judgment, without prejudice. As to the ſtatutes of 12 *R.* 2. c. 2. and 5. and 6 *Ed.* 6. c. 16. " the argument does not turn upon their " extending or not extending to Jamaica." For, this office is granted under the great ſeal. The argument is ſtrong, that theſe ſtatutes do not extend to Jamaica; though they were enacted long before that iſland belonged to the crown of England. If Jamaica was conſidered as a conqueſt, they would retain their old laws, till the conqueror had thought fit to alter them. If it is conſidered as a colony (which it ought to be, the old inhabitants having left the iſland), then theſe ſtatutes are poſitive regulations of police, not adapted to the circumſtances of a new colony; and, therefore, no part of that law of England which every colony from neceſſity is ſuppoſed to carry with them at their firſt plantation. No act of parliament made after a colony is planted, is conſtrued to extend to it, without expreſs words ſhewing the intention of the legiſlature to be " that it ſhould." But here, the office is granted by letters patent under the great ſeal of England; and, therefore, muſt be governed by the laws of England. So that it turns upon the common law. And the firſt conſideration is, whether a great officer, at the head of the treaſury, and in the king's confidence, ſelling his intereſt with the king, in procuring an office, be not guilty of a crime. The king is not to raiſe a revenue out of this office. The duke ſwears, and it is not denied, " That the 5000l. was " offered to him, to procure this office for Mr. *Vaughan.*" Can it be doubted whether the doing this would have been criminal in the Duke of *Grafton?* I ſuppoſe that moſt of the impeachments againſt miniſters have been for taking money to procure offices grantable by the crown. Wherever it is a crime to take, it is a crime to give: they are reciprocal. And in many caſes, eſpecially in bribery at elections to parliament, the attempt is a crime: it is complete on his ſide who offers it. If a party offers a bribe to a judge, meaning to

to corrupt him in a cafe depending before him; and the judge taketh it not; yet this is an offence punifhable by law, in the party that offers it, 3 *Inft.* 147. So alfo a promife of money to a corporator, to vote for a mayor of a corporation; as in *Rex* v. *Plympton*, 2 Lord *Raym.* 1377. And fo alfo muft be an offer to bribe a privy-counfellor to advife the king. Therefore, it appears to me that this is a mifdemeanor.—YATES, J. This has not the leaft refemblance to the fale of an office. This charge is for attempting improperly the procuring of the office; not for giving a price for beftowing it. It is an office in the gift of the crown; not of the duke himfelf. The affidavit which mentions "that the matter requires "the utmoft fecrecy," fhews the defendant's own fentiments about it: and he defires, in cafe of non-acceptance of his offer, to have the affidavit back again, in order to deftroy it. No doubt, this is an offence at common law.—ASTON, J. and WILLES, J. concurred.—Rule abfolute.

A commitment by a juftice of peace for a time certain, as for fourteen days, under the vagrant-act, is a commitment in execution, and the party is not entitled to be bailed. And if another magiftrate, on illegal and corrupt motives, difcharge a perfon fo committed, the Court will grant an information againft him.—A rule had been obtained, calling on the defendants, juftices of the peace for the liberty of the Tower of London, to fhew caufe why informations fhould not be filed againft them for certain mifdemeanors in difcharging *C. Banniftter* out of cuftody, who had been committed by *J. Staples*, a juftice of the peace, as a rogue and vagabond, under the vagrant-act, 17 *Geo.* 2. c. 5. The fecond fection of that ftatute enacts, "That all common players, *not being* "*authorifed by law*, fhall be deemed rogues and vagabonds "within the true intent and meaning of the act." The fixth fection requires any juftice of the peace, on receiving information that rogues and vagabonds are within his jurifdiction, to iffue his warrant to apprehend them, and cauſe them to be taken before any juftice of the peace of the fame county, liberty, &c. By the feventh fection, any juftice, before whom any rogue and vagabond is brought, is required "to inform himfelf, by examination upon oath of the perfon "apprehended, or of any other, of the condition and circum-"ftances of the perfon fo apprehended, &c. the fubftance of "which examination fhall be put in writing, and be fub-"fcribed by the perfon fo examined; and the faid juftice "fhall likewife fign the fame, and tranfmit it to the next "general or quarter feffions of the peace to be holden for the "fame county, &c. there to be filed and kept on record. "*And fuch juftice is hereby required to order all fuch perfons fo* "*apprehended to be publicly whipped, or to be fent to the houfe of* "*correction, there to remain until the next general or quarter-*"*feffions*,

The King v. R. Brooke, *et al.* Hil. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 190.

" *ſeſſions, or for any leſs time, as ſuch juſtice ſhall think proper,*" &c. By the 26th ſection, it is enacted, " that any perſon " aggrieved by any act of any juſtice of the peace out of " ſeſſions, in or concerning the execution of this act, may " appeal to the next general or quarter ſeſſions of the county, " &c. giving reaſonable notice thereof, whoſe order there- " upon ſhall be final." It appeared from the affidavits filed, that *Staples*, who was a juſtice of the peace, had iſſued his warrant on the 17th of July, returnable before himſelf, for apprehending *Banniſter* as a rogue and vagabond, under the 2d ſection of the act; and upon due examination had committed him to the houſe of correction for fourteen days. That the defendants *Brooke* and *Robinſon* had, on the ſame day, iſſued their warrant for diſcharging him out of cuſtody, upon his giving bail to appear at the next quarter-ſeſſions, and to proſecute his appeal againſt the conviction. The affidavit alſo ſtated, that *Staples* had granted a ſimilar warrant to apprehend *William Palmer* on a ſimilar information laid before him. That upon the officer's arreſting him, he produced a *ſuperſedeas* out of his pocket, which the officer would not allow as ſufficient to diſcharge the warrant, but inſiſted upon taking him before *Staples*, by whom it had been iſſued. That was oppoſed by *John Robinſon*, a brother of one of the defendants, who took the priſoner, againſt the conſent of the officer, to the court-houſe, whither the defendants, *Brooke* and *Robinſon*, had given orders to the ſeveral officers to bring all perſons who ſhould be apprehended by any warrant of *Staples*, and where they were then ſitting; who, upon the officer's refuſing to ſet *Palmer* at liberty unleſs the warrant was diſcharged, without hearing the information on which the warrant had been granted, or examining any evidence, wrote " diſcharged" upon the warrant. On the 19th of July, *Palmer* was again apprehended on another warrant of *Staples*, who regularly convicted him as a rogue and vagabond, and committed him to the houſe of correction for fourteen days. And he alſo wrote underneath the commitment, " Take " notice, that *William Palmer* cannot be diſcharged before " the expiration of the above term, unleſs ſuch diſcharge be " ſigned by two juſtices, one of whom muſt be the com- " mitting magiſtrate." The priſoner was, however, diſcharged about an hour after his commitment, by the defendants *Brooke* and *Williams*, on his appealing and giving bail to proſecute it.—ASHHURST, J. If this matter had reſted merely on the charge of the defendants having admitted the parties to bail after they had appealed againſt the convictions, I ſhould have been very unwilling to have granted an information againſt them on that ground; becauſe as the act of parliament gives a ſummary juriſdiction to a magiſtrate to convict perſons coming within the deſcription of vagrants, and

and in the ſame breath gives the party convicted a right of appeal from ſuch conviction, a magiſtrate, not very converſant in the law, might naturally enough have conceived that the meaning of the legiſlature was, that the party ſhould not undergo the puniſhment till the appeal was determined; and therefore, if the juſtices had acted *bonâ fide*, I ſhould not have been inclined, on this ground alone, to have granted the information. But the principal ground is, that *they have taken upon themſelves to ſuperſede a warrant of a juſtice of peace, having competent juriſdiction, before the matter had been inquired into at all, and without having any evidence before them. This was taking upon them to prejudge that the juſtice granting the warrant muſt have done wrong, and that the party on appeal would be acquitted: this was certainly a palpable and groſs abuſe of their office.* But there are other circumſtances beſides this to ſhew that this could not have been done in the ordinary courſe of juſtice, but that the defendants have made themſelves parties in the buſineſs, and have aſſociated themſelves with the perſons who had been convicted by the magiſtrate: for two of the defendants, *Robinſon* and *Brooke*, ordered the conſtable to execute his warrant at the court-houſe, and would not ſuffer him to carry his priſoner to the magiſtrate before whom the information had been laid, and they took upon themſelves to diſcharge the priſoner, without even hearing what had been alleged againſt him. Now admitting that a practice may have obtained of granting a *ſuperſedeas* in bailable offences, the legality of which is very doubtful, yet at any rate it cannot hold in a caſe of this ſort, where the party is convicted in the firſt inſtance as a rogue and vagabond, and committed in execution; for there he is clearly not bailable; this, therefore, was groſs miſbehaviour in the defendants, which cannot be imputed to miſtake or ignorance of the law. And *though they have denied generally that they acted from any intereſted motives in this buſineſs, yet that is not ſufficient; for if they acted even from paſſion or from oppoſition, that is equally corrupt, as if they acted from pecuniary conſiderations.*— BULLER, J. was clearly of opinion, that the charge of corruption was brought home to the two defendants, *Brooke* and *Robinſon*, againſt whom an information ought to go; but that as *Williams* had not interfered in the commencement of the buſineſs, and had only adopted the opinion of the other two defendants upon the conſtruction of the act, the rule ſhould be diſcharged as againſt him; eſpecially as the ends of public juſtice would be equally anſwered by granting the information againſt the other two. He then obſerved, as to the conſtruction of the vagrant act, that he had no doubt upon the ſubject, that the commitments of the juſtice in this caſe were in execution, conſequently, the parties could not be bailed; notwithſtanding the ſtatute had given a right of appeal

againſt the conviction to the next ſeſſions. It is ſaid, that it is ſtrange that the party ſhould ſuffer the puniſhment while the appeal is pending: but we are to conſider it like the caſe put at the bar of a writ of error, which does not ſuſpend the execution of a judgment which it is brought to reverſe. It would be abſurd to put a contrary conſtruction upon this act of parliament, for if the appeal were to put an end to the impriſonment, by entitling the party to be bailed, the conſequence would be, that although the conviction were affirmed, the party would eſcape from puniſhment and laugh at juſtice; for the impriſonment is to run from the time of the conviction; and here the parties have been ſentenced to be impriſoned for fourteen days; and the time would be expired before the appeal was determined. The defendants have alſo acted wrong in another particular; for, by the 26th ſection, it is enacted, "that perſons aggrieved may appeal to the next "ſeſſions, giving reaſonable notice thereof;" but it does not appear in this caſe that any notice was given, either to the proſecutor or to the committing magiſtrate, when the defendants admitted the ſeveral parties to bail; and they could not have miſtaken as to whom notice ought to have been given.—GROSE, J. agreed.

The King *v.* Jolliffe, Tr. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 285.

An information having been granted againſt the defendant for a miſdemeanor, as a magiſtrate, it went down to be tried at the aſſizes; *when an application was made to the judge to put off the trial, upon affidavits, that three days before, the defendant, at* Kingſton, *where the aſſizes were held, gave him four printed papers, one of which was annexed, and aſked him whether he had ſeen any of thoſe papers.* That when the deponent received them he was about to read one, when the defendant deſired he would put them in his pocket, which he did. The affidavits of the other perſons confirmed the receipt of the papers. The ſubſtance of the paper ſo delivered was a vindication by the defendant of his conduct upon the charge contained in the information then pending, and an imputation of malicious motives in the proſecutor. Upon theſe affidavits the trial was put off, on the motion of the proſecutor's counſel, ſuggeſting that the papers had been publiſhed with a view of prejudicing the trial. *And the affidavits being returned into this court by the aſſociate: an application was now made to this Court for another information againſt the defendant.* The rule was oppoſed on two grounds; firſt, that the affidavits could not now be taken into conſideration, becauſe they were not made in this court, nor in this cauſe; but before the judge at *niſi prius*, who does not derive his authority from this Court, but from the ſtatute Weſtm. 2. 13 *Ed.* 1. c. 30. Secondly, that there was no evidence of a publication of this paper, which is of the very eſſence of the offence; for it was only ſtated, that the defendant gave ſome of

of theſe papers to a friend, with expreſs directions to put them in his pocket; and it appeared, that they were afterwards inſidiouſly obtained from that friend, by the contrivance of the proſecutor's ſolicitor. Lord KENYON, Ch. J. I cannot but expreſs my entire concurrence with what was done by the learned judge before whom the former information was to be tried. It appeared to him, by the affidavits then made, and which have been ſince tranſmitted to this Court, that during the courſe of the aſſizes where the record was ſent down for trial, certain papers were diſtributed by the defendant, which could not have been done with any other view than that of influencing thoſe who were to decide on the queſtion then in agitation. If there never had been any precedent before, it is impoſſible that any judge, who wiſhed to adminiſter upright juſtice, could heſitate what ſtep to take on ſuch an occaſion. But the caſe has happened before, *Rex* v. *Martha Gray*, 1 *Burr.* 510. and in this ſame county, where papers had been diſtributed by the proſecutor to influence the deciſion of a popular queſtion, a right of way claimed through Richmond Park, the proſecutor's own counſel moved to have the trial poſtponed, which was accordingly granted. WITH RESPECT TO THE PRINCIPAL QUESTION; we are not now to determine whether or not the defendant be guilty of the offence which is imputed to him, but merely whether ſufficient matter appears to warrant us in putting the guilt or innocence of the defendant into a conſtitutional courſe of trial. Before we ſend it down to be tried, it is neceſſary for us to be ſatisfied that the *corpus delicti* ſtands eſtabliſhed. Now it is impoſſible for any man to doubt whether or not the publication of theſe papers be an offence. Even the charge on the proſecutor would, of itſelf, warrant us to grant the information; but that is a minor offence, when compared with that of publiſhing the papers in queſtion during the pendency of the cauſe at the aſſizes, and in the hour of trial. It is the pride of the conſtitution of this country that all cauſes ſhould be decided by jurors, who are choſen in a manner which excludes all poſſibility of bias, and who are choſen by ballot in order to prevent any poſſibility of their being tampered with. But if an individual can break down any of thoſe ſafeguards which the conſtitution has ſo wiſely and ſo cautiouſly erected, by poiſoning the minds of a jury, at a time when they are called upon to decide, he will ſtab the adminiſtration of juſtice in its moſt vital parts. And, therefore, if the publication be brought home to the defendant, he has been guilty of a crime of the greateſt enormity. But it has been objected that the publication was extorted; to which he anſwers that it was not extorted from the defendant; he was a volunteer in the buſineſs; he voluntarily delivered four of theſe printed papers to *Smith*,

introducing the converſation with a queſtion to *Smith*, whether he had before ſeen any of them, which was a direct avowal of the publication. And it is not neceſſary, in a proſecution for a libel, to prove a publication to ſeveral perſons; publication to one is all that is required. Then the only remaining queſtion is, whether or not there be any legal evidence before the Court to affect the defendant with this charge. *Before the ſtatute* 4 & 5 W. & M. *c.* 18. *it was in the power of any individual to file an information, without diſcloſing to the Court the grounds on which it was exhibited.* But that practice being attended with the inconveniences recited in the preamble to that ſtatute, it was enacted, that no information ſhould be filed without the expreſs order of the Court publicly given. That ſtatute does not enumerate the grounds which are ſufficient to enable us to grant the information, but the legiſlature left it to our diſcretion, truſting that we ſhould not ſo far tranſgreſs our duty, as to go beyond the rules of ſound diſcretion. *In ordinary caſes affidavits are ſworn in the court, for the expreſs purpoſe of praying an information upon them: but that does not preclude us from granting an information on affidavits equally authentic, although not made for that purpoſe.* It has been ſaid, that in no caſe whatever can the proceedings in one cauſe be made uſe of in another; but the contrary is in every day's practice. In the court of Chancery depoſitions taken in one cauſe are frequently read in another, ſaving all juſt exceptions, as that they are not between other parties, and the like. So, in courts of law, the evidence which a witneſs gave on a former trial may be uſed on a ſubſequent one, if he die in the interim; as was agreed on all hands on a trial at bar in the inſtance of Lord *Palmerſton*; but, as the perſon who wiſhed to give Lord *Palmerſton*'s evidence could not give his words, but merely to ſwear to the effect of them, he was rejected. So alſo when a motion is made in this court to ſet aſide interlocutory proceedings on affidavits which diſcloſe criminal matter againſt an attorney, or any other officer of the court, the Court perpetually directs a criminal enquiry into the conduct of ſuch officer, although the affidavits be filed without any view to any criminal proceedings. Again too, when affidavits are made in this court, impeaching the conduct of magiſtrates, they are frequently ordered to be laid before the Lord Chancellor to enable him to judge whether or not ſuch magiſtrates ought to be continued in the commiſſion of the peace. We have alſo been furniſhed with a note, taken by an officer of the court, in which Mr. *Bower*, who had moved, in a cauſe of *Cooke* v. *Schmoll*, for the defendant's diſcharge upon affidavits filed in that cauſe, afterwards moved again on reading thoſe affidavits, and others filed in the cauſe of *Da Coſta* v. *Schmoll* for his diſcharge alſo in the latter, and

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the clerk of the rules doubted as to drawing up the rule upon affidavits which had not been filed in the latter cauſe; but we were of opinion, that being filed regularly in the firſt cauſe, they might be read as the foundation of the rule in this, and directed him to draw up the rule accordingly. In ſhort, all that is required in an affidavit, as the foundation for a criminal information, is, that which is required in every other cauſe, that the affidavit be made in a judicial proceeding; where the party ſwears at the hazard of a proſecution for perjury, if it be falſe. Now theſe affidavits were taken before a judge who had authority to adminiſter an oath, they were made in the courſe of a judicial proceeding, and relevant to the material point in iſſue. And the original affidavits are now before us on the files of the court, for they were tranſmitted here by the officer of the court below. It is not neceſſary for us to decide whether thoſe affidavits were taken under the authority of this Court, though I have a ſtrong opinion on that point. I am ſatisfied that there is ſufficient ground for this court to grant an information on the affidavits now before us, without referring to the authority under which the judge ſat.——ASHHURST, J. agreed; and ſaid, that as the affidavits were made in the courſe of a proceeding upon the trial of a record ſent down by this Court, he did not, therefore, heſitate to ſay, that every thing which was done at the aſſizes was virtually done under the authority of this Court. For though the authority of the judge at *niſi prius* is derived under a particular act of parliament, yet, it is the authority of this Court which is ſo delegated to him.—BULLER, J. alſo agreed; and ſaid, in the trial of a cauſe iſſuing out of this court, I am of opinion, that the judge at *niſi prius* muſt be conſidered to all intents as acting under the authority of this Court, and as an emanation of the Court. If we think proper we may try any cauſe which is commenced here at the bar of the court: it was for the eaſe of the ſeveral courts of Weſtminſter, and the ſuitors, that the legiſlature enacted, that cauſes might be tried in the counties where they ariſe; but if a cauſe be of great importance, or likely to be attended with conſiderable difficulty in the trial, it is ſtill the practice of the courts to retain it, and not ſend it down to trial at *niſi prius*. And in caſes where we ſend a record down to be tried, and for ſome cauſe it is not ſo tried, we are to enquire what is become of the record, and to know for what reaſon it was not tried: or if it be tried, and the verdict be not warranted, we are to correct it in this court. In ſhort, whatever is done in any ſtage of the cauſe is conſidered as done in the court: and the judge at *niſi prius* acts directly under the authority of this Court. Theſe affidavits then being made before the judge at *niſi prius*, when ſitting to try a record ſent down from hence,

were taken under the authority of this Court; and we ſhould degrade the judge at *niſi prius*, if we were to put him merely on the footing of a commiſſioner who is appointed by the Court to take affidavits. If then he be conſidered as repreſenting the authority of this Court, it anſwers two of the objections: firſt, as to the competency of the authority to take the affidavits; and, ſecondly, as to the liability of the parties to an indictment for perjury, if they ſwore falſely. GROSE, J. likewiſe agreed.

Rex *v.* Tarrant, Tr. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2106.

In this caſe an information was granted againſt an overſeer for procuring a pauper to marry a pauper with child of a baſtard, in order to get the baſtard ſettled in the pariſh where the huſband was ſettled.

Rex *v.* Compton, *et al.* Hil. Ter. 23 Geo. 3. B.R. *Cald.* 246.

But in this caſe, on a motion for an information againſt the defendants, overſeers and inhabitants of the pariſh of Doncaſter, in the county of York, for conſpiring to prevail upon a ſoldier to marry a poor woman of their pariſh, then big with child, for the purpoſe of throwing the burthen of her maintenance from themſelves upon the townſhip of Kirkby in that county, in which townſhip her huſband, the ſoldier, was ſettled.—THE COURT ſaid, great inconvenience had been felt from the practice of obliging perſons, in low circumſtances, to ſhew cauſe againſt informations, and to come afterwards before this Court, from, perhaps, a very remote part of the country, and, conſequently, at a great expence, to receive judgment. To be ſure this appears to be a very fit ſubject for proſecution; but juſtice may effectually be done otherwiſe; and it will be more proper in all (1) ſuch caſes, to take the common remedy, and proceed by way of indictment.—Rule refuſed (2).

Rex *v.* Robert Hann and John Price, Tr. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1716.

An information was granted againſt theſe defendants, juſtices of the peace for the borough of Corfe Caſtle, FOR REFUSING TO GRANT A LICENCE TO SELL ALE, to one *Ingram*, an inn-keeper, in that borough, *merely from a motive of reſentment againſt him* for having joined in an affidavit made in ſupport of the intereſt which was adverſe and oppoſite to that which was eſpouſed by theſe two juſtices, and their friends. The defence was, that they did not act from the motives imputed to them, but becauſe the man kept a diſorderly houſe. BUT THE COURT thought it a proper caſe

(1) So in the caſe of the *K.* v. *Slaughter* and *Batt*. *Buller*, J. ſaid, No ſuch rule has been granted, ſince I ſat here. The Court has come to a reſolution not to grant informations in theſe caſes. *E.* 25 *Geo.* 3. 1785, April 20. The like alſo *Rex* v. *Upſtale* and *Winn*, M. 28 *Geo.* 3. 1787, November 26, *per Aſhburſt*, *Buller*, and *Groſe*, juſtices.

(2) The mayor and town-clerk of Doncaſter were included in this application; but the Court thought, that the affidavit did not ſufficiently reach them. If it had, Lord Mansfield ſaid, the Court would have granted the rule againſt them.

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for an information, and made the rule abſolute; *becauſe the charge upon the juſtices was not ſatisfactorily anſwered by them.* Lord MANSFIELD, Ch. J. The Court ſhould never interpoſe againſt magiſtrates, unleſs they have acted from bad motives, and *malâ fide*; eſpecially in a caſe like this, where they are intruſted with an abſolute diſcretion; but, for that very reaſon, this is the ſtrongeſt caſe for the interpoſition of the Court, if it appears that they have acted upon corrupt motives; for it would be of very dangerous conſequence to permit the due diſcretion of the juſtices to be influenced by conſiderations of this kind. If it appeared, clearly, that this man *did keep a diſorderly houſe*, it would be a reaſon againſt the Court's interpoſing againſt the juſtices; but this does not clearly appear.

An information was granted by the Court againſt the defendants, as juſtices of the peace for the borough of Penryn; FOR REFUSING TO GRANT LICENCES TO THOSE PUBLICANS WHO VOTED AGAINST THEIR RECOMMENDATION OF CANDIDATES FOR MEMBERS OF PARLIAMENT FOR THAT BOROUGH. It appeared that they had acted very groſsly in this matter; having previouſly threatened to ruin theſe people, by not granting them licences, in caſe they ſhould vote againſt thoſe candidates whoſe intereſt theſe juſtices themſelves eſpouſed; and afterwards actually refuſing them licences, upon this account only. And Lord MANSFIELD declared, that the Court granted this information againſt the juſtices, not for the mere refuſing to grant the licences (which they had a diſcretion to grant or refuſe, as they ſhould ſee to be right and proper), but for the corrupt motive of ſuch refuſal; for their oppreſſive and unjuſt refuſing to grant them, becauſe the perſons applying for them would not give their votes for members of parliament as the juſtices would have had them.

Rex *v.* Williams, and Rex *v.* Davis, Ea. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1317.

And the ſame principle was laid down in this caſe, as in the laſtmentioned caſe; though the preſent rule "for ſhewing cauſe why there ſhould not be an information" was diſcharged, upon the merits; the juſtices not appearing to the Court to have acted from the corrupt motives which the proſecutor of the rule had charged upon them.

Rex *v.* Baylis, *et al.* juſtices of the peace for the city of Glouceſter, Ea. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1318.

On a motion for an information againſt the defendants, who were juſtices of the peace for the county of Middleſex, for improperly granting an ale licence to one *Harriſon*, who had been refuſed one by the juſtices at their laſt general meeting, on account of miſbehaviour. THE COURT were clearly of opinion, that an information ſhould be granted againſt a juſtice, as well for granting a licence improperly, as for refuſing one in the ſame manner. That it had already been done in the caſe of *The King* v. *Filewood, et al. E.* 26 *Geo.* 3. B.R. And, indeed, the miſchief of granting a licence

The King *v.* Holland and Forſter, Ea. Ter. 27 Geo. 3. B.R. 1 *Term Rep.* 692.

licence improperly was infinitely greater than that of refuſing one; for, in the former caſe, it might be productive of injury to the whole community; while, in the latter, the grievance was felt only by the individual. That the only ground of theſe applications was the improper conduct of the magiſtrates. But, as it appeared, in this caſe, that *Holland*, though not altogether blameleſs, had been deceived by *Forſter*, they diſcharged the rule as to the former, upon his paying the coſts of the application, as againſt himſelf; and, as to *Forſter*, they granted the information (1).

## *In what Caſes the Court will refuſe to grant an Information.*

The King *v.* Miles, Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 283-4.

It is a general rule, that the Court will not grant an information for a *private* libel, charging a particular offence, unleſs the proſecutor will deny the charge upon oath.—A rule having been obtained, to ſhew cauſe why an information ſhould not be filed againſt the defendant, as the author of a libel, accuſing the proſecutor of having been concerned in a monopoly in the Eaſt Indies, which produced a famine, and occaſioned the death of 30,000 people. It was objected, that the proſecutor had not, in his affidavit, ſworn, directly and poſitively, to his innocence of the charge; and the rule was diſcharged.

The King *v.* Haſwell—and the ſame *v.* Bate, on the proſecution of the Duke of Richmond, Ea. Ter. 20 Geo. 3. B.R. 1 *Doug.* 387.

A rule having been obtained, to ſhew cauſe why an information ſhould not be filed againſt *Haſwell*, as printer of the newſpaper called "The Morning Poſt," for a libel inſerted in that paper. In the form of queries, addreſſed to the proſecutor, *imputing to him a variety of treaſonable practices and deſigns*; and accuſing him, among other things, of having, in his ſpeeches in the Houſe of Lords, oppoſed the increaſe of the military ſtrength of the kingdom, in order, by preventing ſuch increaſe, to facilitate a deſcent in this country by the French: charging him alſo with having conveyed intelligence to the miniſters of France. And a like rule having been alſo obtained againſt *Bate*, as the publiſher—Ld MANSFIELD ſaid, there was an objection to which both applications was liable. *The proſecutor, in his affidavit, had not ſpecifically denied the particular charges contained in the libel*, and this was, in general, expected by the Court, before they would interpoſe by way of information. BUT his Lordſhip ſaid, it had occurred to him, that the nature of this libel was

(1) *Vide R. v. T. Sainſbury*, eſq. *et al. poſt.*

ſuch,

ſuch, that it might, perhaps, be an exception to the general rule. It contained, beſides allegations of particular acts of a very foul and treaſonable nature, general charges of treaſon; and, alſo, imputations of treaſonable language, held by the proſecutor in the debates in the Houſe of Lords. That as to what was ſuppoſed to have been ſaid by his grace in parliament, it certainly was unneceſſary to anſwer that by affidavit, becauſe what paſſes there can be queſtioned no where elſe; and general imputations did not ſeem to fall within the rule which requires a denial of the facts charged. His Lordſhip, however, added, that if there ſhould be any difference of opinion on this ſubject, the defect, which was only in point of form, might eaſily be cured by a ſupplemental affidavit.—WILLES, J. ſaid, he did not well ſee how the Court could make any diſtinction between the proſecutor and the loweſt individual. If the rule were general, he thought it ought to be adhered to in this caſe, and no inſtance had been ſtated where it had been diſpenſed with.—— ASHHURST, J. ſaid, he had always underſtood the rule to be general. If it was, the rank of the proſecutor, however eminent, could make no difference. The Court was not to know men, and could only act on what came before them. —BULLER, J. obſerved, that the power of granting informations is diſcretionary, but he thought there ought, in all ſuch caſes, to be certain general rules to guide the Court in exerciſing their diſcretion. Too much latitude was very dangerous, and the original propriety of a rule was of leſs importance than the ſtrict adherence to it, if it were eſtabliſhed. But, as part of this libel contained charges which the duke certainly was not bound to anſwer, perhaps it might be proper to grant the rule as prayed, and the proſecutor might make it abſolute only as to that part. Lord MANSFIELD ſeemed to concur with BULLER, Juſtice, in that idea, and WILLES, Juſtice, thought the word "falſe," in the Duke's affidavit, a ſufficient denial to ground a rule to ſhew cauſe. The rule was granted.—Afterwards the duke made an affidavit, expreſsly denying all the ſpecific charges in the libel, except what related to his conduct in parliament. This affidavit was put in, and was an exact echo (with negative words), of the terms of the libel.— Lord MANSFIELD, Ch. J. ſaid, the Court had conſidered the point very fully, and had had a great deal of converſation upon it, and the reſult was, that the rule was invariable. That it would be extremely dangerous if it were not ſo. —*Dunning* read a note of a caſe of *Rex* v. *Jenniſon*, in H. 13 *Geo.* 3. where the libel contained an accuſation of ſodomy againſt Lord *Arundel*; and Lord *Mansfield*, Ch. J. and ASTON, J. held, that, as the charge was only general, it did

did not require to be anſwered by affidavit (1). ASTON, Juſtice, alſo ſaid, that it would be extraordinary if it were neceſſary to deny the charge, when its being true could not juſtify the defendant. That, if falſe, it was an abominable calumny; if true, the defendant ought to have preferred an indictment. Lord MANSFIELD, Ch. J. then added (as he had ſtated before), that it had ſtruck him, that the ſubject-matter might make an exception, for it would be abſurd, for inſtance, to require of a proſecutor to ſwear, that he was not a traitor or a thief. He ſaid, the Court had looked into the proceedings in the caſe of Lady *Chambers*, and it appeared, that there the party applying for the information (who was a third perſon), had gone as far as the nature of the caſe permitted, by ſwearing to letters and intelligence from the Cape of Good Hope, where the ſcene of the imputed offence was laid, inconſiſtent with the allegations in the libel.

Cauſe was then ſhewn. AND LORD MANSFIELD, Ch. J. (after obſerving particularly on the affidavits), ſaid that wherever a ſtrong probable ground is laid, the Court will grant an information, if the ſubject-matter is fit for that mode of proſecution: and there never was a fitter ſubject than the preſent.—The rule was made abſolute (2).

The King v. Webſter, Tr. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 388.

Neither will the Court grant an information againſt a magiſtrate for having improperly convicted a perſon, unleſs the party complaining makes an exculpatory affidavit, denying the fact.—On ſhewing cauſe againſt a rule for granting an information againſt the defendant, who was a juſtice of peace, for having improperly convicted a perſon for killing a hare.—PER CURIAM: The queſtion is not, Whether the doors of juſtice ſhall be ſtopped, but whether juſtice ſhall be approached by this particular avenue? If the defendant has acted improperly, however innocent the party applying might be of the charge which was imputed to him, there are other ways open to him for redreſs. But *we cannot interfere in this particular manner, according to the eſtabliſhed rules of the Court, without an affidavit from the party complaining that he is innocent of the fact with which he has been*

(1) Thus in Eaſter term, 30 *Geo.* 3. the Duke of *Athol* having applied for an information againſt the printer of a newſpaper, for a libellous paragraph in his paper, ſtating that the duke and his family were held in ſuch general abhorrence, in the Iſle of Man, that if he ſhould ſucceed in obtaining an act, then depending in parliament, it would occaſion a revolt; the Court held, that no affidavit from the duke was neceſſary.

(2) The information was tried at the enſuing ſittings for Middleſex, when the defendant was convicted, *Haſwell* being one of the principal witneſſes againſt him. He was brought up for judgment in T. 21 *Geo.* 3. and ſentenced to an impriſonment of twelve months in the King's Bench priſon.

*charged.*

*charged.* An application of this ſort was made many years ago againſt Sir *John Fielding*, for having iſſued a warrant againſt one *Bernard*, upon a charge againſt him [not upon oath] by the Duke of *Marlborough*, for ſending threatening letters to extort money from the duke. But the information was denied for want of ſuch an exculpatory affidavit from *Bernard*. In libels, the Court always refuſe to interfere without an exculpatory affidavit; and thoſe caſes cannot be diſtinguiſhed from the preſent on principle, becauſe the Court do not interfere on account of the individuals concerned, but for the breach of the public peace.

The King v. Sparrow and Urquhart, Hil. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 198.

And in this caſe the Court ſaid, they had thought it proper to eſtabliſh as A GENERAL RULE for the future, that *when a perſon applies for an information, he is underſtood to waive his right to bring an action, unleſs the Court ſhould, on hearing the whole matter, be of opinion that it is a proper ſubject to be tried in a civil action, and ſhould ſpecifically give him leave to do ſo*, for it frequently happens that informations are moved for merely to ſift out the opinion of the Court, even when the party thinks there is little probability of ſucceeding: it is unreaſonable to engage the time and attention of the Court in ſuch a manner, and ſuch applications are unneceſſary, if the party reſort to his private remedy; and if an information be granted, it is of courſe to ſtay the proceedings in an action for the ſame cauſe.

The King v. Morgan, *et al.* 20 Geo. 3. B.R. 1 *Doug.* 314.

And on a rule for an information, though the Court may think a ground is laid for granting the information, yet if, under all the circumſtances, they are of opinion, that it will be a ſufficient puniſhment if the defendants pay the coſts; they will diſcharge the rule on thoſe terms.

The King v. Cozens, *et al.* Tr. Ter. 20 Geo. 3. B.R. 1 *Doug.* 426.

So in this caſe it appeared, that the right of electing members to ſerve in parliament for the borough of Dorcheſter "is in the inhabitants of the ſaid borough, paying to church and poor, in reſpect of their perſonal eſtates; and in ſuch perſons as pay to the church and poor in reſpect of their real eſtates within the ſaid borough;" and it is a general practice in the weſtern parts of England, for the owners to pay the poor-rate inſtead of the occupiers, who are the perſons rateable under the ſtatute of 43 *Eliz.* c. 2. ſ. 1. On an election petition it was contended, "that ſuch perſons as pay," in the words of the laſt reſolution, ought to be conſtrued to mean ſuch perſons as by law were bound to pay; and that the landlord ought to be conſidered as the mere agent of the occupier, and, as paying for him, ſo as to confine the right of voting to occupiers. But the committee determined upon evidence of the uſage, both before and ſince the date of the reſolution, "that ſuch perſons as pay in reſpect of their real eſtates, "though not inhabitants or occupiers, have a right to vote

"in

"in that borough (1)." In conſequence of this determination, there was a great ſtruggle in the borough, whether the poor-rate ſhould be, in fact, received from the landlords or the occupiers. The occupier of a particular houſe having been rated by name, he was ſummoned by the defendants, who were two juſtices, to ſhew cauſe why he ſhould not pay the rate. On the day for ſhewing cauſe, the overſeers of the poor attended, and alſo a perſon who was the grandſon of the owner of the houſe, and who, in the preſence of the defendants, tendered the ſum aſſeſſed to the overſeers. The defendants aſked him who he tendered it for; to which he anſwered, he tendered it for his grandfather. They then aſked him, "Don't you tender it for the occupier?" To this he anſwered, "No: I tender it for my grandfather." The defendants then aſked the overſeers, if they would take the money; which they refuſed to do; and thereupon the defendants immediately granted a warrant to diſtrain for it on the goods of the occupier. By the leaſe, the landlord had expreſsly ſtipulated to pay the poor-rate. On an application for an information againſt the defendants, on the ground that they had acted from corrupt and criminal motives, and to ſerve election purpoſes—Lord MANSFIELD ſaid, no juſtice of peace ought to ſuffer for ignorance, where the heart is right; but, on the other hand, when magiſtrates act from undue, corrupt, or indirect motives, they are always puniſhed by this Court. That here it was impoſſible for theſe defendants to excuſe themſelves upon the ground of ignorance. That in many parts of the kingdom the landlord pays the poor-rate for his tenants; and the landlord in queſtion had actually paid 28 rates before this, without any objection or difficulty being raiſed. That the juſtices, therefore, muſt have acted with a view to make a point to ſerve the purpoſe of an election.—BUT THE COURT propoſed, that, upon the defendant's undertaking to pay the whole coſts out of pocket, incurred by the application, the rule ſhould be diſcharged; which was accordingly done.

The King v. A. S. Willett, eſq. Ea. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 294.

The Court will not grant an information upon a verbal challenge, unleſs an affidavit from the perſon who delivered the challenge is produced. It was moved for leave to file a criminal information againſt the defendant, a magiſtrate, for ſending a challenge to the proſecutor, Mr. *Pike, on an affidavit made by the proſecutor and two other perſons, that the challenge was delivered to the proſecutor by Hatherley*, who was the acting clerk of the defendant, and who ſaid that he was deſired by the defendant to deliver the meſſage; and that the

(1) Caſes of Contr. Elect. vol. I. p. 358.

proſecutor

profecutor had applied to *Hatherley* to make an affidavit of the fact of the defendant having fent the challenge, which *Hatherley* had refufed.—THE COURT refufed to grant the rule, becaufe the affidavit on which it was prayed for was not legal evidence. They faid, that in thefe cafes they were placed in the room of a grand jury: that if a bill of indictment were preferred before a grand jury, the affidavit, or the oaths of thefe perfons of what *Hatherley* had faid, would not be legal evidence againft the defendant: and that this Court could only grant an information on evidence that would fupport a bill of indictment. That if they were to grant a rule, calling on the defendant to fhew caufe why an information fhould not be filed againft him, it would be calling on him, either to give evidence (on the fhewing caufe) againft himfelf; or leaving the rule to be made abfolute on this affidavit alone, which was not legal evidence. That this was diftinguifhable from *R.* v. *Jolliffe*, *ante*, p. 772. for there the Court had before them the former affidavit of the two perfons who refufed to make a fecond affidavit, which former affidavit was legal evidence, it having been made in the courfe of a judicial proceeding againft the fame defendant; and in *R.* v. *Archer*, *ante*, p. 410. the defendant had been convicted by a jury, and was only brought here to receive judgment; and there too it appeared that the perfon who refufed to make the affidavit was under the influence and control of the defendant. And they added, that if the profecutor chofe to prefer a bill of indictment againft the defendant, he might procure a fubpœna to take *Hatherly* before the grand jury for the purpofe of getting his evidence.—Rule refufed.

An information was moved for againft the defendants, who had collected upwards of 14l. on a brief, for the fufferers by fire at Alborne, in Wilts, and had fpent about 9l. at tavern entertainments; and then returned, upon the back of the brief, that 5l. 3s. and 4½d. only was collected, and figned their names to fuch certificate. But the Court denied a rule to fhew caufe, and referred the profecutors to the ordinary remedy by indictment.

King *v.* the minifter and churchwardens of St. Botolph, Bifhopfgate, Mic. Ter. 4 Geo. 3. B.R. 1 *Black.* 443.

One *Thurry* having recovered, in an action for a malicious profecution againft *Watfon*, 3000l. damages, he agreed, as the payment of fo large a fum would be attended with the ruin of *Watfon*, to accept 1500l. Under thefe circumftances, at a meeting of the corporation of Yarmouth, the defendants being the majority of the corporation, voted to *Watfon* 2300l. to indemnify him, declaring that *Watfon* had been actuated by motives of public juftice; of preferving the rights of the corporation; and of fupporting the honour and credit of the chief magiftrate: AN INFORMATION was, therefore, moved for, on the ground, that the payment of the 2300l. by the defendants, as members to the corporation, was a grofs abufe of

The King *v.* Watfon, *et al.* Hil. Ter. 23 Geo. 3. B.R. 2 *Ter. Rep.* 199.

of their truſt: BUT THE COURT ſaid, though this might be the ſubject of an application to the court of Chancery; yet it could not be the ground of a criminal information in this Court.

The King *v.* the juſtices of Seaford, Tr. Ter. 3 Geo. 3. B.R. 1 *Black.* 432.

The Court will not grant any information againſt juſtices acting in ſeſſions, unleſs in very flagrant caſes: for they act there in a court of record, with powers entruſted to them by the conſtitution; and the Court ſaid, it muſt be a very ſtrong caſe indeed, with flagrant proofs of their having acted from corrupt motives, that would warrant a rule for an information; and, therefore, they refuſed even to grant a rule to ſhew cauſe.

The King *v.* Jackſon, *et al.* Ea. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 653.

In ſupport of a rule for an information againſt the defendants, juſtices of the borough of Kendal, in Weſtmoreland, for miſbehaviour in their office, for having committed a pauper to priſon "*until he ſhould anſwer*," whom they were examining relative to his ſettlement, for not anſwering a particular queſtion propounded to him: under which commitment he continued in priſon for thirteen days; it was contended that this was ſo manifeſtly illegal, that they muſt have known they were exceeding their authority; and, therefore, that it muſt be intended that they acted from corrupt motives. But it appearing from the affidavits, that no corrupt motives were to be imputed to them, the rule was diſcharged. AND ASHHURST, J. ſaid, even ſuppoſing that the defendants have not, ſtrictly ſpeaking, acted legally, we will not grant an information againſt them unleſs they have acted corruptly. When magiſtrates act uprightly and honeſtly, even though they miſtake the law, no information ought to be granted againſt them. I will not now decide whether magiſtrates have a power to commit a pauper for refuſing to anſwer proper queſtions. They certainly have a right to examine a pauper touching his ſettlement; and yet that would only be a ſhadow of a right, unleſs they had likewiſe a power of enforcing that examination, by committing the pauper for refuſing to be examined. But without determining that queſtion, and ſuppoſing they have not that power, if theſe defendants acted without any corrupt motive, this Court will not interfere by granting an information. Now no corrupt motive is expreſsly charged by the affidavits, and we cannot infer it. BULLER, J. The affidavits only charge the defendant with having acted illegally; from whence it is left to the Court to infer corruption: which cannot be done. As to the power of commitment, I do not know how juſtices are to act, unleſs they have ſuch a power. This commitment, "until he ſhould anſwer," I think is right. And though the pauper continued in priſon under the commitment for thirteen days, that will not make the caſe ſtronger againſt the defendants. The party committed for refuſing

to

to be examined is to clear himself, and when he will answer, he must give notice to the magistrates. This is like the case of a commitment by the commissioners of a bankrupt, where the party committed must send word when he will submit and answer the questions. GROSE, J. Of the same opinion.—Rule discharged.

An information was moved for against the defendant, knight of the shire for Westmoreland, for attempting to bribe one *Coulthard*, an alderman of Carlisle, to vote at the election of an alderman, in June, 1763. Rules were then depending against *Coulthard*'s brother, for bribery at the election of a Mayor, at Michaelmas, 1764. The attempt charged was saying, after many persuasions, "I would give 100l. "rather than you should not go up to the hall, and vote for "Mr. *Senhouse*;" who was then the only candidate; but *Coulthard*, disliking him, had absented himself. Lord MANSFIELD, Ch. J. Informations at common law (which are very ancient in this court) were filed by the coroner, who did it upon any application, as a matter of course. The statute was, therefore, made to limit it. And other grounds there are by which the Court has limited itself. 1st, As to the merits of the person applying: for they may be under such circumstances, as that the Court will not interpose to favour them. 2dly, The time of application. As to this, there is no precise number of weeks, months, or years. But, if delayed, the delay must be reasonably accounted for. This consideration is more necessary in election contests, than in others. There is ill-blood enough, without this addition to it. 3dly, The suspicious state of the case, *ex evidentiâ rei*. 4thly, The consequences of granting the information. On which account the Court laid down the rule, that they would not grant one for bribery at parliamentary elections, till after two years were expired, in which civil actions may be brought. Now, first, as to the time. We took it, when the rule to shew cause was granted, to have been the same election, for which the other motions were made; but it appears to be a former year, and the delay is not accounted for. Secondly, as to the circumstances of the prosecutors. It is moved, by persons prosecuted by bribery at a subsequent election. Hereupon I rest my opinion. Though, thirdly, as to the suspicious state of the case, there was no opposition at the time; and, therefore, no visible necessity for such an attempt, which renders it improbable. WILMOT, J. of the same opinion.—Rule discharged.

King v. Robinson, Hil. Ter. 4 Geo 3. B.R. 1 *Black.* 541.

## *How profecuted.*

Rex *v.* Philipps, Lucas, and Gibſon, Tr. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1564.

Mr. Attorney-general having moved for leave (in the ordinary form of theſe motions) to exhibit an information againſt ſeveral perſons for a miſdemeanor in attempting to influence the jury returned to try Mr. *Wilkes*'s cauſe.—Lord MANSFIELD declared, that the Court would never grant an information upon the application of the attorney-general, in caſes proſecuted by the crown; becauſe the attorney-general has a right himſelf, *ex officio*, to exhibit one: and he may, if he thinks proper, ſummon the parties to ſhew cauſe "why "it ſhould not be exhibited," before he ſigns it. Whereupon Mr. Attorney changed his motion, and prayed a rule for an attachment. And the defendants, afterwards, by their affidavits, exculpated themſelves to the ſatisfaction of the Court.

Rex *v.* William Davis Phillips, eſq. mayor of Plymouth, Ea. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2089.

So in this caſe Mr. Attorney-general *(De Grey)* moved, on *the behalf of the crown*, for a rule to be made upon the defendant, to ſhew cauſe why an information ſhould not be granted againſt him, "for certain miſdemeanors in his office "as a juſtice of peace of and for the borough of Plymouth, "and for the illegal and falſe impriſonment of *Hugh Smart*, "*William Puckey*, and *George Lemon*, being officers of his "majeſty's cuſtoms, and in the due execution and diſcharge "of their office." AND LORD MANSFIELD rejected the motion; declaring that he would never grant a motion for an information applied for by the attorney-general on *behalf of the crown:* becauſe the attorney-general has himſelf power to grant it, if he judges it to be a proper caſe for an information; and it would be a ſtrange thing for the Court to direct their officer to ſign an information which the attorney-general might ſign *himſelf*, if he thought proper: and if he did not think it a proper caſe, it would equally be a reaſon why the Court ſhould not intermeddle. If the attorney-general ſhould have any doubt about the propriety of it, he might ſend to the magiſtrate complained againſt, to ſhew him cauſe why he ſhould not grant it.

The King *v.* Stratton, *et al.* Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 239, 240.

Neither will the Court give the attorney-general leave to quaſh an information filed *ex officio*; for he may ſtop the proceedings upon it by *nihil proſequi*, and file another.—An information had been filed, *ex officio*, by the attorney-general, againſt the defendants. The defendants had pleaded, and the parties were at iſſue, and notice of trial given; but the proſecutor countermanded the notice, and the ſolicitor-general applied for a rule to ſhew cauſe, why the information ſhould not be quaſhed, ſuggeſting as the ground of the application, that another was ready to be filed, which ſtated the offence more particularly, and was better adapted to the nature

nature of the charge. Lord MANSFIELD, Ch. J. having aſked the ſolicitor-general if there was any authority or precedent for quaſhing an information *ex officio* upon the application of the proſecutor, he admitted, that he knew of none; and his lordſhip ſaid, that if it was proper to ſtop the information, he did not ſee why the attorney-general might not do it by entering a *noli proſequi*, without the interference of the Court.—BULLER, J. What the ſolicitor-general has ſtated, viz. that the pendency of the firſt information would be no plea to the ſecond; is deciſive againſt this motion. It is certainly not of courſe to quaſh informations. All the litigated caſes are upon inſufficiency; and if the Court has even permitted it in the firſt inſtance, it has been becauſe they gave credit to the counſel in ſtating the inſufficiency.—The rule diſcharged.

An information may be filed by the ſolicitor-general, while the office of attorney-general is vacant.—In Michaelmas term, 1769, the ſolicitor-general (the office of the attorney-general being then vacant), exhibited an information againſt Mr. *Wilkes*, for a libel. Mr. *Wilkes* pleaded not guilty, and, on the trial, a verdict was found againſt him; after which, judgment was ſigned, and a writ of *capias* awarded againſt him, as in ordinary caſes of convictions upon informations for miſdemeanors: upon his non-appearance he was duly outlawed. Mr. *Wilkes* afterwards ſurrendered himſelf upon a *capias utlagatum*, and a writ of error was allowed under the fiat of the attorney-general, who, in ſuch a caſe as this, always examines whether it be ſought merely for delay, or upon a probable cauſe. UNDER THE FIRST ERROR ASSIGNED, viz. that there was no ſufficient information filed or exhibited againſt the defendant, whereon to ground the proceſs of outlawry. One objection was, THAT THE INFORMATION IS BY THE SOLICITOR-GENERAL, AND NOT THE ATTORNEY-GENERAL. PER CURIAM: If this objection is founded, it will equally hold upon a motion in arreſt of judgment: but none of us, from the beginning, ever entertained the leaſt doubt concerning it. An information for a miſdemeanor is the king's ſuit. The title of the cauſe is, "The king againſt the defendant;" the oath, at the trial, to the jurors and the witneſſes, is "between the king and the defendant." As a ſubject ſues by attorney, ſo does the king; with a little variation of form, from decency. Inſtead of ſaying "The king ſues by—," it is ſaid "—ſues for the king;" and yet, "*Coram Domino Rege venit* (1) *Dominus Rex per attornatum "ſuum, et inde producit ſectam,*" was held to be good. (*Hale*, Chief Juſtice, ſaid, it was but an unmannerly way of declaring for the king). The attorney is anſwerable, if he acts without

Rex *v.* John Wilkes, Hil. Ter. 10 Geo. 3. B. R. 4 *Burr.* 2527.

(1) 2 *Lev.* 82. 3 *Keble*, 127. *Raſtal's* Entr. 655. b.

authority; and, upon complaint by the party whose name he has falsely used, the Court would punish him, and set aside the proceedings: but while the principal avows him, neither the adverse party nor the Court can dispute his authority. The coroner of this Court prosecutes informations for the king, as his attorney. The form of the proclamation at criminal trials is a strong proof that anciently the king's serjeant might prosecute for the king. When there did not exist such an officer as solicitor-general, the king's serjeant or his attorney, or other that would sue for the king, should be received to aver against the testimony of the parties' imprisonment, where the outlawry was pronounced at the king's suit (1). There are many entries in *Rastal* (2), which shew that, at the common law, others than the attorney-general have sued for the king; or, in other words, the king has sued by others as his attornies. Serjeant *Glynn* cited a manuscript treatise concerning the star-chamber; of which Mr. *Filmer* has a copy: the original is in the museum (3). The author's name is preserved in a note written in this present book, at the beginning, by the Lord Keeper *Finch*, as follows: "This treatise "was compiled by *William Hudson*, of Gray's-inn, esquire, "one very much practiced, and of great experience in the "star-chamber, and my very affectionate friend. His son "and heir, Mr. *Christopher Hudson* (whose hand-writing "this book is), after his father's death, gave it to me, 19th "of December, 1635, *J. Finch*." The whole passage should be taken together, and is in these (4) words: "It "remaineth that I shall, in the next place, treat of the king's "ordinary suits, which are of two sorts; either by his attorney, informing of himself, or by other men's relations, and "by the king's almoner; the one being in criminal causes, "the other in civil. For the king's attorney, I have known "it much questioned, whether any other of the king's counsel "may not inform for the king, as well as the attorney-"general. And it is true, that in Easter term, 8 *Henry* 8. "it is ordered that the king's solicitor shall not prosecute any "further the merchants of the Stiliard, till it were otherwise "ordered by the council: and the same term, the solicitor "was commanded to sue out process against some, which ac-"quitted one *Blase* of a rape; so that it seemeth, that others "of the king's counsel did prosecute causes for the king, as "well as the king's attorney. But in 1 & 2 *James* the First, "it was resolved by the Court, that it belongeth to the place "of the attorney; and Serjeant *Heale*, the king's serjeant,

(1) Vid. 5 *Ed.* 3. c. 13.
(2) Title *Debt*, 192. b. pl. 4. Title *Escheat*, 114. pl. 3. Title *Quare Impedit*, 527. b. pl. 1.
(3) *Harleian* Catalogue, No. 1226, vol. I.
(4) Fol. 84. and 85.

"putting

"putting in a bill againſt Sir *John Luſon*, was denied the "privilege; for, if a bill be put in by the king's counſel as "for the king, there are no coſts to be paid to the defendant, "nor fees for the proſecution: but in this caſe, Serjeant "*Heale*'s bill was diſmiſſed with 30l. coſts; it continuing in "proſecution not above two terms." It is aſtoniſhing how any other law-officer of the king could claim, *as an official right*, to be the king's attorney in all ſuits which he ſhould think fit to bring in the king's name. The very conſtitution of an attorney-general is deciſive againſt it. He might ſtop every ſuit brought by another; and, therefore, the council did very right, as between the king's law-officers, to overrule Serjeant *Heale*: but they did not mean, that the king himſelf, for ſpecial reaſons, might not appoint another to act as his attorney. In that reign, afterwards, *Yelverton* was ſuſpended, and the ſolicitor appointed to act. Suppoſe the attorney-general perſonally the defendant, there muſt be another to ſue for the king; ſuppoſe the attorney-general out of the realm, or under a diſability from ſickneſs; ſuppoſe the office of attorney-general vacant: when it is; the buſineſs (which cannot ſtand ſtill) muſt devolve upon another of the king's counſel: and there is nothing ſo certain, as that the whole buſineſs and authority of the attorney devolves upon the ſolicitor-general. If the matter was traced, the two precedents in Eaſter term, 8 *Henry* 8. mentioned by Mr. *Hudſon*, were certainly during the vacancy of the attorney's office. It is impoſſible the council could, in the ſame term, order the ſolicitor-general to ſtop one public proſecution and commence another, if there had been an attorney-general. As far back as the memory of the vacancies of the attorney's office has led to a ſearch, precedents have been found of informations filed by the ſolicitor-general in Chancery, and on the law ſide of the exchequer. In this court, the information againſt the Earl of *Devonſhire*, 3 *Jac.* 2. was proſecuted by the ſolicitor-general; and though the enormity of the fine ſet, and the revolution of government, which immediately followed, made this caſe the ſubject of much animadverſion and juſt cenſure, "the ſolicitor-general having proſecuted," was never objected. There are precedents of replying, demurring, taking iſſue, praying judgment or award of execution, by the ſolicitor-general, during the vacancy of the other office. We all know, from our own experience, that upon every vacancy which we remember of the attorney's place, his office has been executed by the ſolicitor-general: but it is ſaid, "the information ought to have *ſuggeſted* that the office of attorney was vacant." Many of the precedents do not ſuggeſt it, and there can be no occaſion. The attorney-general is a great officer of the law, and of this court. The Court take notice when the office is vacant, and by whom it is filled, when full. They give credit to the

ſolicitor-general, when he ſues as attorney for the king, "that he *has authority*." He does it at his peril. In this caſe, before the defendant pleaded, the ſolicitor-general was made attorney, and in that capacity brought into court the information he had filed as ſolicitor. If an objection could lie to his authority as ſolicitor, the only queſtion would be, "From what time the information ſhould be conſidered as "commenced; from the filing by the ſolicitor, or the bringing into court by the attorney." And that could be of no conſequence, but in reſpect of the time when the defendant ought to plead: but he has pleaded to the information brought in by the attorney-general, and been tried. In every light, and in every view, this objection is groundleſs; nothing has been offered to ſupport it, but Serjeant *Heale*'s caſe. Upon ſo plain a point we ſhould not have ſaid ſo much, but that the objection alſo goes in arreſt of judgment, and, therefore, may be argued again.

Afterwards, a writ of error was brought, returnable in parliament, and the judgment was affirmed as follows: *Die Lunæ*, 16° January, 1769.—Counſel having been fully heard to argue the errors aſſigned in theſe cauſes, the following queſtions were put to the judges: "Whether an information, filed by the "king's ſolicitor-general, during the vacancy of the office of "the king's attorney-general, is good in law?" "Whether, "in ſuch a caſe, it is neceſſary, in point of law, to aver upon "the record, that the attorney-general's office was vacant?" Whereupon, the lord chief juſtice of the court of Common Pleas, having conferred with the reſt of the judges preſent, delivered their unanimous opinion upon the ſaid queſtions, with their reaſons: to the firſt queſtion, that an information filed, &c. is good in law; to the ſecond, that in ſuch a caſe it is not neceſſary.—And it was *ordered* and *adjudged*, that the judgments of the court of King's-bench be affirmed.

The King *v.* R. Carpenter Smith, Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 80.

On a motion made November 26th, for a criminal information againſt the defendant, for a neglect of duty as a magiſtrate of Surrey, on the 23d inſtant.—Lord KENYON, Ch. J. expreſſed a doubt, whether it was not contrary to the practice of the Court, to grant an information *againſt a magiſtrate* ſo late in the term, that he could not ſhew cauſe againſt it during the term, and whether the application ſhould not be deferred until the next term; but the officers of the Court certifying that ſuch a motion as the preſent might be made at the end of a term, for ſuppoſed miſconduct *during the term*, and that the practice alluded to only applied to caſes where the fact complained of happened before the commencement of the term—A rule to ſhew cauſe was granted; but a ſimilar motion was immediately afterwards refuſed in *R.* v. *Beavis*, and two other juſtices of the peace in Devonſhire, for ſuppoſed malpractices, on the 4th of July laſt.

But

But an information against a magistrate must be applied for sufficiently early, within the second term after the commission of the supposed offence, to give the defendant time to shew cause against the rule within the term, otherwise the Court will not grant a rule. The King *v.* Taylor, Hil. Ter. 33 Geo. 3 B.R. *Nolan*, 204.

One joint information against several defendants cannot issue upon separate and distinct rules obtained against each defendant.—There were five separate rules "for one or "more informations against each defendant;" and these were consolidated into this *one joint* information, without any rule for such a joint information against all of them. PER CURIAM: The same evidence, which would be sufficient to convict all *jointly*, will be sufficient to convict each one alone separately. And it is clear that this joint information against all is wrong, upon these *separate and distinct* rules for one or more against each.—The proceedings upon this joint information were stayed. Rex *v.* Heydon, and four others, Hil. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1270.

*Judgment on conviction.*]—The defendant, who was a young merchant, being convicted on an information, for contriving and effecting the escape of several French prisoners of war, was fined in the sum of 50l. only, on a representation to the Court, that any corporal punishment, or imprisonment, might prejudice him in his way of life, and that he was sorry for the offence. The King *v.* De Tessier, Mic. Ter. 1 Geo. 3 B.R. 1 *Black. Rep.* 268.

The defendant was convicted on an information, for writing a most blasphemous libel in weekly papers, called the *Free Enquirer*; to which he pleaded guilty. In consideration of which, and of his poverty, of his having confessed his errors in an affidavit, and of his being seventy years old, and some symptoms of wildness that appeared on his inspection in court, the Court declared they had mitigated their intended sentence to the following, viz. to be imprisoned in Newgate for a month; to stand twice in the pillory, with a paper on his forehead, inscribed *blasphemy*; to be sent to the house of correction to hard labour for a year; to pay a fine of 6s. 8d. and to find security, himself in 100l. and two sureties in 50l. each, for his good behaviour during life. The King *v.* Peter Annet, Mic. Ter. 3 Geo. 3. B.R. 1 *Black. Rep.* 395.

The defendants being convicted on an information for a conspiracy, to take away the character of one *Kempe*, and accuse him of murder, received judgment, viz. *Richard Parsons* (the father of the child, who was the principal agent in the pretended communication with a spirit, by supernatural noises, impossible in themselves to be interpreted, unless previously contrived and directed) to stand thrice in the pillory, and be imprisoned two years; *Elizabeth Parsons*, the mother, to be imprisoned for one year; and *Mary Frazer*, a servant, who was aiding and assisting, to be sent to the house of correction, to hard labour, for six months. *Moore*, the curate of the parish, and one *James*, who were found guilty at the trial, The King *v.* Parsons, *et al.* Hil. Ter. 3 Geo. 3. B.R. 1 *Black. Rep.* 401.

trial, were discharged, on paying the prosecutor 300l. and his costs, which amounted to near as much more. *Browne*, who had published a narrative, and one *Say*, the printer of a newspaper, had previously made their peace with the prosecutor.

Rex v Hann and Price, Mic Ter. 6 Geo. 3. B R. 3 *Burr.* 1786.

The Court will not dispense with the personal appearance of the defendants in an information on pronouncing judgment, where the sentence may be corporal.—It was moved on behalf of the defendants, who had confessed themselves guilty of an information, for refusing a licence to a public house-keeper, vide p. 776. *supra*, for a rule *to dispense* with the *personal* appearance of the defendants, on the undertaking of their clerk in Court, "to answer for their fines." AND THE COURT laid down this *general doctrine*, viz. that though such a motion was subject to the discretion of the Court, either to grant or to refuse it, where it was clear and certain that the punishment would not be corporal; yet it ought to be denied, in every case where it was either *probable* or *possible* that the punishment would be corporal. And though the Court did not then declare what punishment they would inflict upon the present defendants, yet they saw the offence in so atrocious a light, as to be far from determining "that it would be *only* pecuniary." And WILMOT, J. and ASTON, J. thought that even where the punishment would most probably be only pecuniary, yet, in offences of a *very gross and public nature* (as they held this to be), the persons convicted should appear *in person*, for the sake of example and prevention of the like offences being committed by other persons, as the notoriety of their being called up to answer criminally for such offences would very much conduce to deter others from venturing to commit the like (1).

## Information qui tam.

The King v. Mordecai Hymen, Ea. Ter. 38 Geo. 3 B.R. 7 *Ter. Rep.* 537.

WHEN a statute creates a penalty, and says that one moiety shall be to the use of the king and the other to a common informer, the king may sue for the whole, unless a common informer has commenced a *qui tam* suit for the penalty.—In such a case, the king may recover the penalty by an information filed by the attorney-general in this court.—This was an information by the attorney-general against the defendant, for a penalty of 500l. under the statute 24 *Geo.* 3. stat. 2. c. 47. s. 32. for bribing an officer of excise. The information also contained counts at common law for bribing the officer

(1) The sentence of the Court, 20th of November, pronounced upon them was, that they should be *committed* for a month, *fined* 50l. a-piece, and be imprisoned till the fine was paid.

of

of the cuſtoms.—The defendant having been convicted, a doubt aroſe, whether the king could ſue for the whole penalty (1); and if he could, whether it ſhould not be by a proſecution in the exchequer; and the matter ſtood over. And now the counſel for the proſecution mentioned, that in *Com. Dig.* title "Information," (A. 3), it is ſaid, "Where a ſtatute gives a penalty to the king, and to him who will ſue for it, *if* the king has not exhibited an information, any common informer may;" evidently implying, that a common informer cannot ſue, if the king has already exhibited an information for the penalty. THE COURT being ſatisfied with theſe authorities, ordered the defendant to pay the whole penalty.

See alſo title ACTIONS ON PENAL STATUTES.

## Inns of Court.

A SURRENDER of Chambers in New Inn, to the treaſurer and ancients of the ſociety, made with their aſſent, *to the intent that they might grant the ſaid chambers to a purchaſer*, paſſes the eſtate to ſuch purchaſer before admiſſion—for admiſſion is not neceſſary, as in the caſe of copyholds, to complete the grantee's eſtate: it is only for the purpoſe of ſignifying the aſſent of the ſociety that the grantee ſhall become a member of the inn.

Doe *ex dim.* Warry, *et al.* *v.* Miller, *et al.* executors of Chambers, Mic. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 393.

## Inſolvent Debtors.

*Under the lords' act.*]—AN order for the diſcharge of an inſolvent debtor under the lords' act, ſ. 16. cannot be made by a judge in term-time, though ſummonſes were taken out in vacation, and the order only delayed till the beginning of term, by an irregularity in the affidavits.—The diſcharge, in term-time, muſt be by the Court.

Haſkins *v.* Morris, Mic. Ter. 38 Geo. 3. C.B. 1 *Pul. & Baſ.* 93.

Upon an application for the diſcharge of an inſolvent debtor out of cuſtody, under the lords' act, 32 *Geo.* 2. c. 28. it appeared, that he had been charged in execution, on the 16th of October, 1789; that, in Michaelmas term following, he had given the proper notice to the plaintiffs, required by the abovementioned act, preparatory to his diſcharge; but, having employed an agent to purſue the ſubſequent ſteps neceſſary to entitle himſelf to take advantage of the act,

Pearce *et al.* *v.* Taylor, Ea. Ter. 31 Geo. 3. 4 *Ter. Rep.* 231.

(1) By the 38th ſect. of the ſtat. 24 *Geo.* 3. c. 47. it is enacted, that one moiety of the ſeveral penalties in the act mentioned ſhall be to the uſe of his majeſty, his heirs, and ſucceſſors, and the other moiety to the uſe of ſuch perſon as ſhall inform, proſecute, or ſue for the ſame; and that the penalties may be ſued for in any of his majeſty's courts of record at Weſtminſter.

which

which the agent had failed to do, he had been, in conſequence, remanded. In Michaelmas term, 1790, he made a ſimilar application to the Court, by virtue of 26 *Geo.* 3. c. 44. which extends the proviſions of the former ſtatute, and having then complied with the requiſitions of the act, the only queſtion was, Whether, under the 5th ſection of 26 *Geo.* 3. the priſoner could make oath that he had neglected to take advantage of the former ſtatute, *from ignorance or miſtake?* That ſection enacts, "that where any debtor ſhall "have neglected to take the benefit of the ſaid act within the "time limited by the ſaid act, and ſhall have remained in "priſon by the ſpace of one year, and ſhall make it appear "to the Court, out of which ſuch execution iſſued, that "ſuch neglect *aroſe from ignorance or miſtake*, ſuch debtor "ſhall then be entitled to take the benefit of the ſaid act, as "if he had taken the ſame within the time by the ſaid act ſo "limited as aforeſaid." PER CURIAM: Even if the neglect aroſe from the miſconduct, and not merely from the ignorance or miſtake of the agent employed; yet, if the defendant were not privy to it, but did every thing in his power to comply with the requiſitions of the act, it is, as to him, imputable to miſtake.

Vaughan *v.* Durnell, Tr. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 367.

If a defendant be arreſted on a *ca. ſa.* and eſcape, and be afterwards retaken and committed to priſon in the next term, he may apply, in the following term, to be diſcharged under the lords' act; for the words in that ſtatute, "charged in "execution," mean being detained within the walls of the priſon.—The writ of *ca. ſa.* on which the defendant was taken in the vacation, was returnable the firſt return of Michaelmas term, but he eſcaped from the cuſtody of the officer who arreſted him, and was not retaken till the 20th of November, when he was carried to the Marſhalſea priſon. In Hilary term he applied to be brought up, under the lords' act, before *Buller*, J. at chambers, for the purpoſe of obtaining his diſcharge; but as there was a miſtake in the notice given to the plaintiff, as to the name of the cauſe, he was remanded. It was now moved that the priſoner might be brought up to the court, in order that he might take the benefit of the lords' act. And it was urged, that if the Court ſhould be of opinion that, for ſo trifling a miſtake in the notice, the defendant ought not to have been remanded, the preſent application was in time, becauſe it muſt be conſidered as having been made in Hilary term, which was the term next after that in which he was charged in execution; and by the 32 *Geo.* 2. c. 28. ſ. 13. "any priſoner may, *before the end of the firſt term which ſhall be next after any ſuch priſoner ſhall be charged in execution*, petition, &c." *The Court* thought the application was made in time, for that the defendant could not be ſaid to be *charged in execution*, within the meaning of this act, until he was actually delivered over to the marſhal.

marshal. And that the 26 *Geo.* 3. c. 44. s. 4. which was made in *pari materiâ*, contained a parliamentary exposition of the words, "charged in execution," in the lords' act; for it directs "all gaolers and keepers of prisons to give notice of that act to all persons in their custody for debt, within three days after such person shall have been respectively *committed or charged in execution.*"—They, therefore, ordered the defendant to be brought up, and recommended it him to amend the title to the notice.

A prisoner who is taken in execution for more than 300l. and afterwards reduces his debts below that sum, by paying some of his creditors, is not entitled to be discharged under the lords' act in the next term after he has so reduced his debt; unless it be also the next term after he was taken in execution: for the material words of the act are "before "the end of the first term which shall be next after such "prisoner shall be charged in execution by his creditor." And the Court will not establish a precedent which may enable prisoners to deal with their creditors; and thus manage to prefer some of them by paying their debts; and come in under the lords' act against all the rest. *Ex parte* Hubbard, Ea. Ter. 39 Geo. 3. C.B. 1 *Pat. & Bos.* 423.

A defendant, charged in execution on a *qui tam* action, cannot be discharged on surrendering his effects under the lords' act, 32 *Geo.* 2. c. 28.—The defendant was charged in execution for a penalty recovered on a *qui tam* action, for exercising a trade contrary to the statute 5 *Eliz.* And it was moved, on the statute 32 *Geo.* 2. c. 28. to discharge him from the moiety of the penalty belonging to the informer, upon his giving up all his effects upon oath, according to the provisions of that statute. Lord *Mansfield*, Ch. J. Not one of the provisions in the act can apply to the case of the crown. These acts have had a very long existence, and there is no precedent in this court of a discharge on a *qui tam* action, which is a strong reason for disallowing it now. I apprehend, there is no severance of interest between the king and the informer, till the levying of the sum upon execution, and then the sheriff severs it. *Denison*, Justice. You may enter judgment, either jointly or severally, for the whole penalty, or for the distinct moieties; but the more regular way is, to enter it jointly for the whole.—*Foster*, J. of the same opinion. *Wilmot*, J. It is clearly the suit of the informer till execution. He may be nonsuited; and also the privilege of an attorney has been allowed to take place in these actions; neither of which could happen, were it looked upon as the suit of the crown. Hart *qui tam v.* Hawkins, Tr. Ter. 2 Geo. 3. B.R. 1 *Black. Rep.* 372.

But a defendant in execution for the contempt, and for the costs on a *quo warranto* information, may be discharged under the lords' act, for the fine to the king, in such a case, is merely nominal, and is no objection to the defendant's being discharged out of custody under the lords' act, as to the execution The King *v.* Pickerill, Tr. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 809.

execution for the costs, which is now considered as an execution in a civil suit.

Hutchins v. Hesketh, Mich. Ter. 38 Geo. 3. C.B. 1 *Pul. & Bos.* 143.

If a prisoner, brought up to be discharged under s. 16. of the lords' act, deliver in a false schedule and is remanded, the Court will not, at the instance of a creditor, even with the prisoner's consent, order him to be brought up a second time, for the purpose of amending his schedule, and assigning over that property which he had before concealed.—PER CURIAM: If a man in this situation make a mistake, the Court will go as far as possible to assist him. But this is not that case: this is a detected man, who has dared to give in a schedule as the schedule of a man without effects, when he really had effects. Here *we* are without apology for allowing him to amend his schedule. Should we assist him in his attempt to avoid those heavy penalties which are imposed by the act on persons who have conducted themselves in this way? He may possibly escape those penalties, but it must not be by any act of this Court: nor is it necessary, for the sake of the creditor, that we should interpose. If the defendant really has such effects as the plaintiff supposes, he may procure a title to them without coming to this court. We shall not, after what has passed, order the prisoner to be brought up on this suggestion.

Bayes v. Gamble, Tr. Ter. 3 Geo. 3. B.R. 3 *Burr.* 1393.

The lords' act, 32 *Geo.* 2. c. 28. s. 13. which directs in general, "that the Court shall cause the petitioning prisoner to be brought up *on some other day*, to be appointed by such Court, some time at farthest, *within the first week of the term next following*, the time of such examination, *but sooner* if any *such Court shall so think fit*," leaves the time of bringing the prisoner up a second time to the discretion of the Court; and in this case, the prisoner was ordered to be brought up again on the last day of the term, otherwise he would have remained in prison during the whole long vacation.

Thornton *et al. v.* Dunphy, Hil. Ter. 29 Geo. 3. C.B. 1 *Hen. Black.* 101.

Where a prisoner has been brought into court to be discharged under the lords' act, s. 13. and, upon his examination, the Court have refused to discharge him, they will not afterwards discharge him on that act, though he make an affidavit of circumstances in answer to the cause shewn, on his examination, against his discharge; and that those circumstances were not *then* disclosed, owing to a mistake; for the 5th section of the 26 *Geo.* 3. c. 44. (1) is only meant to remedy a neglect, in not taking the benefit of the lords' act, *within the time limited* by that act.—In this case the de-

(1) Which enacts, "that where any debtor *shall have neglected to take the benefit of the said act* (the 32 *Geo.* 2. c. 28), *within the time limited by the said act*, and shall have remained in prison by the space of one year, and shall make it appear to the Court, out of which such execution issued, *that such neglect arose from ignorance or mistake*, such debtor shall then be entitled to take the benefit of the said act, as if he had taken the same within the time so limited."

fendant

fendant had petitioned, and been brought into court, within the limited time, namely, before the end of the first term after he was taken in execution; and it was moved to bring him into court a second time, upon an affidavit as above: but the Court said, there was no instance of a second petition being allowed, after the merits of the first had been finally decided. If such practice were suffered, it would produce infinite vexation.

An insolvent debtor has a right to his discharge, if his groats be not paid before ten at night of the day on which they are payable; and this right is not waived by the turnkey on the felons' side accepting them after that time.—It appeared that the debtors' side, on which the prisoner was, is always locked up at ten o'clock; and that the turnkey on that side goes away, and another takes charge during the night. That in this instance the groats were not brought to the prisoner till a quarter past ten, and were then given to the turnkey on the felons' side, who received them at the gate; but that the defendant afterwards refused to accept them, alleging that they had not been tendered in time. AND PER CURIAM: It is not necessary to determine, whether the acts of the turnkey can bind the prisoner as his agent, or not; for in this case, the turnkey, who did receive the groats, cannot be so considered, for he was the turnkey on the felons' side, and not on the debtors'.

Fisher *v.* Ball, Mic. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 36.

If a judge make an order for a prisoner's discharge under the lords' act, 32 *Geo.* 2. c. 28. s. 13. out of term, it is final; and, although he may have made a mistake, the Court will not direct the order to be set aside, and give the plaintiff liberty to retake the party.—Also all notes for the groats under that act must be paid, and made payable, on the Monday in each week, and on no other day; for it is fit that there should be one common day, that the turnkey may know when to attend.

Lench *v.* Pargiter, Hil. Ter. 19 Geo. 3. B.R. 1 *Doug.* 68.

When a debtor is in execution at the suit of several plaintiffs, on a joint debt due to them, as partners, one of them may give a note for the weekly payment of 3s. 6d. under the lords' act, signed by him alone "*for himself and partners.*"

Meux *et al.* *v.* Humphry, Mic. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 25.

But a note for the groats must be signed by all the lessors of the plaintiff, where the defendant is in custody, under an attachment for not paying money awarded under a reference in an ejectment cause; and if a note for the groats be signed by one of the lessors only [in this case it was signed by *Moore* only], the defendant is entitled to be discharged, though he has received some payments under the note.

The King, on the prosecution of Moore and Wife, and ——— and Wife, *v.* Wilkinson, Hil. Ter. 32 Geo. 3. B.R. 7 *Ter. Rep.* 156.

So also when several executors are plaintiffs, a note given to an insolvent debtor under the lords' act must be signed by all of them; for a defendant has a right, under the statute, to the security of all the plaintiffs, personally; and a note signed by one executor only, will not bind the other executors; nor will it be a charge on the assets of the testator; and, therefore, all the executors must sign it.

Lepine, *et al.* executors, *v.* Bayley, Tr. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 325.

It

Tekell *v.* Caſey, Tr. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 670.

It is now clearly ſettled, that no ſtamp is neceſſary for a promiſſory note for the payment of a priſoner's groats under the lords' act.—Lord KENYON, Ch. J. ſaid, that the Court had conferred with the other judges on this ſubject, and that they were all of opinion that no ſtamp whatever is neceſſary on notes of this kind (*See vol. II. p.* 373.)

Flarty *v.* Odlum, Tr. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 681.

On a rule to ſhew cauſe why the defendant, an inſolvent debtor, ſhould not be diſcharged out of cuſtody, THE ONLY QUESTION was, *Whether or not his half pay, as a lieutenant in a reduced regiment of foot, ſhould be included in his ſchedule delivered in under the lords' act?* Againſt his diſcharge ſeveral caſes were mentioned; one was that of a life-guard-man, ſome few years ago, whoſe diſcharge was oppoſed before *Aſton*, J. on the ground that, as the place was aſſignable for his own benefit, he was compellable to aſſign it for the benefit of his creditors; and the judge refuſed to diſcharge him on that ground. Another inſtance was in the caſe of one *Peake*, a ſuperannuated boatſwain of the *Royal George*, in May, 1789, who was brought up by a creditor under the compulſory clauſe, where it was held that he was compellable to aſſign his commiſſion; but, before the expiration of the ſixty days, he made a compromiſe. PER CURIAM: This half-pay could not be legally aſſigned by the defendant, and, conſequently, the creditors are not entitled to an aſſignment of it for their benefit. Emoluments of this ſort are granted for the dignity of the ſtate, and for the decent ſupport of thoſe perſons who are engaged in the ſervice of it. It would, therefore, be highly impolitic to permit them to be aſſigned; for perſons, who are liable to be called out in the ſervice of their country, ought not to be taken from a ſtate of poverty: beſides an officer has no certain intereſt in his half-pay, for the king may, at any time, ſtrike him off the liſt. Indeed aſſignments of half-pay have been frequently made in fact, but they cannot be ſupported in law. It might as well be contended, that the ſalaries of the judges, which are granted to ſupport the dignity of the ſtate, and the adminiſtration of juſtice, may be aſſigned. What the duty of the life-guardsmen was originally we do not know; but, for ſome time paſt, theſe places have been held regular objects of ſale; and, *if an office may be ſold by the party himſelf, it is aſſignable for the benefit of his creditors.* But that is very different from the preſent caſe: if the queſtion had been, Whether or not the pay, which was *actually due*, might be aſſigned? it would be, like any other exiſting debt, aſſignable; but that does not extend to *future accruing payments*. The priſoner was ordered to be diſcharged accordingly (1).

(1) In the caſe of Captain *Kennedy*, a bankrupt, the ſame point was determined by the lord chancellor about a year and a half ago. See alſo the caſe of *Lidderdale* v. *The Duke of Montroſe*, et al. under the title OFFICER, *infra*, vol. IV.

*Under*

*Under insolvent acts.*]—Cause was shewn against the defendant's being discharged out of custody upon filing common bail: he had been discharged under the insolvent debtor's act, 16 *Geo.* 3. c. 38. and afterwards held to bail for *a debt accruing subsequent to the 22d of January*, 1776, viz. in May following.—It was admitted, that by sec. 33. no person discharged under this act could be arrested for any debt *contracted or growing due before the 22d of January*, 1776. But the legislature, foreseeing a case might happen, where a party, *in custody on the 22d of January*, and remaining so till discharged, might be indebted for a cause of action subsequent to that time, had, by the next section (34) expressly provided, that "no prisoner should be discharged of any debt *subsequent* "to the 22d of January, 1776; and if any prisoner should "stand charged *with debts previous as well as subsequent to that* "*day*, the justices should discharge him as to the previous "debts, and remand him for all debts he should stand charged "with in custody, subsequent to the said time." That here the debt, though *incurred previous to the defendant's being discharged*, was not *contracted* till long after the 22d of January, therefore could not be discharged under this act; and, consequently, the defendant was rightly held to bail.—In support of the rule it was said, that the doubt in this case arose upon the 22d section of this statute; by which it was enacted, "that the creditors of any person discharged under that act "may commence any suit against such prisoner for the "recovery of any sum *which shall be due at the time of his dis-* "*charge*, but shall not hold such prisoner to special bail." That these words, *at the time of his discharge*, meant to include *all debts due at that time*, and, therefore, this being confessedly a debt previous to the defendant's discharge, the plaintiff, by the express words of the act, was precluded from holding him to special bail. PER CURIAM: Nothing can be clearer than this case: all the clauses clearly relate to debts previous to the 22d of January; only here the debt, though contracted before the defendant's discharge, was subsequent to the 22d of January; clearly, therefore, he might be held to special bail.

Ernst, *et al. v.* Sciaccaluga, Hil. Ter. 17 Geo. 3. B.R. *Cowp.* 527.

It was moved to discharge the defendant (an insolvent debtor) upon common bail; the debt for which he was arrested having accrued before his insolvency. The facts were, that the plaintiff had been security for the defendant. The bond became forfeited *before the defendant's discharge* under the insolvent act, though the money had been paid *since*. PER CURIAM: The damnification, which is the cause of the present action, did not arise till after the time of his discharge, and is not the object of the act.—Rule discharged (1).

Mason *v.* Vere, Tr. Ter. 18 Geo. 3. C.B. 2 *Black.* 1217.

(1) See also *Cotterell* v. *Hooke*, vol. I. p. 599. and *Goddard* and *Vanderheyden*, and other cases in vol. II. p. 242. 244.

It

Norris v. Levy, Ea. Ter. 18 Geo. 3. C.B. 2 *Black. Rep.* 1188.

It was moved to discharge the defendant from his arrest on entering a common appearance: and it appeared that a commission of bankrupt had issued against him, but he had not obtained his certificate, and being now arrested for a debt accrued before the date of the commission, he now applied to be discharged by the Court under sect. 68. of the insolvent act, 16 *Geo.* 3. c. 38. which directs, that an uncertificated bankrupt, who hath duly conformed to the several acts of parliament, &c. and who is afterwards arrested for a debt contracted previous to the commission, may be discharged by any judge of the Court, unless the plaintiff appears, and proves a concealment of any part of his effects, or the nonconformity of the defendant to any of the bankrupt laws (1). This was opposed on two grounds, 1st, that of concealment; 2dly, that of nonconformity. And the latter was so clear, that the Court gave no opinion, whether there was due proof of the first: and they said, it is the duty of every bankrupt to attend the commissioners at all times, till his affairs are finished, or, at least, to be amenable to their call. It is also his duty to assist his assignees in discovering and getting in his effects. A bankrupt, who quits the kingdom before the settlement of his affairs, as this man did, especially in a large concern, puts it out of his own power to conform to the bankrupt laws.

Ford v. Chilton, Hil. Ter. 12 Geo. 3. C B. 2 *Black.* 798.

On a motion to discharge the defendant out of custody, he having been discharged on the insolvent debtors' act, 9 *Geo.* 3. c. 26. It was objected, that the defendant ought to have *pleaded* this act, in discharge of his person. BUT PER CUR. he is at liberty to plead it, to prevent going to gaol, but is not obliged so to do; and it is unlawful to take his person in execution; and, upon disclosing it to the Court, we will free him from such unlawful imprisonment. He has attempted to plead the act, but did it informally, and it was over-ruled on demurrer: but the statute never could intend, that the defendant should *plead* the act, or be deprived of its benefit; for there are some cases, in which he has no opportunity of pleading; as in entering up judgment, upon an old warrant of attorney, &c. IT WAS THEN OBJECTED, that since his discharge he had promised to pay the debt, which was a new *assumpsit*. BUT PER CUR. The evidence of this is very slight; affirmed by the plaintiff's affidavit, and denied by the defendant's; and, were it proved, still, if the new promise was *occasioned* by the former debt, it seems within the general discharge. THE THIRD OBJECTION was, that the defendant was an attorney, and excepted out of the act, for money recovered and received by him, for the use of another. That the cause of action was for 20l. 10s. of which 10l. was contracted, by receiving a bill of exchange for the plaintiff, of one

(1) This clause, which used to be inserted in the occasional insolvent acts, has been omitted in the two last.

*Cheney.*

*Cheney*. BUT PER CUR. The true construction of the act is, when the defendant, an attorney, has *recovered and received* money for another, in the course of his practice as an attorney. In the present case, he appears in no other light than as a mere indorsee of a bill, and had no instructions to sue for the money, or recover it by any course of law. No special confidence has been reposed in him, in consequence of his profession.—Prisoner discharged.

Hartwell v. Vere, Tr. Ter. 19 Geo. 3. C.B. 2 *Black.* 1307.

The defendant (a sheriff's officer) was discharged on the insolvent act of 16 *Geo.* 3. on the 29th of July, 1776. The plaintiff having paid (as one of *Vere*'s sureties to the sheriff), in 1773 and 1774, 331l. 5s. 4d.; and since the 22d of January, 1776 (the day limited in the act), the further sum of 34l. 6s. 8d. brought his action for the whole in January, 1768, and held the defendant to special bail for 34l. On the trial the plaintiff had a verdict, and endeavoured to fix the defendant's bail; in whose discharge the defendant rendered himself a prisoner on the 13th of May, 1779. It was now moved, that on payment of the 34l. 6s. 8d. and 41l. 3s. costs, a *supersedeas* should issue, to discharge the defendant from the Fleet, as to this action.—This was objected to, because the defendant had not *pleaded* this matter; and it was insisted, that he could not now take advantage of it upon motion, after verdict, judgment, and execution. DE GREY, Chief Justice:—That a discharge under the insolvent act may be taken advantage of upon motion after judgment, without pleading it to the action, has been settled in the case of *Ford* and *Chilton*, Hil. 12 *Geo.* 3. The general principle of the insolvent acts is to discharge the person of the debtor, but not his effects, for debts incurred before the time limited in the act. This discharge may be obtained whenever he is imprisoned, either on mesne process or by writ of execution: if arrested on mesne process, he may apply to the Court, or a judge, who will discharge; therefore, the plaintiff was well advised in holding the plaintiff to bail for only the new debt of 34l.—When the cause proceeded, the defendant might have pleaded the act; but then he must have confessed the whole debt, which, perhaps, he might have reason to dispute; and the verdict and judgment must have been special, distinguishing what accrued before the discharge, and what since, in order to restrain the execution to the effects, with respect to the former. But the defendant is not bound to plead it, but may take advantage of it upon motion, if his person is taken in execution. In some cases he has no opportunity to plead it; and in those cases he must avail himself of it (if at all) upon motion after imprisonment. In cases of bankruptcy, and of privilege (which most resemble this case), the imprisonment being illegal, the party may be discharged upon motion, as well as by plea. It was so done in the famous case of Mr. *Pitt*, and in many others. In Sir *Daniel Ocarrol*'s case, before Lord

*Hardwicke*, the chancellor governed himself by analogy to the proceedings at law. He was decreed to pay money, and in default thereof process of contempt to issue against his effects, but not against his person.

Mason *v.* Vere, Tr. Ter. 19 Geo. 3. C.B. 2 *Black.* 1309.

The insolvent act, 16 *Geo.* 3. recited "that, from "their future effects being liable to their previous debts, "persons had found difficulty of obtaining new credit to set "themselves up in their usual trades and occupations, and had, "therefore, gone abroad, and carried their arts and manufac- "tures into foreign countries;" and, therefore, to prevent such evil, IT WAS ENACTED that "only their real estates, or "money in the funds, acquired after such discharge, shall be "liable to their former debts;" but that "no discharge of "the insolvent shall be a discharge to any of his partners in "trade, or his sureties, or co-obligors." It was insisted, that the preamble confined the clause to persons in trade, or exercising arts and manufactures beneficial to this country only. BUT THE COURT held, that the clauses were general, and extended to all persons whatsoever, notwithstanding the special preamble, because it gave to more persons an opportunity of gaining a subsistence by raising a new credit, and so prevented, in the idea of the legislature, the depopulation of the kingdom. Special preambles may, or may not, restrain the generality of the enacting clause, as in the case of *Rial* and *Rowles*, before Lord *Hardwicke*. But, in the present case, an insuperable difficulty would arise, by making it a question upon every particular insolvent, What is a trade, an occupation, an art, a manufacture, &c. and how far he is to be classed under any of them? The clause relating to partners and sureties is clearly general; and as that is a proviso and exception from the body of the clause, an argument fairly arises from thence, that the clause itself is general.

Hatt *v.* Verdier, Mic. Ter. 11 Geo. 3. C.B. 2 *Black.* 724.

It was moved to discharge the defendant on common bail, the defendant having been discharged on a late insolvent debtors' act.—This was opposed, because the defendant had afterwards promised the plaintiff, that, if he would pay him 1l. 1s. for a wig which he had made him, he would waive the benefit of the insolvent act, and pay him 11l. 11s. for which this action was brought, when he should be thereunto requested. PER CUR. This is a strange promise; but, if true, the debt is thereby revived: but then the plaintiff ought to make request before he brings the action; and, this not being sworn to, we must make the—Rule absolute.

Bowen *v.* Hill, Ea. Ter. 15 Geo. 3. C.B. 2 *Black.* 992.

A creditor may prove a debt by judgment under the insolvent act, provisionally, pending a writ of error.—It was moved to discharge the defendant from his imprisonment at the plaintiff's suit, who had obtained judgment, on which a writ of error was brought. Pending the writ of error, the defendant took the benefit of the last insolvent debtors' act; after which the writ of error was nonpros'd. Then the plaintiff

plaintiff ſued out *ca. ſa.* and took the defendant in execution for 20l. 12s. debt and coſts It was contended, that by reaſon of the writ of error, the plaintiff's judgment was ſuſpended, that he was excluded from any benefit under the inſolvent act; and it was hard he ſhould be deprived of his remedy at common law, and have no relief under the ſtatute. *Sed non allocatur:* for PER CUR. the plaintiff might have come in as a creditor, and proved his judgment proviſionally; that is, ſubject to the writ of error.—Rule abſolute.

Blandford, *et al.* executors of Froud, *v.* Foote, Tr. Ter. 14 Geo. 3. B.R. *Cowp.* 138.

It was moved that the defendant, who was *an uncertificated* bankrupt, and in cuſtody upon a *ca. ſa.* might be diſcharged under the inſolvent act, 12 *Geo.* 3. c. 47. ſ. 2.—The facts were as follows: The defendant became indebted to the teſtator, *Froud*, upon bond in the year 1756, and about two years afterwards became bankrupt. Subſequent to the bankruptcy, *Froud* brought an action upon the bond, obtained judgment, and died: after which the executors brought a new action upon the judgment, and on this laſt action the defendant was in cuſtody. It was inſiſted, that the judgment, upon which the defendant had been taken, being ſubſequent to the commiſſion ſued out, the defendant was not within the favour of the ſtatute, which expreſsly relates to *any debt or debts due or contracted* before ſuch commiſſion iſſued, and to ſuch debts only. On the other hand, it was contended that the defendant ought to be diſcharged; for, though the judgment was ſigned after the commiſſion ſued, yet the cauſe of action was antecedent to the commiſſion, and, therefore, within the intention of the ſtatute. AND OF THIS OPINION WERE THE COURT, who ſaid, that the intereſt and coſts accrued ſince the bankruptcy alſo ſtood upon the ſame foundation as the original debt, which was clearly before the bankruptcy, and that, therefore, they were equally within the benefit of the act.—Rule abſolute.

Workman *v.* Leake, Hil. Ter. 14 Geo. 3. B.R. *Cowp.* 22.

The defendant had indorſed a promiſſory note, dated the 28th of October, 1771, drawn by one *Hodgſon*, payable to the defendant, or order, three months after date: this note was, conſequently, *not payable till January* 31, 1772. The defendant was arreſted upon this note, and it was moved that he might be diſcharged upon filing common bail, on the ground that the cauſe of action, for which he was arreſted, had *accrued* prior to the inſolvent act, 12 *Geo.* 3. c. 23. *which act took place on the 1ſt of January*, 1772, and under which the defendant had obtained his diſcharge. PER CURIAM: The words of the inſolvent act, 12 *Geo.* 3. c. 23. ſ. 27. are much larger than thoſe of the ſtat. 5 *Geo.* 2. c. 30. ſ. 7. relating to bankrupts, which latter ſtatute mentions only ſuch debts as were *due or owing* at the time the party became bankrupt; whereas this ſtatute extends to all debts contracted, incurred, occaſioned, owing, *or growing due*;

therefore this is *debitum in præſenti ſolvendum in futuro*; and conſequently, being due on the 1ſt of January, 1772, it is diſcharged under the act: but it would have been otherwiſe if it had depended upon a contingency, becauſe then, till the event happens, it is no debt.

Paget v. Wheate, Ea. Ter. 21 Geo. 3. B.R. 2 *Doug.* 668.

By the inſolvent debtors' act of 18 *Geo.* 3. c. 52. the inſolvent perſon is diſcharged, as to bonds *executed before* the day in the act, but *not payable till after* the day.—This was an action of debt on a bond, executed at Weſtminſter on the 21ſt of November, 1777, for the penal ſum of 250l. The defendant, by his *plea*, confeſſed the debt, but pleaded an inſolvent act, 18 *Geo.* 3. c. 52. *in diſcharge of his perſon*, as being a fugitive in foreign parts, for debt, on the 10th of March, 1778. The replication was, that the bond was made on the 21ſt of November, 1777, conditioned to pay 125l. with lawful intereſt *on the 21ſt of November*, 1778; and that, after the ſaid 10th of March, 1778, to wit, on the ſaid 21ſt of November, 1778, in the condition mentioned, the ſaid ſum of 125l. *firſt became due*; and that, therefore, the bond became forfeited, and the ſaid debt and cauſe of action thereby and thereupon accrued, *after the ſaid 10th of March*, 1778.—General demurrer. It was contended that, if the whole act was taken together, it would be manifeſt that it was the intention of the legiſlature, that debts, under the circumſtances in this caſe, ſhould be diſcharged by the act. That this appeared clearly from the 37th ſection, which provides, that no perſon diſcharged by the act ſhall be impriſoned for any debt, bond, &c. contracted, incurred, occaſioned, owing, *or growing due, before*, &c.; and that, if arreſted, ſuch perſon ſhall be releaſed by any judge of the Court, out of which the proceſs iſſued, or by two juſtices of peace. On the other ſide it was inſiſted, that inſolvent acts ought not to be conſtrued with greater latitude in reſpect to the inſolvent, than the bankrupt laws in reſpect of the bankrupt; and that a bond, made before bankruptcy, but not due till after, was not proveable under a commiſſion, nor diſcharged by the certificate, till a ſtatute was expreſsly made for that purpoſe, 7 *Geo.* 1. c. 31. ſ. 1, 2. Lord MANSFIELD Ch. J. ſaid, that the very ſame queſtion had occurred in a caſe of *Workman* v. *Leake*, H. 14 *Geo.* 3. where the Court had held, that a debt due by a promiſſory note, though not payable till after the day in the act, yet was *debitum in præſenti*, and that, as ſuch, it was diſcharged, differing from a debt only payable on a contingency, which would not be diſcharged, unleſs the contingency had happened before the day; and that he had then mentioned, that he and the other judges had been reminded of various inſtances, where they had diſcharged from arreſts, under circumſtances ſimilar to thoſe of the caſe then before them.—Judgment for the defendant.

So

So in this case, the defendant, having been a prisoner in the Fleet prison, on the 12th of February, 1794, was discharged at the London quarter-sessions, on the 15th of July in that year, under the insolvent debtors' act, 34 *Geo.* 3. c. 69. After which he was arrested, at the suit of the plaintiffs, for a debt of 80l.; 30l. part of which was due to them before the 12th of February: the remaining 50l. became due in this way; the defendant had given a bill of exchange for 20l. and a promissory note for 30l. before the 12th of February, 1794, both payable, six months after date, to *J. Parkyns*, or order; the former was dated on the 10th, the latter on the 13th of October, 1793; and they respectively became due on the 13th and 16th of February, 1794.—It was moved, that the defendant might be discharged out of custody, because the whole of the plaintiffs' debt was either *due or growing due* before the 12th of February. *The Court* were clearly of opinion, that these two sums were within the letter as well as the spirit of the act of parliament. That the words "growing due" meant something more than "owing" or "due;" and that those words were inserted for the purpose of meeting such a case as the present. That this, and the other insolvent acts alluded to, being made in *pari materiâ*, ought to receive a similar construction; and that the case in *Cowper* was a direct authority in point.—Rule absolute.

Lord Kinnaird, *et al. v.* Barrow, Mic. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 49.

Only those prisoners for debt, who were in custody on the 12th of February last, and have continued in *the same prison* to the time of their being carried to the sessions to be discharged, are entitled to the relief given by the insolvent act, 34 *Geo.* 3. c. 69.—A *mandamus* was applied for, to be directed to the defendant, the marshal of the King's Bench prison, to command him to include in his list of debtors, to be delivered at the adjourned Surrey sessions, the name of *John Daws*, in order that he might take the benefit of the last insolvent act, 34 *Geo.* 3. c. 69. Daws *was originally in the custody of the sheriff of Devon, and was afterwards removed into the King's Bench prison, where he was charged in execution, but this removal was after the 12th of last February.* The marshal's objection to include this person in his list arose from the two first sections of the act; the first of which directs the gaoler, or keeper, of every prison to make out *a true list of the names of the persons who, on the 12th of February, 1794, were, and at the time of making out such list should be, actual prisoners in the custody of any gaoler*, &c. upon any process for debt, &c. and an account of the time when such persons were respectively charged in custody, or received in prison, &c. and deliver the same, &c.; and the second of which imposes an oath on the marshal, or keeper, that every person, whose name is inserted in the list, was, to the best of his knowledge and belief, *a prisoner in actual custody in the prison or gaol of* ——, *on*

The King *v.* W. Jones, esq. Mich. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 28.

——, *on the 12th of February*, 1794. PER CURIAM: If the attention of the legiſlature had been called to a caſe circumſtanced like the preſent, they would, moſt probably, have provided for it. But it ſeems to be a caſe omitted in the act. The form of the oath, which is required by ſect. 2. to be taken by the marſhal, is poſitive; but he cannot ſwear, as directed by that clauſe, that this perſon was actually *in his cuſtody* on the 12th of February. It appears, that the act of parliament only extends to thoſe perſons who have continued in the ſame cuſtody from the 12th of February, 1794, to the time of their being brought up to be diſcharged; but, probably, application will be made to parliament, in the next ſeſſion, to correct ſeveral miſtakes that have crept into the act, and then this omiſſion may be ſupplied (1).—Rule refuſed.

The King *v.* The Juſtices of Surrey, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 76.

If an inſolvent debtor, brought up to the ſeſſions under the laſt inſolvent act, be remanded on a charge againſt him, of having obtained money by falſe pretences under ſect. 37. and he give notice that he will diſprove the charge at a ſubſequent adjournment of the ſeſſions, he is entitled to be brought up to the adjourned ſeſſions for that purpoſe.—The facts on which this caſe aroſe were diſcloſed to the Court upon an application for a *mandamus*, as follows: *William Smith*, a priſoner for debt, in the cuſtody of the marſhal of the King's Bench priſon, was brought up at the adjourned general quarter-ſeſſions for the county of Surrey, on the 31ſt of July, 1794, in order to take the benefit of the inſolvent act of the laſt ſeſſion of parliament, 34 *Geo.* 3. c. 69. His diſcharge was oppoſed by ſeveral of his creditors, on the ground of his having obtained money on falſe pretences, ſect. 37. which was then denied by him; but not having before had notice that any ſuch objection was intended to be made, he was not then prepared with any evidence to contradict the facts alleged againſt him in ſupport of the charge; whereupon the Court made an order, in which, after ſtating that it appeared to them that the ſaid *William Smith* had obtained money, goods, &c. by falſe pretences, it was ordered that he ſhould be remanded back into the cuſtody of the marſhal, &c. and he was remanded accordingly. *Smith* afterwards gave due notice to theſe creditors of his intention to apply to the next ſeſſions to get rid of this objection, which he accordingly did in October laſt, when he tendered witneſſes to the Court to controvert the facts before alleged againſt him: but the Court refuſed to enter into the examination, being of opinion, as ſtated in their order, that they had not power to go into evidence after their former deciſion; and, therefore, *Smith* was remanded back into cuſtody. PER CURIAM: It is

(1) An application was made, and an act accordingly paſſed, to remedy this defect.

neceſſary

necessary to the administration of justice, that every person, who is accused of a crime, should have an opportunity of being heard in his defence against the charge of which he is accused: but the party making this application was not previously apprised of the accusation intended to be made against him, and, of course, he had no opportunity, when he was accused, of defending himself against it. But the instant he heard the charge, he said he could disprove it, and he gave notice that he would bring witnesses at the next adjournment to exculpate himself.—The rule must be made absolute.

Declaring an insolvent debtor irrelievable, because an outlaw, is a nullity.—This was a question on the insolvent debtors' act, 5 *Geo.* 3. c. 41. wherein it was provided "that "all those who did not obtain their respective discharges "before the 1st of August, in this year 1767, should be ex- "cluded the benefit of the act." This man had been brought up to the quarter-sessions of Surrey; and they had declared him to be irrelievable; because he was charged with an outlawry: therefore they remanded him. The persons entitled to receive the benefit of the act, were described in it.—"All and "every person who on 1st of January, 1765, was, or were, "an actual prisoner or prisoners, UPON ANY PROCESS WHAT- "SOEVER, for, or by reason of any debt, damage, costs, sum "or sums of money, contempt, or otherwise." It was a very hard case; and a case of great compassion. The difficulty was how to come at relief; AND THE COURT thought the best way would be by removing the order hither; and there being no clause in the act to prohibit a *certiorari*, they granted one.

Castleman's case, *ads.* Price, Clerk, Tr. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2119.

Accordingly the order of the sessions being now removed hither by *certiorari*, it was moved to quash it. This was opposed on the ground of no notice having been given to the parties.—PER CUR. The justices had no authority to give this negative judgment, "that he is irrelievable." 'Tis a nullity: it is no order at all. But there is no difficulty, if the justices at sessions will act; he may be brought up again before them; and they may make an order of discharge. We cannot meddle at present; because there is *no notice to the justices; and, therefore, no* certiorari *was grantable.* The best way is, to apply to the sessions.

Rex *v.* Castleman, Tr. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2127.

If a person who has been discharged by an insolvent-act, brings an action, and recovers, on a promissory note made payable to him before his imprisonment, but not due till after his discharge, and which was not inserted in his schedule, he shall hold the money as a trustee for his assignees.

Brown *v.* Rivers, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 471.

The effects acquired by an insolvent after his discharge under the 34 *Geo.* 3. c. 69. are liable to be taken in execution for a debt due before, for the thirty-first section confines the protection to the person only of the insolvent: the words are, "to discharge the person of such prisoner on account of all debts, &c."

Spilton *et al.* *v.* Moorhouse, Tr. Ter. 35 Geo 3. B.R. 6 *Ter. Rep.* 366.

Buxton *et al. v.* Mardin, Mic. Ter. 26 Geo. 3. B.R. 3 *Ter. Rep.* 80.

A general judgment ſigned by virtue of a warrant of attorney given before the paſſing of an inſolvent-act, of which the defendant is entitled to take advantage by pleading in diſcharge of his perſon, &c. will not warrant a ſpecial execution under the act. But the Court will give the plaintiff leave to plead the inſolvent-act for the defendant, and ſign a ſpecial judgment under it; for the warrant of attorney will preclude the defendant from ſaying there is no debt.—The defendant, being indebted to the plaintiffs in 206l. 4s. on the 8th of June, 1769, executed a bond and warrant of attorney for payment thereof. On the 28th of May, 1772, he was diſcharged under an inſolvent act of the 12 *Geo.* 3. c. 23. No proceedings were had againſt him on this bond and warrant of attorney till Trinity term, 1785, when judgment was entered up on the bond and warrant of attorney; on which a *fieri facias* iſſued, directed to the ſheriff of Middleſex to levy of the defendant's goods *(except the neceſſary wearing apparel and bedding of himſelf and family, and the working tools and implements neceſſary for his trade, not exceeding 20l. in the whole)* as well a debt of 412l. 8s. as alſo 63 ſhillings coſts. A rule had been obtained to ſhew cauſe why the judgment in this cauſe ſhould not be ſet aſide, and the writ of *fi. fa.* executed thereon; and the motion was granted on the 34th and 35th ſections of the 12 *Geo.* 3. the firſt of which declares, "that "the future effects of inſolvents (except clothes and tools, of "the value of 20l.) are to be liable as before the act; and "that any creditor may at any time hereafter ſue out execu- "tion on any judgment at the time of the act recovered, but "not againſt his perſon, &c." The latter clauſe provides, "that any creditor may, at any time after the inſolvent's diſ- "charge, commence and proſecute any action or ſuit againſt "the priſoner or fugitive for any ſum due at the time of his "diſcharge." This, it had been contended, was neither a judgment recovered at the time of the act, nor a judgment obtained on an action commenced and proſecuted ſince the act; but BULLER, J. obſerved, that this was a *ſpecial execution taken out on a general judgment*. That if the defendant choſe to avail himſelf of this act of parliament, he muſt do it by pleading it, when the judgment muſt be ſpecial: and if he do not plead his inſolvency, the judgment muſt be general. But, at all events, the execution muſt follow the judgment. Here the defendant had no opportunity of pleading this act. If the judgment had been entered generally againſt the defendant before his diſcharge, no ſpecial execution could be taken out on that, without firſt ſuing out a *ſcire facias*.—IT WAS THEN SAID, there was a difference between a warrant of attorney to confeſs a judgment, and an action in the uſual way. In the former caſe, when a man confeſſes a judgment, he waives all benefit of his plea, by declaring to the plaintiff he will plead nothing: and this is like that caſe; for the defendant

fendant waives his right of pleading the act.—BULLER, J. Wherever a man neglects to take advantage of any defence which he has at the time, he waives it: but here he had not a defence at the time of giving the warrant of attorney.—Afterwards, three propoſitions were ſubmitted to the Court: 1ſt, That a judgment, entered under a power of attorney, muſt be warranted by that power; and conſequently, that a general power only warrants a general judgment.—2dly, Since the act of 12 *Geo.* 3. a general judgment cannot be entered againſt an inſolvent, unleſs by his own acquieſcence.—3dly, A diſcharge under an inſolvent act is a countermand of a power of attorney. In ſupport of the firſt were cited *Co. Lit.* 112. 181. 258. 1 *Mod.* 1. 1 *Salk.* 399. 3 *Burr.* 1471. He was then ſtopped by Lord MANSFIELD, Ch. J. It is clear the judgment is wrong, as it cannot be entered up generally by virtue of the power of attorney ſince the act, without giving the defendant an opportunity of pleading in diſcharge of his perſon. But the warrant of attorney is concluſive in another action on it.—BULLER, J. This warrant of attorney will preclude the defendant from ſaying there is no debt: but the ſtatute has given a defence as to his perſon and wearing apparel, &c. and that muſt be put on record before judgment. Now, if a *ſcire facias* had been brought on that judgment, the defendant could only have pleaded matter ſubſequent to it; ſo that the defendant had no way whatever of availing himſelf of the privilege of the act but by pleading. The plaintiff, perhaps, on an application to the Court, would be permitted to plead the act for him. This judgment is wrong, and muſt be ſet aſide.—Rule abſolute.—A rule was then obtained to ſhew cauſe, why *the plaintiff ſhould not be at liberty to enter a plea under the inſolvent act for the defendant, and take his judgment under the ſtatute;* AND THE COURT recommended it to the defendant's counſel not to object to it.

## Inſpection of Books.

IN an action brought by the corporation for toll againſt the defendant, the Court on his application granted a rule for inſpection of ſuch parts of the deeds, &c. as related to that matter, on the town-clerk, which he was to give upon oath.—This was an action brought by the corporation of Barnſtable, againſt the defendant for certain tolls; in which the defendant now moved to inſpect all public deeds, records, charters, and writings, belonging to the corporation, in their cuſtody.——AND THE COURT made a rule upon the town-clerk to give on oath an inſpection of all ſuch parts of the deeds,

The Corporation of Barnſtable v. Lathey, Ea. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 303.

deeds, &c. as reſpected the queſtion of toll. But a few days afterwards, it was objected that the town-clerk ought not to be obliged to give the required inſpection on oath, ſince not even the court of Chancery would have compelled that, becauſe the application was againſt the corporation itſelf. And that at all events his reaſonable expences for attendance and trouble ought to be defrayed; the latter of which the Court aſſented to immediately; but, as to the oath required, they ſaid they had endeavoured to frame their rule as nearly as poſſible to what the court of Chancery would have done, under the like circumſtances. And that Court would have required the ſeveral individuals of the corporation who had any knowledge of the ſubject to make anſwer on oath. Therefore, that part of the rule remained as before (1).

The King v. G. Babb, Hil. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 579

Where a rule had been granted for an information in the nature of *quo warranto* againſt *A.* to ſhew by what authority he claimed to be mayor of G. on the relation of ſome of the corporators, and another rule in that cauſe for inſpecting all the corporation books, papers, &c. directed to the town-clerk; an inſpection of ſuch only as related to the election and office of mayor was held to be a ſufficient compliance with the latter rule, ſo as to protect the town-clerk from an attachment as for a contempt of the Court; it appearing that he had acted *bonâ fide*.—A rule having been obtained for an information in the nature of a *quo warranto* againſt one *Woolmer*, to ſhew by what authority he claimed to be mayor of Great Grimſby in Lincolnſhire, at the relation of three perſons who were aldermen of the corporation. And another rule that "the "proſecutor in the ſaid cauſe, his agent, attorney, or ſolicitor, "ſhall have the inſpection of all the public books, records, "and papers, of and belonging to the borough, by delivering "and leaving with the ſaid *G. Babb* [who was the town-"clerk] a true copy of this rule, and at the ſame time ſhewing "him the original." An attachment was moved for againſt the town-clerk, for not giving an inſpection of ALL THE BOOKS, &c. in obedience to the rule, which was oppoſed on an affidavit, ſtating that the defendant had complied with the ſubſtance of the rule, by having given an inſpection of ALL THOSE BOOKS, &c. *which related immediately to the ſubject-matter in diſpute* in the rule for the information in the nature of *quo warranto* againſt *Woolmer*.—Per Curiam: It has been

(1) A ſimilar motion was made in this cauſe on the laſt day of the laſt term, but the Court wiſhing, as the grounds of the deciſion in the mayor, &c. of *Lynn* v. *Denton* (*ante*, vol. II. p. 712.) were doubted, to take time to conſider of it, in order that the rule might be certain in future; but the plaintiffs having given notice of trial for the Spring Aſſizes, which would happen before the reſult of the Court's conference could be known, no rule was then made; and afterwards the notice of trial was countermanded.

been argued, that this application for an inſpection of the papers differs from the caſe of an application made by a ſtranger, becauſe this rule was obtained by ſome of the members of the corporation. For the purpoſe of the argument, it may be admitted that in certain caſes the members of a corporation may be permitted to inſpect all papers relating to the corporation: but if ſuch an application had been made in this inſtance, it would have been for a *mandamus* for that purpoſe; whereas this is an application for a rule of Court in the cauſe which is entitled "*R.* v. *Woolmer*," where the inquiry was reſpecting the validity of *Woolmer*'s election to be mayor: and it muſt be remembered that *we cannot grant a rule of Court for the inſpection of papers, unleſs there be a cauſe in the court, and ſome proceeding in it.* This, therefore, is like the caſe of an application by a ſtranger to the corporation. And in ſuch a caſe we ſhould tranſgreſs the line of our duty, if we were to grant *a general unlimited inſpection of all papers reſpecting the corporation.* We ought to confine the rule to the inſpection of ſuch papers only as reſpect the ſubject-matter in diſpute. But it is ſaid, that, whether or not this rule was properly drawn, the defendant has been guilty of a contempt of the Court in not obeying the rule as it is drawn in general terms. But as he ſwears that he has given an inſpection of all ſuch papers as relate to the election of mayor, which was the only ſubject in diſpute in the cauſe of the *King* v. *Woolmer*, and as he appears not to have refuſed an inſpection of all the other corporation papers from corrupt or improper motives this rule ought to be diſcharged; though we ought not to countenance the idea that any perſon, to whom a rule is directed, may aſſume to himſelf the power of controlling the generality of the terms of it.—Rule diſcharged.

In a queſtion concerning right of common, claimed by the defendant, as a freeholder within the manor of Upottery, in Devonſhire. A rule was made abſolute, no cauſe being ſhewn, to permit the defendant to inſpect the court rolls of the plaintiff, who was lord of the manor.

Addington v. Clode, Tr. Ter. 15 Geo. 3. C.B. 2 *Black.* 1030.

In caſe, by one copyholder of the manor of Hampſtead againſt another for an incroachment on the common, to which the general iſſue had been pleaded, it was moved for a rule on the ſteward of the manor to permit the plaintiff to inſpect, and take copies of the original minutes of the manor courts, held the 29th of May, and the 6th of July, 1775, and to produce all books and court rolls relating to the title of the defendant at the trial. On cauſe ſhewn, THE COURT made the rule abſolute, for inſpecting all books and rolls relating to the defendant's title, and producing them at the trial.

Folkard v. Hemet *et al.* Ea. Ter. 16 Geo. 3. C.B. 2 *Black.* 1061.

Leave to inſpect the court rolls, &c. of a manor will be granted of courſe on the application of a tenant of the manor who has been refuſed that permiſſion by the lord.—A rule having

The King v. Shelley, Hil. Ter. 29 Geo. 3 B.R. 3 *Ter. Rep.* 141.

having been obtained to ſhew cauſe why an information in the nature of *quo warranto* ſhould not be filed againſt the defendant to ſhew by what authority he claimed to be a burgeſs of the borough of Horſham. It was afterwards moved on behalf of the three relators, who were burgage tenants of the manor, and entitled to be ſummoned to the court leet and court baron (and which was alſo a ſort of corporate court), to inſpect the court rolls and books of the manor (leave having been refuſed by the lord), on an allegation that burgage tenures gave title, and that evidence relating to theſe would be found by ſuch an inſpection; and for this was cited, *Wood* v. *Whitcomb*, E. 6 *Anne*, C.B. 12 *Vin.* 146. where it was conſidered as a matter of courſe to grant an inſpection of the court rolls in a queſtion between two tenants.—PER CURIAM: The practice is clearly ſettled, that where the tenant of a manor demands leave to inſpect the court rolls, and it is refuſed him, the Court will grant a *mandamus* to compel it. There are ſeveral caſes cited in the laſt edition of *Comyns* Dig. title Evidence (1). Beſides which, there are two other caſes to the ſame effect. The firſt is *Hodſon* v. *Farker*, E. 27 *Geo.* 2. C.B. [this is the ſame caſe as that reported in *Barnes*, under the title of *Hobſon* v. *Parker*, H. 29 *Geo.* 2]. The other is *Talbot* v. *Villeboys*, M. 23 *Geo.* 3. B.R. *Wood* ſhewed cauſe againſt a rule for an inſpection of books, rolls, and records, belonging to the plaintiff's manor of Littleburn. The defendant claimed a manor of Littlehams, of which he ſaid the *locus in quo*, &c. mentioned in the plaintiff's declaration of treſpaſs, was part; and he was not a tenant of the plaintiff's manor, or claimed any intereſt under him. *Mingay* ſupported the rule. The Court held that the defendant was not entitled to an inſpection in this caſe; for one man has no right to look into another's title-deeds and records, when he ſets up an adverſe claim to him, and has no intereſt in the deeds or rolls himſelf, as tenants of a manor have: and the rule was diſcharged. Theſe caſes are directly in point. In criminal caſes, indeed, the Court have frequently refuſed ſuch motions; as in the *King* v. *Purnell* (2), and the *King* v. *Cornelius* there cited. Therefore, let the rule be abſolute in the firſt inſtance.

The King v. Allgood, Tr. Ter. 32 Geo. 3. B.R. 7 *Ter. Rep.* 746.

But a freehold tenant has no right to call for the inſpection of the Court rolls of a manor, unleſs there be ſome cauſe depending: and in this caſe, a rule having been obtained, calling on the defendant, the lord of a manor, to ſhew cauſe *why a mandamus* ſhould not iſſue, commanding him to permit

(1) Page 21. *Roe* v. *Aylmar*, *Barnes*, 321. 4to. *Ed.* 236. *Hobſon* v. *Parker*, ib. 237. *Baldwin* v. *Trudge*, ib.

(2) 1 *Black.* 37. 1 *Wilſ.* 239. *S.C.*

*J. Thompſon*,

*J. Thompſon*, a freehold tenant of the manor to inſpect the court rolls, and to take copies.—THE COURT diſcharged the rule, as it did not appear that any cauſe was depending.

A board of inquiry having been appointed in India for examining into certain charges of peculation and corruption againſt the defendant, who filled an office of great truſt and importance under the Eaſt-India company; and that board having examined witneſſes and made a report upon the matter which was tranſmitted home; in conſequence of which, an information had been filed by the attorney-general againſt the defendant; a rule *niſi* was obtained on the part of the defendant for an inſpection of that report; which was oppoſed on the ground that there never was yet an inſtance of ſuch an application as the preſent to give the defendant an opportunity of inſpecting the evidence intended to be produced againſt him upon a public proſecution.—PER CURIAM: We ought not to grant this application. There is no principle or precedent to warrant it; nor was ſuch a motion as the preſent ever made; and if we were to grant it, it would ſubvert the whole ſyſtem of criminal law. In treaſon and felony, where the puniſhment is infinitely greater than can be inflicted in this caſe, no ſuch indulgence was ever granted. In only one caſe, treaſon, which is particularly provided for by ſtatute, is the priſoner entitled to a copy of the indictment. And in this caſe the defendant derives much more intelligence from an inſpection of the information than could be received from a copy of the indictment in ordinary caſes; becauſe the particulars of the offence are fully diſcloſed in this information. Lord *Somers*, and Sir *J. Holt*, in framing the ſtatute of *Anne*, thought it a great indulgence to furniſh a perſon accuſed of high treaſon with the names of the witneſſes to be produced againſt them. But it never occurred to them that the rule, even in the caſe of treaſon, ſhould be extended as far as this application ſeeks to go; for here the application is made for a copy of the ſubſtance of the evidence, which is to be produced againſt the defendant. It is clear that neither at common law, or under any of the ſtatutes, is the defendant entitled, as a matter of right, to have his application granted. And if we were to aſſume a diſcretionary power of granting this requeſt, it would be dangerous in the extreme, and totally unfounded on precedent.—Rule diſcharged.

The King *v.* Holland, Eaſ. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 691.

On an information for election-bribery, the proſecutor moved for a rule to inſpect, and take copies of the books of the corporation of Eveſham, in order to prove one *Robins*, who was to be produced as an evidence for the proſecutor, to be a freeman of Eveſham. But, being an attempt to make the corporation furniſh evidence in a criminal proſecution, the Court refuſed it, on the authority of the *King* and *Purnell*. M. 22 *Geo.* 2.

The King *v.* Heydon, Hil. Ter. 2 Geo. 3. B.R. 1 *Black. Rep.* 351.

Inſpection

Allan *v.* Tap, Mic. Ter. 13 Geo. 3. C.B. 2 *Black.* 850.

In this caſe inſpection of the books of Clement's-Inn, to prove payment of poor's rates, or being within the pariſh of *A.* was denied.—In treſpaſs, for a diſtreſs for a poor's rate; it was on the behalf of the defendant moved for liberty to inſpect the records, archives, books, papers and writings of Clement's-Inn; ſo far as the ſame related to the payment of poor's rates, within the pariſh of St. Clement's Danes; or could prove whether or no the ſaid inn was within the ſaid pariſh.—BUT BY THE COURT, theſe are private books, and the queſtion concerns a private right.—Rule refuſed.

Hodges *v.* Atkis, Hil. Ter. 13 Geo. 3. C.B. 2 *Black.* 877.

And no inſpection of books, &c. will be granted till iſſue joined.—In a ſuit againſt the corporation of Shrewſbury upon a right of toll, the Court refuſed a rule to inſpect the public books, records, and writings of the corporation, becauſe no iſſue was yet joined; ſo that it could not appear whether ſuch inſpection would be neceſſary: without giving any opinion as to the plaintiff's right of inſpecting, provided there had been an iſſue.

## Inſurance from Fire.

Drinkwater *v.* the Corporation of the London Aſſurance, Mic. Ter. 8 Geo. 3. C.B. 2 *Wilſ.* 363.

A PROVISO was contained in a policy of inſurance from fire, that the defendants ſhould not be liable in caſe the houſe be burnt by reaſon of *any invaſion, foreign enemies, or any military or* USURPED POWER. And the houſe being burnt by *a mob at Norwich*, which roſe to reduce the price of proviſions, the Court held that this was not within the proviſo.—For, PER CURIAM: The words, "*uſurped power*," in the proviſo, according to the true import thereof, and the meaning of the parties, can only mean *an invaſion of the kingdom by foreign enemies to give laws and uſurp the government thereof, or an internal armed force in rebellion, aſſuming the power of government by making laws, and puniſhing for not obeying thoſe laws.* They muſt mean ſuch an uſurped power as amounts to high treaſon, which is ſettled by the 25 *Ed.* 3. The offence of the mob in the preſent caſe was a felonious riot, for which the individuals might have ſuffered, but cannot be ſaid to be an *uſurped power*; therefore, judgment muſt be given for the plaintiff.

Tarleton *et al. v.* Staniforth *et al.* Tr. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 695.

In a policy of inſurance againſt loſs by fire, from half a year to half a year, the aſſured agreed to pay the premium half-yearly "*as long as the inſurers ſhould agree to accept the ſame*," within 15 days after the expiration of the former half-year: and it was always ſtipulated that no inſurance ſhould take place till the premium was actually paid. A loſs happened within 15 days after the end of one half-year, but before

before the premium for the next was paid; AND THE COURT held that the inſurers were not liable, though the aſſured tendered the premium before the end of the 15 days, but after the loſs.—PER CURIAM: This kind of inſurance is as much to be favoured as marine inſurances; and in the conſtruction of deeds the obvious intention of the parties is to prevail; and the words of the covenantor, according to Lord *Bacon*, *fortius accipiuntur contrâ proferentem.* But theſe principles do not lead to the concluſion attempted to be deduced from them; that, therefore, the Plaintiffs are entitled to our judgment. It was admitted in the argument, that the inſurance, when made, did not extend to half a year and 15 days; and that completely puts an end to the whole caſe. By the agreement under which the plaintiffs were inſured they ſtipulated that they would pay half-yearly, namely, on the 10th of June and the 10th of December, the ſum of 7l. 10s. and that they would, *as long as the managers agreed to accept the ſame*, make their payments within 15 days after the day limited. If, therefore, when the firſt premium was paid, the inſurance did not extend to 15 days beyond the half-year, the continuation or prolongation of the term depends on two circumſtances, which muſt both concur, that the aſſured ſhould pay the ſum of 7l. 10s. and that the inſurers ſhould agree to accept that ſum. Here, after the policy had had its effect, and before the expiration of the 15 days, during which time the aſſured might have propoſed to continue the policy, and to which propoſal the truſtees might or might not have acceded, the loſs happened. Barely ſtating theſe facts is ſufficient to ſhew that the plaintiffs are not entitled to recover. They inſiſt that though the time of inſurance was expired, and though no new inſurances had been made, they are protected by the policy by reaſon of the indulgence for 15 days: but that argument cannot be ſupported; the allowance of the 15 days was merely given for the purpoſe of ſaving the expence of a new policy and a new ſtamp. The plaintiffs were right in contending that policies for half a year referred to, and adopted, the printed propoſals: but the third article in thoſe propoſals is deciſive againſt the plaintiffs; for it ſays, that the premium muſt be paid "as long as the managers agree to accept the ſame," within 15 days after the day limited; and that no *inſurance is to take place until the premium be actually paid.* Then in expreſs terms no policy is to have exiſtence until the premium be paid by one party and accepted by the other. In this caſe the loſs unfortunately happened in that interval of time when it was in ſuſpence whether or not the policy would be renewed; for, at that moment, the plaintiffs had not offered to pay, and of courſe the truſtees had not accepted, the premium for the next half year. Therefore, clearly, the defendants are not liable.

A deed

Routledge, adminiſtrator of Routledge, *v.* Burrell, bart. *et al.* Tr. Ter. 29 Geo. 3. C.B 1 *Hen. Black.* 254.

A deed-poll, containing an inſurance againſt fire, may refer to conditions in a printed paper, without ſtamp, ſeal, or ſignature: and it may be a part of thoſe conditions that the inſured ſhall procure a certificate of his character; and that the loſs happened without fraud.

Wood, *et al.* aſſignees of Lockyer and Bream, bankrupts, *v.* Worſley, Mic. Ter. 36 Geo 3. C.B. 2 *Hen. Black.* 574.

And the production of ſuch a certificate is a condition precedent to a recovery againſt the inſurers on the policy; and it is not ſufficient to ſhew that a certificate was produced and ſigned by many reputable houſeholders of the pariſh, and that the miniſter and churchwardens being applied to, *without any reaſonable or probable cauſe wrongfully and unjuſtly refuſed to ſign it.*

This was an action of covenant. The declaration ſtated, that by a policy of inſurance made before *Lockyer* and *Bream* became bankrupts, namely, on the 9th of March, 1792, it was witneſſed that *Lockyer* and *Bream* had paid 11l. 16s. to the Phœnix Company, and had agreed to pay to them, at their office, the ſum of 11l. 16s. on the 25th of March, 1793, and the like ſum yearly on the ſaid day during the continuance of the policy for inſurance from loſs or damage by fire, not exceeding the ſum of 7000l. That *Worſley* covenanted with *L.* and *B.* that ſo long as the aſſured ſhould pay the above premium, the capital ſtock and funds of the Phœnix Company ſhould be liable to pay to the aſſured any loſs that the aſſured ſhould ſuffer by fire on the property therein mentioned, not exceeding 7000l. according to the tenor of the printed propoſals delivered with the policy. That in the printed propoſals referred to by the policy it is declared, that the company would not be accountable for any loſs by fire cauſed by foreign invaſion, civil commotion, &c.; and alſo, that all perſons aſſured, ſuſtaining any loſs by fire, ſhould forthwith give notice to the company; and, as ſoon as poſſible after, deliver in as particular an account of their loſs as the nature of the caſe would admit; and make proof of the ſame, by their oath, and by their book of accounts, or other vouchers, as ſhould be reaſonably required; and ſhould procure a certificate, under the hands of the miniſter and churchwardens, and of ſome reputable houſeholders of the pariſh not concerned in the loſs, importing that they were acquainted with the character and circumſtances of the perſon inſured, and knew, or believed, that he, by misfortune, and without any kind of fraud, or evil practice, had ſuſtained, by ſuch fire, the loſs and damage therein mentioned; and in caſe any difference ſhould ariſe between the aſſured and the company, touching any loſs, ſuch difference ſhould be ſubmitted to the judgment of arbitrators indifferently choſen, whoſe award ſhould be concluſive, &c. and when any loſs ſhould have been duly proved, the aſſured ſhould immediately receive ſatisfaction to the full amount of the ſame. The declaration then ſtated, that on the 1ſt of July, 1792, a

loſs

loſs happened by fire in the houſe of *L.* and *B.* in which all their books of accounts were deſtroyed, to the amount of 7000l. That *L.* and *B.* on the ſame day gave notice of it to the company; and on the ſame day delivered to the company as particular an account of their loſs as the nature of the caſe admitted, and were then and there alſo ready and willing, and then and there tendered to make proof of the loſs, by their oath; and to produce ſuch vouchers as could be reaſonably required in that behalf: that on the ſame day they procured and delivered to the ſaid company a certificate under the hands of four reputable houſeholders of the pariſh, to the effect required in the printed propoſals, and applied to *E. Embry*, the miniſter, and *H. Hutchins* and *J. Bellamy*, the churchwardens of the pariſh, to ſign ſuch certificate; but that they, without any reaſonable or probable cauſe, wrongfully and unjuſtly refuſed, and have ever ſince refuſed, to ſign it. The declaration then ſtated, that the funds of the company were ſufficient to pay this loſs, yet the company have not paid it, either to the bankrupts or to their aſſignees; nor have the company ſubmitted the ſaid difference to the judgment of ſuch arbitrators, &c. There was another count, in which it was not averred, that the bankrupts either offered to make proof of the loſs, or procured a certificate, or applied to the miniſter, &c. for one; and the breach in this count was, that the company had not ſubmitted the ſaid difference to the judgment of ſuch arbitrators, &c. The defendant pleaded, to the firſt count, that the bankrupts were not intereſted in the houſe or goods, &c. at the time of the loſs; on which iſſue was taken in the replication. 2dly, That the loſs was occaſioned by the fraud and evil practice of the bankrupts; on which iſſue was taken, &c. 3dly, That the miniſter and churchwardens did not refuſe wrongfully and injuriouſly and without any reaſonable or probable cauſe to ſign the certificate; on which iſſue was taken. To the ſecond count, 1ſt, That the bankrupts were not intereſted, &c. on which iſſue was taken. 2dly, That the loſs was occaſioned by fraud, &c. as above; on which iſſue was taken. 3dly, That neither the bankrupts, nor their aſſignees, procured ſuch certificate under the hands of the miniſter and churchwardens and reſpectable inhabitants, &c. as required in the printed propoſals. To the laſt of theſe pleas the plaintiffs replied, that the bankrupts, as ſoon as poſſible after the loſs, namely, on the 1ſt of July, 1792, procured and delivered to the company ſuch certificate as is required in the printed propoſals, under the hands of four reſpectable inhabitants, &c. but that the miniſter and churchwardens wrongfully refuſed to ſign it, without any reaſonable or probable cauſe for ſo doing. The rejoinder ſtated, that the miniſter and churchwardens did not wrongfully refuſe, &c. on which iſſue was taken in the ſur-rejoinder.—The jury found all the iſſues for the plaintiffs,

and gave a verdict for 3000l. A rule was granted to ſhew cauſe why the judgment ſhould not be arreſted: AND THE QUESTION was, Whether the production of a certificate, ſigned by the miniſter and churchwardens, was a condition precedent, the performance of which was neceſſary to enable the plaintiffs to recover againſt the inſurance office. From what paſſed after the argument upon the bench, it ſeemed as if the chief juſtice, Mr. J. Buller, and Mr. J. Rooke, thought, that ſuppoſing the printed propoſals to be conditions precedent, there had been a performance *cy pres*, but that in truth the policy being a commercial contract was to be conſtrued liberally, and the true queſtion was, Whether the loſs had fairly been incurred? If it had (and it appeared on the record to have ſo happened), the refuſal of the miniſter and churchwardens was without good cauſe; and, therefore, the plaintiffs were entitled to maintain their action. But Mr. J. Heath appeared to differ from the reſt of the Court, and time was taken to conſider. The cauſe having ſtood over, THE LORD CH. J. ſaid, that as a difference in opinion prevailed among the judges, and as they were informed that a writ of error would be brought at all events, whichever way the judgment was given, they thought it unneceſſary to diſcuſs the queſtion any farther. Judgment, therefore, was ordered to be entered for the plaintiff, *pro formâ*, merely that the writ of error might proceed.

Worſley *v.* Wood, *et al.* aſſignees of Lockyer and Bream, bankrupts, in error, Tr. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 710.

The defendants below moved the record into this Court by writ of error, and aſſigned for error, that the declaration, the replication, and the other pleadings of the plaintiffs below, were not ſufficient in law to maintain the action.—This caſe was twice argued; and, upon the argument, it was, therefore, inſiſted, that at all events the aſſured might recover on the ſecond count in the declaration, where the breach aſſigned was for not referring the matter to arbitration, and it could not be pretended that the procuring of the certificate was a condition precedent to the reference; ſince the conſequence of this was, that a *venire de novo* muſt iſſue to aſſeſs damages on that count. —Lord KENYON, Ch. J. The ſecond point reſpecting the *venire de novo* is now, for the firſt time, ſtarted; no notice having been taken of it on the firſt argument here, or on the motion to arreſt the judgment in the court of Common Pleas: if there appeared to be any ground for it, we would deſire to have the caſe farther inveſtigated; but it ſeems to me to have no foundation, becauſe the objection that the procuring of the certificate is a condition precedent is as applicable to the ſecond as to the firſt count of the declaration. We are called upon in this action to give effect to a contract made between theſe parties, and if from the terms of it we diſcover that they intended that the procuring of the certificate by the aſſured ſhould precede their right to recover, and that it has not been procured,

tured, we are bound to give judgment in favour of the defendant below. These insurance companies, who enter into very extensive contracts of this kind, are liable (as we but too frequently see in courts of justice) to great frauds and impositions; common prudence, therefore, suggests to them the propriety of taking all possible care to protect them from frauds when they make these contracts. The Phœnix Company have provided, among other things, that the assured should, as soon as possible after the calamity has happened, deliver in an account of their loss, and procure a certificate, under the hands of the minister and churchwardens, and of some reputable householders of the parish, importing that they knew the character and circumstances of the assured, and believed that they had sustained the loss without any kind of fraud. That this is a prudent regulation this very case is sufficient to convince us; for it appears on the record, that soon after the fire the assured delivered in an account of their loss, which they said amounted to 7000l. that they obtained a certificate from some of the reputable inhabitants that the loss did amount to that sum; and that the jury, after enquiring into all the circumstances, were of opinion, that the loss did not exceed 3000l. and yet it is also stated, that the minister and churchwardens, who refused to certify that they believed that the loss amounted to 7000l. wrongfully, and without any reasonable or probable cause, refused to sign such certificate. The great question here is, Whether or not it was the intention of these parties that that certificate should precede payment by the insurance office; now it seems to me, from the printed proposals, that it was their intention that it should precede payment. What is a condition precedent, or what a condition subsequent, is well expressed in the case of *Hotham* v. the *East-India* Company, *ante*, vol. I. p. 401, to which I refer in general. If there be a condition precedent to do an impossible thing, the obligation becomes single: but, however improbable the thing may be, it must be complied with; or the right, which was to attach on its being performed, does not vest. If the condition be that *A.* shall infeoff *B.*, and *A.* do all in his power to perform the condition, and *B.* will not receive livery of seisin, yet, from the time of Lord *Coke* to the present moment, it has not been doubted but that the right which was to depend on the performance of that condition did not arise. In the case of *Hesketh* v. *Gray*, *Say.* 185, there was also an application to the great seal at the time when Lord Ch. J. *Willes* was the first commissioner to dispense with the condition, which was, that the Bishop of *Chichester* should accept the resignation of a living; but it was held, that there was no ground for a court of equity to interfere. This Court also held, when the case came before them, that it was a condition precedent, and must be performed. In this case, however, it is said, that though the

miniſter and churchwardens did not certify, ſome of the inhabitants did certify, and that was ſufficient, it being a performance of a condition *cy pres*. But I confeſs I do not ſee how the terms *cy pres* are applicable to this ſubject; the argument for the plaintiffs below goes to ſhew, that if none of the inhabitants of this pariſh certified, a certificate by the inhabitants of the next, or of any other pariſh, would have anſwered the purpoſe. But the aſſured cannot ſubſtitute one thing for another. In the caſe of *Campbell* v. *French*, *ante* vol. II. p. 417, we explained the grounds of this doctrine, and ſaid that the party who had not complied with the condition could not ſubſtitute other terms or conditions in lieu of thoſe which all the parties to the contract had originally made. So here it was competent to the inſurance office to make the ſtipulations ſtated in their printed propoſals, that they had a right to ſay to individuals, who were deſirous of being inſured, "Knowing how liable we are to be impoſed upon, we will, "among other things, require that the miniſter, church-"wardens, and ſome of the reputable inhabitants of your "pariſh, ſhall certify that they believe that the loſs happened "by misfortune, and without fraud, otherwiſe we will not "contract with you at all." If the aſſured ſay that the miniſter and churchwardens may obſtinately refuſe to certify, the inſurers anſwer, "We will not ſtipulate with you on any other terms." Such are the terms on which I underſtand this inſurance to have been effected; and, therefore, I am clearly of opinion, that there is no foundation for the action, and that the judgment below muſt be reverſed.—Ashhurst, J. agreed that the certificate required was a condition precedent; and ſaid, It is perfectly immaterial whether they have entered into an improvident contract; if they chooſe to take the burden upon themſelves, they cannot call on the inſurance office until they have complied with the condition.—Grose, J. Four queſtions ariſe on this record; 1ſt. Whether the printed propoſals are to be taken as part of the policy of inſurance? 2dly, Whether that part reſpecting the certificate creates a condition precedent? 3dly, If it does, whether the aſſured were bound to perform the conditions? 4thly, Whether they have performed it? Theſe are the material points. On the firſt, the caſe of *Routledge* v. *Burrell*, *ante*, p. 816, is deciſive to ſhew that the printed propoſals are to be taken as part of the policy. The ſecond point alſo ſeems to me to be decided by the caſe of *Oldman* v. *Bewicke* (1). For though the words in both

(1) *Oldman* et al. Aſſignees of *Ingram* a bankrupt, v. *Bewicke*, et al. In C.B. Mic. 26 *Geo.* 3.—This was an action againſt the Directors of the Sun Fire Office, upon a policy of inſurance againſt fire: the declaration among other things ſtated the 10th propoſal to have been as follows,

both proposals are not exactly similar, the substance is the same. And what *Ashhurst*, J. said in the case of *Hotham* v. *The*

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follows, viz. "Persons sustaining any loss or damage by fire, are forthwith to give notice thereof at the office, and as soon as possible afterwards, to deliver in as particular an account of their loss and damage as the nature of the case will admit of, and make proof of the same by their oath or affirmation (according to the form practised in the said office), and by their books of account, and such other proper vouchers, as shall be reasonably required, and *procure a certificate under the hand of the minister and churchwardens*, together with some other reputable inhabitants of the parish not concerned in such loss, importing that they were well acquainted with the character and circumstances of the person or persons insured, and do know or verily believe that he, she, or they, really, and by misfortune, without any fraud or evil practice, have sustained by such fire, the loss and damage as his, her, or their loss, to the value therein-mentioned, BUT TILL SUCH AFFIDAVIT AND CERTIFICATE OF SUCH INSURED'S LOSS SHALL BE MADE AND PRODUCED, THE LOSS MONEY SHALL NOT BE PAYABLE; and if there appears any fraud or false swearing, such sufferers shall be excluded from all benefit by their policies, &c. &c." It then stated, that the bankrupt did forthwith give notice of his loss to the society, at their said office, and as soon as possible afterwards, did there deliver in as particular an account of his said loss and damage as the nature of the case would admit of, and did make proof of the same by his oath or affidavit in writing, according to the form practised in the said office, and by such other proper vouchers as were reasonably required; and farther, that the minister of the parish of Portsea, in which, &c. long before, and at the time of the loss, dwelt and resided at a distance from and out of the said parish, and was wholly unacquainted with the character and circumstances of the said *Ingram*, and wholly unable to make such certificate, as by the said policy was required. But that the said *Ingram* (afterwards, &c.) did procure and deliver to the said office, a certificate under the hands of *William Thomas*, &c. &c. then and at the time of the said loss being reputable inhabitants of the said parish, who were not concerned in the said loss, importing, &c. &c. The defendant pleaded, first: That the premises were wilfully set on fire, and burnt down by the bankrupt. Secondly, That at the time of the supposed loss the bankrupt had no interest in the premises, but no notice was taken of the certificate required, or the want of it, in any of the pleadings, except in the declaration as above set forth. But issues being joined upon both pleas, the cause went in that state to trial, and the jury found a verdict for plaintiffs, damages 300l. the demand being for 1500l. the amount of the insurance. It was afterwards moved in arrest of judgment, on the ground that the title of the plaintiffs to recover was not set forth in the declaration, in as much as it did not thereby appear that the certificate required had been procured and produced.—Lord LOUGHBOROUGH: Though I am satisfied the verdict was right, that the fire was accidental, and that the certificate could not have been procured, because the bankrupt had not sustained all the loss he claimed, yet the rule of intendment after verdict cannot be applied where there is an absolute defect of title, as there is in this case. As to the pleas, they are wholly collateral to the title.—GOULD, J. Till the affidavit is made, and the certificate procured, the money is not to be payable: the time of payment therefore is not yet come. Though a person were a *bona fide* sufferer, still he is not entitled without a certificate. The

*The Eaſt-India Company*, is applicable here, that there are no preciſe words neceſſary to make either a condition precedent or ſubſequent, but that the queſtion muſt depend on the intention of the parties. As to the third point, the caſes alluded to by the defendant's counſel (to which another in 22 *Edw.* 4. 26. *b.* may be added) are ſtrong to ſhew, that if a perſon engage for the act of a ſtranger, he muſt procure that act to be done. With regard to the laſt point, the aſſured have not obtained the certificate required, but they have procured a certificate, which, under the circumſtances of the caſe, they conſider equivalent to it, namely, a certificate by ſome of the reputable inhabitants of the pariſh. It is true that the miniſter and churchwardens were not bound to certify; *but the aſſured undertook to procure ſuch a certificate*; that is a condition, on performing which alone the Phœnix Company engaged to pay any loſs that might ariſe. It is admitted, that the aſſured did not procure ſuch a certificate; but, they ſay, that the miniſter and churchwardens wrongfully, and without any reaſonable or probable cauſe, refuſed it: but that, if true, is no ground for ſupporting this action; it is a misfortune to the plaintiffs, but it ought not to prejudice the defendant. It is not ſufficient that there is no probable cauſe for not certifying, there ought to be a probable cauſe to induce the miniſter and churchwardens to certify; they ought to be ſatisfied with the truth of the loſs before they certify. Here they were requeſted to certify that the plaintiffs had ſuſtained a loſs to the amount of 7000l. but the jury found that the loſs only amounted to 3000l.; therefore the miniſter and churchwardens could not, in conſcience, ſign the certificate which was offered to them. If the certificate, which the aſſured procured, were conſidered as a compliance with this condition, a certificate by the inhabitants of any other pariſh might equally be ſubſtituted in lieu of that which was required: but it is not competent to the aſſured to ſubſtitute other terms for thoſe which were the foundation of this contract. With regard to the queſtion relative to a *venire de novo*; if a *venire de novo* were awarded, the plaintiffs could not recover on the ſecond count for want of a certificate.—LAWRENCE, J. If the matter were to go to arbitration, and no certificate were produced, the arbitrators ought to determine againſt the plaintiffs; therefore it would

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ſtipulation is a condition precedent, that there ſhall be a certificate that there is no kind of fraud. Nothing is ſaid about the churchwardens: and the excuſe of the miniſter living at a diſtance is frivolous.—NARES, J. I have had no doubt ſince the caſe was firſt mentioned to the Court. The ſtipulation is, that the office will in no caſe be liable, unleſs ſuch certificate be produced. The plaintiff, therefore, ought to aver the performance of the ſtipulation. There is no pretence to ſay that this objection is waived by the pleas.—Judgment arreſted.

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anſwer no purpoſe to grant a *venire de novo*. With reſpect to the principal queſtion; he agreed, that the inſurance office was only liable to make good according to the terms of their engagement. That there was no ambiguity in thoſe terms; and the plaintiffs muſt be conſidered as having aſſented to them; and, conſequently, he agreed with the other judges, that the certificate was a condition precedent. A fire without fraud will not give the aſſured a right of action: it muſt be a fire, accompanied with the notice, affidavit, and certificate, ſpecified in the propoſals. And as to the argument, on behalf of the plaintiffs below, that it was ſufficient for them to perform the conditions in ſubſtance; even admitting that argument to be well founded, there was no ſubſtantial performance here. In ſome caſes in the books reſpecting conditions precedent, where the thing agreed to be done was, in effect, performed, though not in the exact manner, nor with all the circumſtances mentioned, it was deemed a ſubſtantial performance, as where the condition was to enfeoff, a conveyance by leaſe and releaſe has been deemed a compliance. So if the condition be to deliver the will of the teſtator, and he delivers letters teſtamentary. 1 *Rol. Abr.* 426. pl. 2. 4. But this, inſtead of being a ſubſtantial performance of the condition, is only a ſubſtitution of one thing for another. Suppoſe the terms of this contract had been that the inſurance office ſhould not pay any loſs unleſs *A. B.* and *C.* certified, it would not have been ſufficient for *E. F.* and *G.* to certify. So here the agreement was, that perſons of certain characters ſhould certify; and when the aſſured ſubſtitute, for ſuch a certificate, one ſigned by perſons bearing different characters, it is the ſame as a certificate ſigned by perſons of different names from thoſe required. Perhaps it is difficult to aſcertain who ſhall be called reputable or ſubſtantial perſons; and, in order to avoid this difficulty, the inſurance office inſiſt on the certificate being ſigned by perſons who hold public ſituations in the pariſh. Theſe terms ſeem highly reaſonable; it is a duty that the office owe to the public, as well as to themſelves, to take every precaution to protect them againſt fraud; and, unleſs ſome ſuch check as the preſent were interpoſed, the office would be holding out a premium to wicked men to ſet fire to their own houſes. Then, as this is a condition precedent, even ſuppoſing that the refuſal by the miniſter and churchwardens were a wrongful act in them (which can not be admitted under theſe circumſtances), the caſes are uniform to ſhew, that if a perſon undertake for the act of a ſtranger, that act muſt be done. PER TOT. CUR. The judgment below muſt be reverſed.

## Inſurance on Lives.

London. Roſs v. Bradſhaw.

THE concealment of circumſtances on a life inſurance, is not ſo fatal, if the life be warranted good, as if it be a common inſurance.—Action on policy of inſurance on the life of Sir *James Roſs*, for one year, commencing the 22d of October, 1759, with warranty from the inſured, that Sir *James*'s was then a good life. Sir *James* had received a wound, at the battle of *Lafeldt*, in 1747, in his loins, which had occaſioned a partial relaxation or palſy, ſo that he could not retain his urine or *fæces*; which circumſtance was not mentioned to the inſurers, at the time of inſurance: at eleven months' end Sir *James* died of a malignant fever.—Lord MANSFIELD gave it in charge to the jury, that there was a diſtinction between a common inſurance and one with warranty, that the concealment of many circumſtances will vitiate the firſt, which will not vitiate the ſecond; becauſe, in the ſecond, the inſured takes it upon him to prove in caſe of death, that *ceſtui que vie* was in a general good ſtate of health; and it appearing, by many witneſſes, that the conſequence of Sir *James*'s wound was inconvenient only, and not dangerous to his life at the time of the inſurance, the jury found a verdict for the plaintiff.

**Inſurance on Ships.**—See SEA INSURANCES.

## Juries.

*Grand Jury.*]—THURSDAY, the 20th of November, 1760, being grand-jury day, it was intended by the ſheriff, and preſſed by the two knights of the ſhire for Middleſex, that all the principal gentlemen of the county (not fewer than fourſcore in number) ſhould be ſworn of this grand-jury, in order to their being included in an addreſs to his majeſty, from, and in the name of, the grand-jury of Middleſex, upon his acceſſion to the crown. But, upon the ſheriff's mention of this to me, it ſeemed to me to be irregular and improper to ſwear more than twenty-three. Becauſe, if a number, amounting to two full juries, or more, ſhould be ſworn, it might happen that a complete jury of twelve might find a bill to be a true one, though other twelve, or even many more than twelve of the very ſame jury, might reject it as an untrue one; which would be inconvenient

inconvenient as well as contradictory, and even ſomewhat abſurd and ridiculous. Lord MANSFIELD, upon being apprized of this, ſaid, it would be monſtrous to ſwear fourſcore; and that the officer could not properly ſwear more than three-and-twenty.

If the inhabitants of an hundred have enjoyed an immemorial exemption from ſerving on juries, they are not liable to be ſummoned, under any of the different ſtatutes relative to jurors.—On a caſe reſerved upon an indictment on the ſtatute of 3 & 4 *Ann.* c. 18. ſ. 5. againſt the defendant as high conſtable of the hundred of Battle, for not obeying a warrant of the juſtices in quarter ſeſſions, for preparing liſts of perſons qualified to ſerve on juries, &c. it was ſtated, that the defendant had been legally appointed to his office; and that a warrant (ſtated *in hæc verba*), iſſued at the Midſummer ſeſſions; that he was duly ſerved with it, and neglected and failed to iſſue forth his precepts, &c. That *William* I. when he founded the abbey, granted, among other things, "*quod habeat* "*curiam ſuam per omnia, & regiam libertatem & conſuetudinem* "*tractandi de ſuis rebus vel negotiis, & juſtitiam per ſe tenen-* "*dam,*" ſanctuary for felons, freedom from all epiſcopal juriſdictions, &c. That *Henry* I. by two ſeveral charters (part of which were ſet forth), confirmed the privileges granted by *William* I. That *Henry* 8. granted the manor and hundred of Battle-abbey to Sir *Anthony Brown*, his heirs and aſſigns, with power to hold ſuch views of frank-pledge, court-leet, hundred-courts, law-days, ſokes, returns of writs, cognizances of pleas, and other rights, juriſdictions, powers, liberties, &c. as the late abbot, or any of his predeceſſors, had held and enjoyed, in right of the ſaid abbey. That, under this grant, the manor and hundred had come, by various meſne aſſignments, to the preſent proprietor Sir *Whiſtler Webſter*, bart. That the defendant lived within the manor. That the manor and hundred are co-extenſive. That there had been a court of record regularly held within the manor till the year 1744. That, by immemorial cuſtom, the reſiants within the hundred had not been returned to ſerve on juries out of the hundred; and that no precepts had ever been iſſued, from time immemorial, by the high conſtable of Battle. That no proof was given of any allowance of this privilege. That the town of Battle is not a town corporate, that has power by charter to hold ſeſſions of gaol-delivery, or ſeſſions of the peace for ſuch town.—The defendant was found guilty, ſubject to the opinion of the Court on the following queſtion, viz. "Whe-" ther the above charters and immemorial cuſtom would ex-" empt the inhabitants of the hundred of Battle from ſerving " on juries, and the high conſtable from iſſuing his precepts? " or, Whether the ſeveral acts of parliament paſſed, and now " in force, concerning jurors, or ſome, or one of them, have " not

The King *v.* Pugh, Ea. Ter. 19 Geo 3. B.R. 1 *Doug.* 188.

" not taken away ſuch exemption?" After argument the Court took time to conſider, and now Lord MANSFIELD, Ch. J. delivered their opinion, as follows: Lord MANSFIELD—We have conſidered this matter very fully, and we are all of opinion, that the ſtatutes relative to juries, being affirmative, do not take away the prior exemption; and ſo is the text of *Littleton*.—A verdict of acquittal entered for the defendant.

Rex *v.* Edmund Thirkell, Tr. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1695.

A jury's repreſentations in favour of a criminal, after conviction, is to be cenſured.—The defendant had been convicted of an aſſault upon *Mary Amelia Halfpenny*, an infant under ten, and upwards of five, years of age, with an intent to raviſh her; and eight of the jury ſigned a paper in his favour; intimating their diſapprobation of the verdict, which they themſelves had given. Lord MANSFIELD expreſſed great diſlike of ſuch repreſentations made by jurymen, after the time of delivering their verdict. It might be of very bad conſequence, to liſten to ſuch ſubſequent repreſentations contrary to what they had before found upon their oaths; and which might be obtained by improper applications ſubſequently made to them. And Mr. Juſtice WILMOT thought they ought to be totally diſregarded. He was committed to the cuſtody of the marſhal; and afterwards ſentenced to be ſet in and upon the pillory for an hour, between the hours of 12 and 2, to be impriſoned one year, to find ſecurity, himſelf in 100l. and his ſureties each in 50l. for his good behaviour for three years; and to pay a fine of 6s. and 8d.

*For other caſes relating to juries, ſee the tables of contents to the reſpective volumes of this work.*

## Juſtices of the Peace.

Rex *v.* Juſtices of the Peace for the city of London, Hil. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1456.

IF juſtices of peace adjourn their proceedings to a day ſubſequent to the repeal of an act of parliament, under which they derived their authority, their juriſdiction will ceaſe.—It was moved for a *mandamus* to be directed to the juſtices, to proceed upon a matter depending before them, upon an application regularly made to them before the repeal of the 46th clauſe of the act 1 *Geo.* 3. c. 17. by the act of 2 *Geo.* 3. c. 2.: which application had been duly and in due time made by *Jane Lawry* againſt *William Milner*, a debtor in their priſon, upon a compulſory cauſe, in the former act, then ſubſiſting in its full

full force (1); and upon ſuch application, all the requiſites had been complied with by all the parties concerned; and *Milner* had appeared, and given in a ſchedule of his effects on oath, and had aſſigned them over for the benefit of his creditors; but the court of quarter-ſeſſions, in whom juriſdiction was thus properly attached before the repeal of the clauſe, voluntarily and without neceſſity or ſufficient reaſon, and without the deſire or conſent of any of the parties, adjourned the matter till a day which was ſubſequent to the time when the repeal of the ſaid compulſory clauſe took place.—It was urged, that as the juriſdiction was fully attached in the juſtices, whilſt the clauſe ſubſiſted; and as the parties concerned had exactly complied with all requiſites; they ought to proceed to do all ſubſequent acts, and complete the juriſdiction once attached in them. But Lord MANSFIELD was very clear, and all the reſt of the Court concurred with him, "That no juriſdiction now "remained in the ſeſſions."—PER CURIAM: THEREFORE, whatever may be the hardſhip of this particular caſe, we have no foundation to ſupport our iſſuing ſuch a *mandamus* as is prayed.

A charter granting juriſdiction to borough magiſtrates over a diſtrict not within the borough does not exclude the county juſtices without expreſs words. And though ſuch charter contain words of reference to former charters in which excluſive juriſdiction is given to the borough juſtices within the borough, and add that they ſhall have juriſdiction within the new diſtrict in *tam amplis modo et formâ*, &c. yet if there be in the latter charter a ſaving clauſe of the rights of the crown and of all other perſons, the borough magiſtrates have only a concurrent juriſdiction with the county juſtices. Where the words of a charter are doubtful, they may be explained by long uſage.—This was an action of treſpaſs and falſe impriſonment againſt the defendants who were juſtices of the peace for the county of Leiceſter, for cauſing the plaintiff to be apprehended and ſent to the houſe of correction by virtue of a warrant iſſued by them, they not having any juriſdiction over The Biſhop's Fee in the ſaid county, inaſmuch as it is within and under the excluſive juriſdiction of the magiſtrates of the borough of Leiceſter, and not under the juriſdiction of the juſtices of the county. Plea not guilty. A ſpecial verdict was found,

Blankley *v.* Winſtanley, *et al.* Ea. Ter. 29 Geo. 3. B R. 3 *Ter. Rep.* 279.

(1) Great inconveniences were found to ariſe from this compulſory clauſe; and the legiſlature had not thought fit to reſerve any juriſdiction to the juſtices, after the 19th of November, 1761. The words of 2 *Geo.* 3. c. 2. are, "That from and after that day, ſo much of the former act as relates "to creditors compelling priſoners charged in execution to deliver up "their eſtates, and to ſuch priſoners being thereupon diſcharged, ſhall "be, and the ſame is hereby repealed to all intents and purpoſes what-"ſoever."

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which ſtated the borough of Leiceſter to be an ancient borough and body corporate; and that *Edw.* IV. on the 24th of *Auguſt*, in the 4th year of his reign, by letters patent, granted to the ſaid borough [*inter alia*] that the mayor, and four of the more diſcreet burgeſſes, together with the recorder, ſhould be juſtices of the peace within the ſaid borough, and the precincts and limits of the ſame, to hear and determine felonies, treſpaſſes, and other miſdemeanors, with a clauſe of *non-intromittant* as to the juſtices of the peace for the county. That *Henry* VII. in the twentieth year of his reign, by his letters patent, after reciting by *inſpeximus* the laſtmentioned charter, granted excluſive juriſdiction to the borough magiſtrates over the ſuburbs, in the ſame manner, with a *non-intromittant* clauſe. Afterwards Queen *Elizabeth*, on the 1ſt of June, in the forty-firſt year of her reign, granted a new charter to the borough of Leiceſter; in which ſhe recited, "Cumque dilecti ſubditi noſtri major et burgenſes prædicti burgi noſtri de Leiceſter nobis humillime ſupplicaverint, quatenus nos eiſdem majori et burgenſibus gratiam et munificentiam noſtram regiam in hac parte graciosè exhibere et extendere velimus; quodque nos pro meliori gubernatione regimine et melioratione ejuſdem burgi dictos majorem et burgenſes ejuſdem burgi in aliud corpus corporatum et politicum, per nomen majoris ballivorum et burgenſium burgi de Leiceſter, per literas noſtras patentes ratificare, confirmare, facere, conſtituere, redigere, ſeu creare de novo, dignaremus, *cum additione et augmentatione quarundam libertatum* pro bono publico ejuſdem burgi, prout nobis melius videbitur expedire; nos igitur meliorationem ejuſdem burgi graciosè affectantes, ac volentes quod de cætero in perpetuum in eodem burgo continuo habeatur *unus certus et indubitatus modus de et pro cuſtodia pacis et bono regimine et gubernatione populi ibidem*, et quod burgus prædictus de cætero in perpetuum ſit et remaneat burgus pacis et quietis ad formidinem et terrorem malorum, &c. She willed, ordained, and granted, that Leiceſter ſhould be a free borough and a corporation, by the name of the mayor, bailiffs, and burgeſſes, and that the mayor, recorder, and the four laſt aldermen who ſerved the office of mayor ſint juſticiarii, tam ad pacem in eodem burgo *ac libertatibus et præcinctis ejuſdem* conſervandam, quam ad ſtatuta de vagabondis, &c. infra burgum prædictum ac libertates et præcinctas ejuſdem conſervanda, &c. ad quod iidem major et recordator et quatuor aldermanni prædicti burgi, vel aliqui tres eorum, quorum majorem et recordatorem burgi prædicti pro tempore exiſtentes duos eſſe volumus, omnes & ſingulas tranſgreſſiones, &c. quæ ad officium juſticiarii pacis *infra burgum prædictum libertates et præcinctas ejuſdem* pertinent, faciendum, inquirere, audire, peragere, et terminare, poſſint et valeant in perpetuum, *in tam amplis et conſimilibus modo et formâ, prout præantea in eodem burgo uſitatum et conſuetum fuit, adeo plenè et integrè, ac in tam amplis*

*amplis modo et formâ*, ſicut aliqui alii juſticiarii pacis noſtri ac hæredum et ſucceſſorum noſtrorum in aliquo comitatu infra regnum noſtrum Angliæ per leges et ſtatuta ejuſdem regni noſtri Angliæ, inquirere, audire, ſeu determinare, poſſint ſeu poterint. Ita tamen quod prædicti major, recordator, ac aldermanni ejuſdem burgi, pro tempore exiſtentes, vel ſucceſſores ſui, ad determinationem alicujus murdredi ſive felonii, aut alicujus alteræ materiæ tangentis amiſſionem vitæ vel membrorum, infra burgum prædictum aut libertates vel præcinctas ejuſdem, abſque ſpeciali mandato noſtro hæredum vel ſucceſſorum noſtrorum quoque modo impoſterum non procedant. Et ulterius, pro meliori regimine et gubernatione prædicti burgi noſtri de Leiceſter, ac omnium & ſingulorum burgenſium, inhabitantium, commorantium, et reſidentium infra eundem burgum, volumus et concedimus quod omnia et ſingula domus, edificia, meſſuagia, terræ tenementa, et hereditamenta quæcunq. ſituata jacentia vel exiſtentia, tam infra parochiam Sanctæ *Margaretæ*, vulgariter vocata The Biſhop's Fee, in prædicto burgo de Leiceſter, quam infra parochias Sanctæ *Mariæ*, Sancti *Leonardi*, et le Newarke, in eodem burgo de Leiceſter, per quodcunq. aliud nomen vel alia nomina vocantur ſive nominantur, nec non omnes burgenſes inhabitantes commorantes et reſidentes in eiſdem parochiis et locis, ſive in earum aliquâ, pro tempore, et de tempore in tempus exiſtentes, de cætero *in perpetuum ſint, erunt, et reputabuntur, fore ſub regimine, poteſtate, gubernatione, juriſdictione, correctione, et coercione*, majoris ballivorum et burgenſium burgi de Leiceſter prædicti et ſucceſſorum ſuorum; et quod major ballivi et burgenſes burgi de Leiceſter prædicti et ſucceſſores ſui deinceps in perpetuum habeant, gaudeant, et utantur, omnibus et ſingulis eiſdem conſimilibus juribus, libertatibus, præheminenciis, et juriſdictionibus in omnibus et ſingulis eiſdem parochiis Sanctæ *Margaretæ*, Sanctæ *Mariæ* Sancti *Leonardi*, et le Newarke, qualia et quæ, *ac in tam amplis modo et formâ, prout iidem major ballivi et burgenſes virtute harum literarum noſtrarum patentium, aut aliorum progenitorum noſtrorum, habere uti et gaudere poſſint aut debent in prædicto burgo de Leiceſter, aut in aliquo membro parte vel parcellâ ejuſdem burgi. Ita tamen*, quod hæc præſens conceſſio noſtra non ſit ad prejudicium noſtrorum hæredum aut ſucceſſorum noſtrorum: *ſalvis* etiam omnibus et ſingulis corporibus corporatis et politicis, ac aliis perſonis quibuſcunque, omnibus juribus, libertatibus, præheminenciis, et juriſdictionibus quibuſcunque, aliter quam prædictis, majori ballivis et burgenſibus [ut prefertur] conceſſis, quæ ipſi aut eorum aliquis jurè et legitimè habuere et gaviſi fuerint ante confectionem et tempore confectionis harum literarum noſtrarum patentium *in tam amplis modo et formâ prout ſi hæ literæ noſtræ patentes nunquam habitæ vel factæ fuiſſent.* The queen further granted and confirmed

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of her certain knowledge and mere motion, &c. to the mayor, bailiffs, and burgeſſes, all and ſingular maneria, meſſuagia, terras, tenementa, et hereditamenta, libertates, liberas conſuetudines, privilegia, franchiſeas, immunitates, exemptiones, et juriſdictiones, whatſoever, which the corporation heretofore had or ought to have enjoyed within the borough, and the ſuburbs, limits, and precincts of the ſame, ratione ſive pretextu aliquarum chartarum aut literarum patentium per nos aut per aliquem progenitorum noſtrorum quo modo antehac factarum confirmatarum aut conceſſarum, ſeu quocunque alio legali modo, jure, conſuetudine, uſu, præſcriptione, ſive titulo, antehac legitimè uſitatarum, &c. Theſe ſeveral charters were found to have been duly accepted, and to be ſtill in force, of which the defendants had due notice. The ſpecial verdict further ſtated, that the place where the ſuppoſed treſpaſs, &c. was committed, was within the pariſh of St. Margaret, commonly called The Biſhop's Fee, in the ſaid county of Leiceſter, being The Biſhop's Fee named in the charter of *Elizabeth*, and therein mentioned to be, but in fact not being, within the ſaid borough before the time of granting that charter; and that the plaintiff and the aftermentioned *George White* were inhabitants reſiding in The Biſhop's Fee at the time, but were not either of them a burgeſs or freeman of the borough. It was alſo found that the juſtices of the peace for the county and thoſe of the borough have reſpectively exerciſed juriſdiction within The Biſhop's Fee from the time of granting the charter of *Elizabeth*. It then proceeded to ſtate, that the defendants were juſtices of the peace for the county, and that *George White* laid an information upon oath before them, that the plaintiff, who was his apprentice, had been guilty of miſdemeanors againſt him, &c. whereupon the plaintiff was ſummoned before them the juſtices, &c. at The Biſhop's Fee, &c. who, on hearing the complaint, &c. adjudged him to be committed to the houſe of correction, &c. It then ſtated the previous notice to the defendants from the plaintiff's attorney of the ſuing out the writ, &c. But whether, &c. THE QUESTION was, Whether the charter of *Elizabeth*, with reference to the former charters, had granted an excluſive juriſdiction to the borough magiſtrates over The Biſhop's Fee, or only a concurrent juriſdiction with the county juſtices. Lord KENYON, Ch. J.—The propoſition which was adopted in the caſe of *Talbot* v. *Hubble*, 2 *Str.* 1154. namely, that the juriſdiction of county juſtices can only be taken away by expreſs words, I have always underſtood to be a cardinal ground in deciſions of this kind. And this is not more grounded in law than in convenience. For it does ſometimes happen in limited juriſdictions that little factions and intrigues ſtep in and impede the adminiſtration of juſtice. In this particular caſe, we ſhould at leaſt pauſe before we broke in upon the uſage

uſage which has prevailed for near two centuries, and which has at leaſt grown venerable from length of time, that both the county and borough juſtices have, without any objection, concurrently adminiſtered juſtice in this place. And during all this time no great inconvenience has ariſen; for, as it was in the power of the crown to add a *non-intromittant* clauſe, and as no application has been made for that purpoſe, it may be taken for granted that this uſage has not been very pregnant with miſchief. It is clear that the uſage alone would not prevail againſt the expreſs proviſions of the charter: but in this as in other caſes contemporary and continued uſage is a good guide for the conſtruction of it. However, I do not rely on that; my opinion is formed entirely on the words of the charter. There is one fact of great importance in this caſe, that the diſtrict in queſtion was not part of the borough of Leiceſter prior to the charter of *Elizabeth*, and was not added thereto by it. But the proximity of the borough magiſtrates might make it convenient that they ſhould act within that diſtrict in concurrence with the county juſtices; that power is given to them by the charter of *Elizabeth*, to which is added the ſaving clauſe couched in emphatical words, reſerving the rights of the crown, and of all other perſons enjoyed before that time, *in tam amplis modo et formâ, prout ſi hæ literæ noſtræ patentes nunquam habitæ vel factæ fuiſſent.* Therefore, at the ſame time that the queen conferred a juriſdiction on the borough juſtices, ſhe expreſsly reſerved all rights belonging to other perſons. Then, on the words of the charter of *Elizabeth*, there not being a *non-intromittant* clauſe, and this diſtrict not being made part of the borough (which might have varied the caſe), it does not appear to have been the intention of the crown to give them more than a *concurrent* juriſdiction with the county juſtices. And it is not a new thing to give to borough juſtices a juriſdiction out of the limits of the borough; for, in Clithero, in Lancaſhire, and other places, it has been done. But *the excluſion of county juſtices from acting in particular diſtricts has always been watched with a jealous eye; and nothing but expreſs words are ſufficient to exclude them.* Now, in this caſe, there are no ſuch expreſs words; but, on the contrary, there are expreſs words reſerving to them the ſame juriſdiction which they had prior to the granting of that charter. Therefore the act complained of by the plaintiff was a legal act, done under the authority of juſtices having a competent juriſdiction.—Ashhurst, J. I am of opinion that this is a grant to the magiſtrates of the borough of Leiceſter, of a concurrent juriſdiction with the county juſtices over The Biſhop's Fee. And it is obſervable that this diſtrict was not only not part of the borough before the charter of *Elizabeth*, but the juſtices of the borough had no juriſdiction at all there previous to that time, and that

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charter has not made it part of the borough. Perhaps it was owing to the circumſtance of the non-reſidence of the county juſtices near this place that it was found convenient to extend the juriſdiction of the borough juſtices over it. But ſo far from there being any expreſs words of excluſion in this charter, which are neceſſary in caſes of this ſort to exclude the county magiſtrates, it appears from the very words of it, that this is only a grant of a *concurrent juriſdiction*; becauſe the rights of the crown, and of all other perſons, are expreſsly reſerved.—BULLER, J. In the deciſion of this caſe, which comes before the Court on a ſpecial verdict, we are bound to determine on the facts found by the jury, and cannot infer any thing. We cannot preſume any thing that does not appear upon the record. Laying that argument, therefore, out of the caſe, we muſt conſider the facts which are found by the jury. The verdict ſtates, that The Biſhop's Fee was no part of the borough of Leiceſter previous to the charter of *Elizabeth:* if not, then the queſtion muſt turn on the true conſtruction and meaning of that charter; in deciding which two things are to be conſidered; firſt, the words of the charter; and, ſecondly, the uſage which has prevailed ſince. As to the firſt; nothing but expreſs words can exclude the county juſtices: but here are no ſuch words; and it is a very material part of the caſe that even, by that charter, The Biſhop's Fee is not made part of the borough; ſo that, without the ſaving clauſe, the charter gives the borough juſtices a power of acting within a certain diſtrict not within the borough, which cannot exclude the juſtices of the county who had juriſdiction there before. And this is confirmed by the ſaving clauſe, which expreſsly reſerves all former rights. Then with regard to the uſage; uſage, conſiſtent with the meaning of the charter, has prevailed for 190 years paſt. And if the words of the charter were more diſputable than they are, I think that ought to govern this caſe. There are caſes in which this Court has held that a ſettled uſage would go a great way to control the words of a charter. Such was the caſe of *Gape* v. *Handley* (1), in which the Court went much farther than

(1) *Gape* v. *Handley*, Mich. 17 *Geo.* 3. B.R.—This was an iſſue, to try whether the preſentation to the rectory of St. Alban's belonged to the mayor and aldermen, or to the mayor, aldermen, and burgeſſes of St. Alban's at large. A verdict was given for the defendant, viz. that the right of preſentation belonged to the mayor and aldermen only; Lord *Mansfield* being of opinion, that the charter, explained by uſage, veſted the right of preſentation in the ſelect body. Afterwards it was moved for a new trial. There were three charters; viz. The charter of the 7th *Ed.* 6. by which the borough was firſt incorporated by the name of the mayor and burgeſſes of the borough of St. Alban's; and ten principal burgeſſes were appointed, who, together with the mayor, are made the governing part of the corporation, with power to make by-laws. And the king, by that charter, erected the church of the late monaſtery of St. Alban's

than is neceſſary in the preſent caſe. And it is for the ſake of quieting corporations that this Court has always upheld long uſage

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Alban's into a pariſh church, and granted the ſame, and the advowſon and donation thereof, to the mayor and burgeſſes; 2d, The charter of the 8th *Car.* 1. appointing twenty-four aſſiſtants, a recorder, coroner, and ſome other additional officers within the corporation, and with ſome amendments of the former charter; but the mayor and the ten principal burgeſſes continued to be the governing part of the corporation till the 16 *Car.* 2. when a further charter was granted, and the corporation was entirely new modelled: the ten principal burgeſſes were laid aſide, and the aldermen were appointed in their ſtead, to enjoy all the like powers and privileges as the ten principal burgeſſes; and the borough was incorporated by the name of the mayor, aldermen, and burgeſſes of the borough of St. Alban's. From the time of the firſt incorporation till the charter of the 16th *Car.* 2. the mayor and the ten *principal burgeſſes alone* elected the parſon of the church in queſtion; and, ſince the charter of 16 *Car.* 2. the parſon has been conſtantly elected by the *mayor and aldermen, without any interference of the commonalty or burgeſſes* at large; nor was any claim ever made by the burgeſſes at large to vote in the election till this now ſet up. On the part of the defendant was read the clauſe in the charter of *Ed.* 6. conſtituting the ten principal burgeſſes, by which he granted to the mayor and burgeſſes, quod de cætero ſint et erunt decem homines de diſcretioribus et probioribus viris dicti burgi, Sancti Albani, qui erunt aſſiſtentes et auxiliantes majori ejuſdem burgi pro tempore exiſtenti, in cauſis et materiis eundem burgum tangentibus, et qui erunt et vocabuntur principales burgenſes ejuſdem burgi, et erunt commune conſilium dicti burgi pro ſtatutis, actibus, et ordinationibus, publicam utilitatem et commodum ejuſdem burgi et inhabitantium inde pro tempore exiſtentium tangentibus et concernentibus, per eos, ſeu per majorem partem eorundem cum majore burgi illius pro tempore exiſtente, de tempore in tempus, faciendo, et agendo, pro meliori gubernatione et regimine hominum, ac cauſarum, rerum, et negotiorum, dicti burgi, &c. giving to the mayor and the principal burgeſſes a power of electing other diſcreet men when a vacancy happened. The defendant alſo read a clauſe in the charter of *Car.* 1. (1634) inveſting the powers in the mayor and ten principal burgeſſes in more extenſive words, as follows: Et ulterius volumus, et concedimus, &c. præfato majori et burgenſibus burgi prædicti, et ſucceſſoribus ſuis, quod major et principales burgenſes burgi prædicti pro tempore exiſtentes, vel major pars eorundem (quorum unum majorem eſſe volumus), habeant plenam poteſtatem et auctoritatem condendi, conſtituendi, ordinandi, faciendi, ſtabiliendi, de tempore in tempus, leges, ſtatuta, jura, ordinationes, et conſtitutiones, quæ eis aut majori parti eorundem (quorum majorem, &c.) bona, ſalubria, utilia, honeſta, et neceſſaria, juxta eorum ſanas diſcretiones, fore videbuntur, pro bono regimine et pacificâ gubernatione burgi prædicti, ac omnium officiorum, miſterorum, artificum, burgenſium, inhabitantium, et reſidentium ejuſdem burgi, vel ad eundem confluentium; ac pro declaratione quo modo et ordine iidem major et principales burgenſes burgi prædicti, ac cæteri omnes et ſinguli officiarii, burgenſes, et inhabitantes ejuſdem burgi in officiis, functionibus, miſteriis, et negotiis ſuis, infra burgum prædictum, libertates, et præcinctas ejuſdem, ſeſe habebunt, gerent, et utentur; ac etiam pro meliori gubernatione, preſervatione, diſpoſitione, locationè, et demiſſione, *terrarum, tenementorum, poſſeſſionum, et hereditamentorum, ac bonorum et catallorum*, præfato majori et burgenſibus burgi prædicti, ac res et cauſas

uſage where it was poſſible, though recent uſage would not perhaps have much weight. But, without having recourſe to the

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alias quaſcumque burgum prædictum aut ſtatum jus et intereſſe ejuſdem tangentes; ſeu quo modo concernentes, dictaſque leges, ordinationes, ſtatuta, et conſtitutiones, in formâ prædictâ, conſtitutas, ordinatas, &c. debitâ executione demandare, quas ejuſdem leges ordinationes, &c. ſic ut prefatur fiendas, obſervare volumus ſub pœnis in eiſdem contínendis; (provided that they be not repugnant to the laws and cuſtoms of the realm of England). Clauſes were alſo read from the charter of 16 *Car.* 2. appointing twelve aldermen, who were to enjoy all the privileges, &c. which had been enjoyed by the ten principal burgeſſes, and inveſting the mayor and aldermen with the ſame powers for making laws, regulations, &c.; and alſo for managing, preſerving, diſpoſing, letting, and demiſing the lands, tenements, goods, and chattels, of the mayor and burgeſſes, in the ſame extenſive words as in the preceding charter of *Car.* 1. and *totidem verbis*, only ſubſtituting aldermen inſtead of burgeſſes. The advowſon was granted to the mayor and burgeſſes, and their ſucceſſors, by the charter of *Ed.* 6. Beſides this many entries were read, by which it appeared that the ſeal of the corporation had always been under the power of the mayor and aldermen only. There were conſtitutions 100 years old, preſcribing what order ſhould be obſerved by the mayor and aldermen in putting the ſeal. Every leaſe, or deed, or other act relating to the revenue of the corporation, had been done by the mayor and aldermen, and there was no evidence of any inſtance where the body at large had voted for a clergyman. When the preſentation has been made by the mayor and aldermen, it was made in the name of the corporation; but, in the year 1713, they preſented, in the name of the mayor and aldermen only, and ſo continued ſince. Lord MANSFIELD.—Leave was given for a new trial without coſts, and the meaning of that was to move on the queſtion of law: and ſuppoſing the uſe eſtabliſhed by the verdict could not be ſupported in law, the verdict was to be entered for the plaintiff; for this was only to inform the Court. The reſtriction of the preſentation at large to the ſelect body is the moſt reaſonable reſtriction that can exiſt. A popular election of a miniſter raiſes fumes and heats among the pariſhioners, and tends much to deſtroy chriſtian charity. The queſtion is, Whether, on the conſtruction of this charter, the Court is warranted to ſay that the king who granted the charter, and the corporation who took it, meant that the preſentation ſhould be made by the mayor and aldermen only? The advowſon is granted to the corporation; ſo is the power of making by-laws, though that power is to be executed by the ſelect body. The words of the charter are very particular: firſt, there is a general power to make by-laws, under which they may make every by-law on the uſual ſubjects; and then it adds, that they ſhall make by-laws concerning the letting of land, &c. goods and chattels, &c. as it is given in ſuch a large manner, it is a demonſtration that they ſhould have the management of the revenue. They cannot take for their own uſe the profits of the lands, &c.; that would be an abuſe: but the charter implies ſtrongly that they ſhould have the management of them; the uſage is uniform that they have had it; they have made mortgages, leaſes, &c. and have executed bonds. If it were doubtful, ſuppoſing the queſtion to have ariſen recently, the uſage is a ſtrong information of the true conſtruction. I thought ſo at the trial; and think now, that without reſorting to the by-law, by the conſtruction of the charter, with the uniform uſage under it, the mayor and aldermen only ought to have the diſpoſal of the advowſon.

ASTON,

the uſage in this caſe, on the words of the charter alone, I think the county juſtices are not excluded, there being no expreſs words for that purpoſe.—GROSE, J. agreed that it was the intention of the crown only to grant the borough juſtices a *concurrent* juriſdiction with the magiſtrates of the county.—Judgment for the defendants.

And where two ſets of magiſtrates have a concurrent juriſdiction, and one appoints a meeting to grant the licenſes, their juriſdiction attaches, ſo as to exclude the others appointing a ſubſequent meeting, though they may all meet together on the firſt day. But if, after ſuch appointment, the other ſet of magiſtrates meet on a ſubſequent day, and grant other licenſes, their proceeding is illegal, and the ſubject of an indictment.—On the trial of an indictment againſt the defendants, two juſtices of the peace for the town and borough of Southwark, in unlawfully and wrongfully meeting together, as juſtices, for the purpoſe of granting ale-licenſes, and unlawfully and wrongfully granting their licenſe to one *Hedger*. A ſpecial verdict was found, in ſubſtance as follows: after ſtating that the corporation of London were a corporation by preſcription, it ſet forth three ſeveral charters, 1 *Ed.* 3. 23 *Hen.* 6. and 4 *Edw.* 6. by which *(inter alia)* the mayor, recorder, and ſuch of the aldermen of the city as have paſſed the chair, are appointed juſtices of the peace for the town and borough of Southwark; but neither of thoſe charters contained a *non-intromittant* clauſe as to the juſtices for the county of Surrey. That the mayor and aldermen of the city, who have borne the office of mayor, and the recorder for the time being, have been uſed and accuſtomed to hold ſeſſions of the peace within and for the town and borough of Southwark four times in every year, and, for forty years and upwards, have licenſed perſons to keep alehouſes in the ſaid town and borough; but they have not been accuſtomed to act as juſtices of the peace there in any other manner. That the town and borough of Southwark is within the county of Surrey; and the juſtices appointed for the county have been accuſtomed to act in Southwark, and to licenſe perſons to keep alehouſes therein. That the general quarter-ſeſſions have been uſually holden once in every year within the borough, and the three other ſeſſions in other different places in the county. The verdict then ſtated, that *A. B.*, *C. D.*, &c. (the juſtices for the county mentioned in the indictment) were, on the 4th and 11th of September, 1787, juſtices of the county of Surrey, and

The King v. T. Sainſbury, eſq. *et al.* Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 451. *Nolan* 8.

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ASTON, J.—I think that it is right not to go on the ſuppoſition of the by-law, but that this uniform uſage is a good conſtruction of the charter. WILLES and ASHHURST, juſtices, of the ſame opinion.—Rule diſcharged.

acting in and for that diviſion in which Southwark lies. That certain juſtices of the county, acting in and for the diviſion in which Southwark lies, on the 15th of Auguſt, 1787, iſſued their warrant under their hands and ſeals, and thereby appointed a general meeting of the juſtices of the county, acting in and for the ſaid diviſion, to be holden on the 4th of September then next following, at a certain place therein mentioned, for the purpoſe of licenſing perſons to keep common inns and alehouſes within the ſaid diviſion; and that, in purſuance of ſuch warrant, the ſaid general meeting in the ſaid indictment mentioned, was held on the ſaid 4th of September, by and before *A. B.*, *C. D.*, &c. That, at that meeting, *J. Hedger* applied to thoſe juſtices for a licenſe, who did not grant it, but poſtponed the further conſideration of it till the 11th of September, to which day that meeting was adjourned. That, at the adjourned meeting held, &c. thoſe juſtices refuſed to grant a licenſe to *J. Hedger*. That, on the 25th of Auguſt, 1787, the defendants, then being the mayor and aldermen of the city of London, who had paſſed the chair, iſſued their warrant for holding a general meeting of the juſtices in and for the town and borough of Southwark, on the 14th of September then next, at a certain place within the borough, for the purpoſe of granting licenſes, &c. in purſuance of which a meeting was held by the defendants on that day, which was adjourned to the 18th of September, when they granted a licenſe to *Hedger*. That, at this adjourned meeting, and before the defendants licenſed *Hedger*, they had notice of the general meeting held by the juſtices of the county, and of their having refuſed to grant a licenſe to *Hedger*. Lord KENYON, Ch. J.—That the king may grant a commiſſion of the peace for a county, and that the juriſdiction of ſuch juſtices may pervade the whole county, cannot be doubted; neither can it be diſputed that he may grant commiſſions of the peace for any particular diſtrict in the county, and that that ſubdiviſion may have juſtices of its own, excluſive of the juriſdiction of the juſtices of the county at large; but the latter can only be effected by a *non-intromittant* clauſe, prohibiting the county juſtices from interfering in that diſtrict. This doctrine was fully recogniſed in *Talbot* v. *Hubble*, 2 *Str.* 1154.; from a manuſcript note of which it appears, that it was there taken as a *datum*, that the juſtices of the county would be excluded, if there were a *non-intromittant* clauſe in the charter granted to the ſmaller diſtrict, but not otherwiſe. In one of the charters granted to the city of London there is an expreſs power, conſtituting the mayor and certain of the aldermen juſtices of the borough of Southwark; they are, therefore, charter juſtices of that diſtrict; and that juriſdiction has never (I believe) been doubted. *But another queſtion has ariſen, and*

*and which is proper ſhould be ſettled, Whether it be legal* (for whether it be decent or decorous no perſon can doubt) *for two different ſets of magiſtrates, having a concurrent juriſdiction, to run a race in the exerciſe of any part of their juriſdiction?* It is of infinite importance to the public, that the acts of magiſtrates ſhould not only be ſubſtantially good, but alſo that they ſhould be decorous. The facts in this caſe are ſhortly theſe: ſome of the juſtices for the county of Surrey, having before them the ſtatute of 26 *Geo.* 2. and knowing that the licenſes ought to be granted on a certain day and time, appointed a day, the 4th of September, for licenſing alehouſes in this diviſion, on which day they accordingly held their meeting; and certain of the magiſtrates of the city of London, who in general are competent to this purpoſe, appointed another meeting on a ſubſequent day. But the juriſdiction of the juſtices, who had appointed the firſt meeting, had attached before this time; not, indeed, ſo as to exclude the city juſtices from acting at the firſt meeting, for they might all have acted together; but it excluded the city juſtices of their juriſdiction to act on the ſubſequent day. On the general queſtion, therefore, I am clearly of opinion, that the Surrey juſtices, and the magiſtrates for the city, have a co-ordinate juriſdiction within this diſtrict; and that the meeting of the city juſtices in this caſe was illegal, the juriſdiction of the other magiſtrates having firſt attached. ASHHURST, J.—There being no words of excluſion in the city charters, it follows, as a conſequence, that the juſtices of the county have a concurrent juriſdiction in the borough of Southwark; if ſo, it alſo follows, that the juriſdiction of holding the meeting, directed by the 26 *Geo.* 2. attached in thoſe magiſtrates who firſt gave notice of the meeting; and it was a breach of the law in the other magiſtrates, to attempt to wreſt this juriſdiction out of their hands; for what the law ſays ſhall not be done, it becomes illegal to do, and is, therefore, the ſubject of an indictment, without the addition of any corrupt motives. And though the want of corruption may be an anſwer to an application for an information, which is made to the extraordinary juriſdiction of the Court, yet it is no anſwer to an indictment, where the judges are bound by the ſtrict rule of law. BULLER, J. of the ſame opinion.—Judgment for the crown.

The ſecretary of ſtate is not, as ſuch, a conſervator of the peace; neither can he iſſue *a general warrant* to ſearch for and ſeize the perſon and papers of any one.—In this caſe, which was treſpaſs for breaking and entering the plaintiff's houſe, and breaking open the doors to the rooms, and breaking open the boxes, cheſts, and drawers, of the plaintiff, and ſearching and examining all the rooms, and all the boxes, cheſts, and drawers, ſo broke open, and reading over, prying into,

Entick *v.* Carrington, *et al.* king's meſſengers, Mic. Ter. 5 Geo. 3. B. R. 2 *Wils.* 275.

into, and examining, the private papers, books, &c. of the plaintiff, and taking and carrying away certain charts and printed pamphlets; there was a ſpecial juſtification, under a warrant from the earl of Halifax, *one of the privy-council, and one of the principal ſecretaries of ſtate*, whereby the defendants were authorized, *taking a conſtable to their aſſiſtance*, to ſearch for the plaintiff, mentioned in the ſaid warrant to be the author of certain ſeditious papers inſerted in the "Monitor, or Britiſh Freeholder;" and him, the plaintiff, having found, to ſeize and apprehend, and bring, together with his books and pamphlets, in ſafe cuſtody before the Earl of *Halifax*, to be examined and further dealt with according to law. It appeared on the trial, that the defendants executed the warrant *without a conſtable*, and carried the books and papers to one *Lovel Stanhope*, who was law aſſiſtant in the ſecretary of ſtate's office, and a juſtice of the peace, and no demand was made of the copy of the warrant, nor did the plaintiff bring his action within ſix months. There was a ſpecial verdict ſtating the facts, and, if the action could be ſuſtained, aſſeſſing 300l. damages to the plaintiff. The caſe was fully argued, and on behalf of the defendants it was contended, 1ſt, THAT *a ſecretary of ſtate*, AS A JUSTICE OR CONSERVATOR OF THE PEACE, *and theſe meſſengers acting under his warrant, are within the ſtat.* 24 Geo. 2. *c.* 44. *ſ.* 6. *which enacts, that "no action ſhall be brought againſt any conſtable*, or other officer, or any perſon, *acting under a warrant of a juſtice, until demand be made of the peruſal and copy of the warrant, and the ſame hath been refuſed or neglected for ſix days;" and that no ſuch demand was ever made by the plaintiff in this caſe, and, therefore, the action did not lie againſt the defendants, who were mere miniſterial officers acting under the ſecretary of ſtate, who was a juſtice and conſervator of the peace*; 2dly, THAT *the warrant, under which the defendant acted, was a legal warrant, for that, at many different times, from the time of the revolution till this time, the like warrants with that iſſued againſt the plaintiff in this caſe had been granted by ſecretaries of ſtate, and executed by the meſſengers in ordinary for the time being.*—BY THE COURT: The ſecretary of ſtate is no conſervator, nor a juſtice of the peace (1), *quaſi* ſecretary, within the

(1) A ſecretary of ſtate is the keeper of the king's ſignet, wherewith the king's private letters are ſigned, and he is not a conſervator of the peace. Juſtice *Rokeby*, in 1 Lord *Raym.* 66. he is *in the nature* of a conſervator of the peace; formerly he was not a privy-counſellor, or conſidered as a magiſtrate. He began to be ſignificant about the time of the revolution, and grew great when the princes of Europe ſent ambaſſadors hither.—Same caſe, 2 *Will.* 288, 289. By the common law, neither ſecretaries of ſtate, nor privy-counſellors, are conſervators of the peace,

the words of equity of the ſtat. 24 *Geo.* 2. admitting him (for argument's ſake) to be a conſervator. The preamble of the ſtatute ſhews why it was made, and for what purpoſe: the only grantor of a warrant therein named is a juſtice of the peace; *juſtice of peace* and *conſervator* are not convertible *terms.* The juſtice is liable to actions, as the ſtatute takes notice, it is applicable to him who acts by warrant, directed to conſtables: a conſervator is not entruſted with the execution of laws, which, by this act, is meant ſtatutes, which give juſtices juriſdiction; a conſervator is not liable to actions; he never acts, he is almoſt forgotten: there never was an action againſt a conſervator of the peace, as ſuch; he is antiquated, and could never be thought of when this act was made; and *ad ea quæ frequenter accidunt jura adaptantur.* There is no act of a conſtable or tithingman, as conſervator, taken notice of in the ſtatute; and we are all clearly of opinion, that neither the ſecretary of ſtate, nor the meſſengers, are within the ſtat. 24 *Geo.* 2.; but if the meſſengers had been within it, as they did not take a conſtable with them according to the warrant, that alone would have been fatal to them, nor did they purſue the warrant in the execution thereof, when they carried the plaintiff and his books before *Lovel Stanhope*, and not before Lord *Halifax*; that was wrong, becauſe a ſecretary of ſtate cannot delegate his power, but ought to act in this part of his office perſonally.—The defendants, having failed in their defence under the ſtat. 24 *Geo.* 2. we ſhall now conſider the ſpecial juſtification, whether it can be ſupported in law, and this depends on the

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peace, nor has any ſtatute ever conferred any ſuch juriſdiction upon them. The office neither implies nor requires the authority of a magiſtrate, nor is it conſiſtent with the wiſdom or analogy of our law, to give a power to commit, without power to examine upon oath.—Same caſe, 11 *State Trials*, 317, 319. The ſecretary has no power to adminiſter an oath, or to take bail, and yet, *for treaſon, and for other offences againſt the ſtate*, he is in full exerciſe of the power to commit whatever was the original ſource of that power, as appears by the caſes of *The Queen* v. *Derby**, *Fortes.* 140; *The King* v. *Earbury* †, 8 *Mod.* 177, 2 *Barnard* 346; and *The King* v. *Kendal* and *Roe* ‡, *Skin.* 596. 1 *Salk.* 346. 1 Lord *Raym.* 65. 5 *Mod.* 78; and theſe caſes the Court cannot overturn.—Same caſe, 2 *Wilſ.* 288. 290. 11 *State Trials*, 323.

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* *Derby* was committed by the ſecretary of ſtate, *for publiſhing a libel*, called The Obſervator, and the Court held the warrant good and legal.

† Dr. *Earbury* was arreſted and committed by warrant from the ſecretary of ſtate, *for being the author of a ſeditious libel*, and his papers ſeized, and he was continued on his recognizance.

‡ *Kendal* and *Roe* were committed by Secretary *Trumbal*, *for high-treaſon*, in aſſiſting the eſcape of *Montgomery*, and by *Holt*, Ch. J. held good, but the priſoners were bailed.

juriſdiction of the ſecretary of ſtate; for, if he has no juriſdiction to grant a warrant to break open doors, locks, boxes, and to ſeize a man, and all his books, &c. in the firſt inſtance, upon an information of his being guilty of publiſhing a libel, the warrant will not juſtify the defendants. Now the warrant in this caſe was an execution in the firſt inſtance, without any previous ſummons, examination, hearing the plaintiff, or proof that he was the author of the ſuppoſed libels; a power claimed by no other magiſtrate whatever. It was left to the diſcretion of theſe defendants, to execute the warrant in the abſence or preſence of the plaintiff, when he might have no witneſs preſent to ſee what they did; for they were to ſeize all papers, bank bills, or any other valuable papers they might take away, if they were ſo diſpoſed; there might be nobody to detect them. If this is law, it would be found in our books, but no ſuch law ever exiſted in this country; our law holds the property of every man ſo ſacred, that no man can ſet his foot upon his neighbour's cloſe without his leave; if he does he is a treſpaſſer, though he does no damage at all: if he will tread upon his neighbour's ground, he muſt juſtify it by law. The defendants have no right to avail themſelves of the uſage of theſe warrants ſince the revolution; for, if it began then, it is too modern to be law; the common law did not begin with the revolution; the ancient conſtitution, which had been almoſt overthrown and deſtroyed, was then repaired and revived. The revolution added a new buttreſs to the ancient venerable edifice; this is the firſt inſtance of an attempt to prove a modern practice of a private office, to make and execute warrants to enter a man's houſe, ſearch for, and take away, all his books and papers in the firſt inſtance to be law, which is not to be found in our books. It muſt have been the guilt, or poverty, of thoſe upon whom ſuch warrants have been executed, that deterred, or hindered, them from contending againſt the power of a ſecretary of ſtate, and the ſolicitor of the treaſury, or ſuch warrants could never have paſſed for lawful till this time. We are inclined to think the preſent warrant took its firſt riſe from the licenſing act, 13 & 14 *Car.* 2. c. 33. ſ. 15. whereby authority was given to a meſſenger, under a warrant of the ſecretary of ſtate, to ſearch for books unlicenſed; and if they found any againſt the religion of the church of England, to bring them before the ſecretary of ſtate. It is ſaid, it is better for the government and the public to ſeize a libel before it is publiſhed; if the legiſlature be of that opinion, they will make it lawful; but the twelve judges cannot make law. Upon the whole, we are all of opinion that this warrant is wholly illegal, and void.—Judgment for the plaintiff.

So

So alſo in this caſe, general warrants were held illegal and void.—This was error from the Common Pleas, on a bill of exceptions. It was an action of treſpaſs and falſe imprisonment, for breaking and entering the houſe of the defendant in error (the plaintiff below), and impriſoning him for five days, without any reaſonable or probable cauſe. The defendants below, now plaintiffs in error, pleaded the general iſſue, and alſo a ſpecial juſtification, ſtating his majeſty's ſpeech, 19th April, 1763, and the *North Briton*, No. 45, 23d April, 1763, highly reflecting on the fame, and publiſhed by one *John Wilkes*. That the Earl of *Halifax* was then ſecretary of ſtate, and a lord of the privy council; and, upon information given him of the ſaid libel, and producing the ſame before him, 26th of April, 1763, he iſſued his warrant in writing, under hand and ſeal, to the defendants and another, being four of his majeſty's meſſengers in ordinary, *requiring them (taking a conſtable to their aſſiſtance) to ſearch for the authors, printers, and publiſhers, of the ſaid ſeditious and treaſonable libel, and to apprehend and ſeize them, together with their papers, and to bring them in ſafe cuſtody before the ſaid earl, to be examined concerning the premiſes, and to be further dealt with according to law.* That the plaintiff, *Leach*, was a printer, and had printed ſome former numbers of the *North Briton* (ſtating them); that, on the 27th of April, 1763, the defendants had information that he was the printer of No. 45; and, therefore, they, with one *Thomas Freeman*, a conſtable, did enter the plaintiff's houſe, the door being open, and ſearch for the printers of the ſaid libel; that they found the plaintiff, and his ſervants, reprinting a new edition of the *North Briton*; whereupon they took him into cuſtody, and kept him four days, till the Earl of *Halifax* had leiſure to examine him; and then, it appearing that he did not print the ſame No. 45, he was diſcharged, which are the ſame, &c.—*Leach* replies, *De injuriâ ſuâ propriâ abſque hoc*, &c. And thereupon, and upon the general iſſue aforeſaid, iſſue was joined, and came on to trial before *Pratt*, Ch. J. the 29th of November, 1764, at Guildhall; at which time a bill of exceptions was tendered by the defendant's counſel, and, on the 10th of December following, was ſealed by the chief juſtice, ſtating the proof of the facts in the declaration, and that the council for the defendants, in order to acquit the defendants under the general iſſue, did prove the king's ſpeech, libel, office of Lord *Halifax*, information, and warrant to the defendants, being his majeſty's meſſengers (as before ſtated in their juſtification), and that *it was the long and frequent uſage of office to grant and execute ſuch warrants*, that they had ſuch grounds of ſuſpicion, and did ſuch acts, &c. as are ſtated in the ſaid plea; and that it was proved, that the plaintiff was not

Money *et al. v.* Leach, Tr. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1742. 1 *Black. Rep.* 555.

not the author, printer, or publiſher, of the ſaid paper, No. 45. Whereupon the council for the defendants inſiſted, on the benefit of the ſtat. 24 *Geo.* 2. c. 44. for indemnifying conſtables, &c. acting in obedience to the warrants of juſtices of the peace; and that the matters aforeſaid were concluſive evidence for that purpoſe, and to bar the action of the plaintiff. The counſel for the plaintiff inſiſted, that neither the defendants nor the Earl of *Halifax* were within the meaning of the ſtat. 7 *Jac.* 1. c. 5. [which allows juſtices, and other officers, to give the ſpecial matter in evidence, on not guilty], nor of 21 *Jac.* 1. c. 12. making the former perpetual, nor of 24 *Geo.* 2. c. 44. nor entitled to the benefit thereof; and that the ſeizure and impriſonment of the plaintiff were not made, or done, in obedience to the ſaid warrant, nor had the defendants any authority thereby. *That the chief juſtice declared his opinion, that the ſaid matters were not ſufficient to bar the plaintiff's action*, and, with that direction, left the ſame to the jury, who found a verdict for the plaintiff on both iſſues, with 400l. damages. The counſel for the plaintiffs in error made three points: 1ſt, That the defendants had a right to plead the general iſſue, and to give the ſpecial matter in evidence, under 7 *Jac.* 1. c. 5; or, in other words, Lord *Halifax*, *the ſecretary of ſtate, was a juſtice of peace within the intention of that act*; 2dly, That the evidence was ſufficient to entitle the defendants to a verdict which took in both the validity of the warrant itſelf, and the manner of executing it; 3dly, That they were alſo entitled to a verdict within the meaning of 24 *Geo.* 2. c. 44. the plaintiff not having obſerved the terms required by it. After the firſt argument, Lord MANSFIELD ſaid, a bill of exceptions ſuppoſes the evidence true, and queſtions the competency or propriety of it. "Whether there was a *probable* cauſe or ground of ſuſpicion, was a matter for the jury to determine: that is not now before the Court." So, "whether the defendants detained the plaintiff an unreaſonable time." But, if it had been found to have been a reaſonable time, yet it would be no juſtification to the defendants, becauſe it is ſtated, "*that this man was neither author, printer, nor publiſher;*" *and if he was not, then they have taken up a man who was not the ſubject of the warrant.*—THE THREE MATERIAL QUESTIONS are, 1ſt, "Whether a "ſecretary of ſtate, acting as a conſervator of the peace by "the common law, is to be conſtrued within the ſtatutes of "James the Firſt, and of the late king?" The protection of the officers, if they have acted in obedience to the warrant, is conſequential, in caſe a ſecretary of ſtate is within theſe ſtatutes. 2d. As to the arreſt being made in obedience to the warrant, or only under colour of it, and without authority from it?—This queſtion depends upon the conſtruction of the warrant, whether it muſt not be conſtrued to mean "ſuch "perſons

" perſons as are under a *violent* ſuſpicion of being guilty of " the charge;" (for they cannot be *concluſively* conſidered as guilty, till after trial and conviction). The warrant itſelf imports only ſuſpicion, for it ſays, " to be brought before " me and examined, and dealt with according to law;" and this ſuſpicion muſt eventually depend upon future trial: therefore the warrant does not ſeem to me to mean concluſive guilt, but only *violent* ſuſpicion. If the perſon apprehended ſhould be tried and acquitted, it would ſhew " that he was not guilty, yet there might be ſufficient cauſe of ſuſpicion." " To bring a perſon within 24 *Geo.* 2. the act muſt be done " in obedience to the warrant." 3d. The laſt point is, " WHE- " THER *this general warrant be good?*" One part of it may be laid out of the caſe; for, as to what relates to the ſeizing his papers, that part of it was never executed, and, therefore, it is out of the caſe. It is not material to determine, " Whe- " ther the warrant be good or bad?" except in the event of the caſe being within 7 *Jac.* 1. but not within 24 *Geo.* 2. At preſent, as to the validity of the warrant, upon the ſingle objection of the incertainty of the perſon, being neither named nor deſcribed, the common law, in many caſes, gives authority to arreſt without warrant; more eſpecially, where taken in the very act; and there are many caſes where particular acts of parliament have given authority to apprehend under general warrants; as in the caſe of writs of aſſiſtance, or warrants to take up looſe, idle, and diſorderly people: but here it is not contended, that the common law gave the officer authority to apprehend, nor that there is any act of parliament which warrants this caſe; therefore, it muſt ſtand upon principles of common law. It is not fit that the receiving or judging of the information ſhould be left to the diſcretion of the officer. The magiſtrate ought to judge, and ſhould give certain directions to the officer. This is ſo, upon reaſon and convenience. Then, as to the authorities: *Hale* and all others hold ſuch an uncertain warrant void, and there is no caſe or book to the contrary.—It is ſaid, " that the uſage has " been ſo, and that many ſuch have been iſſued ſince the re- " volution down to this time." But an uſage, to grow into law, ought to be a general uſage, *communiter uſitata et approbata*, and which, after a long continuance, it would be miſchievous to overturn. This is only the uſage of a particular office, and contrary to the uſage of all other juſtices and conſervators of the peace.—There is the leſs reaſon for regarding this uſage, becauſe the form of the warrant probably took its riſe from a poſitive ſtatute; and the former precedents were inadvertently followed, after that law was expired (1).

(1) The ſtatute for licenſing the preſs.

WILMOT,

WILMOT, J. declared, that he had no doubt, nor ever had, upon theſe warrants; he thought them illegal and void. Neither had the judges YATES or ASTON any doubt (upon this firſt argument) of the illegality of them, for no degree of antiquity can give ſanction to an uſage bad in itſelf: and they eſteemed this uſage to be ſo. They were clear and unanimous in opinion, "*that this warrant was illegal and bad.*" IT STOOD OVER FOR FURTHER ARGUMENT; and, in the next term, *Yorke*, Attorney-general, was to have argued for the plaintiff in error, but declined it, as not being able to get over the objection that the defendants in error were not the authors, printers, or publiſhers, of the libel. And he mentioned a caſe, before Lord *Manſfield*, at the Norfolk aſſizes, 1761, where an officer, executing a warrant of a juſtice of Norfolk at large, in the county of the city of Norwich, was held not to be juſtifiable under the ſtat. 24 *Geo.* 2; and the caſe of *Dawſon* and *Clerk*, at the Middleſex ſittings, where, under a warrant to take up looſe and diſorderly perſons, the conſtable took up a woman of character, and held that he could not juſtify. Lord MANSFIELD remembered both theſe caſes, and ſaid, he ſtill continued of the ſame opinion. Where the juſtice cannot be liable, the officer is not within the protection of the act. The caſe in Middleſex concludes exactly to the preſent caſe; for here the warrant is "to take up the author, printer, or publiſher;" but they took up a perſon who was neither author, printer, nor publiſher; ſo that caſe was a warrant "to take up a diſorderly woman;" and the defendant took up a woman who was not ſo. And he held the ſame opinion now, he ſaid, as he did before, in the caſe at Norwich.—This makes an end of the preſent caſe; for this is a previous queſtion, and the foundation of the defence fails.—The conſequence is, that the judgment muſt be affirmed.

Rex *v.* Fliſher, and Rex. *v.* Towill, Mic. Ter. 22 Geo. 3. B.R. *Cald.* 135.

To ſtate upon an appeal, that thoſe againſt whoſe acts you complain are juſtices, is ſo far an admiſſion of their juriſdiction.—On an appeal againſt the appointment of overſeers of the poor by *James Hare* and *Thomas Foy*, who claimed to be mayor and juſtices of the corporation of Taunton, to the general quarter-ſeſſions. The juriſdiction of the ſeſſions was queſtioned by (1) the reſpondents, upon the ground of their having, as a corporate body, an excluſive juriſdiction; in order to prove this, they produced to the Court a liſt of names (in which number were thoſe of *James Hare* and *Thomas Foy*), as members admitted into the body corporate, written in a book uſually kept by the town clerk for ſuch purpoſe, in which there were no ſtamps. No evidence was

(1) The pariſh.

offered

offered of an admiſſion of *James Hare* and *Thomas Foy*, or of any other perſon claiming to be of the body corporate, upon ſtamped paper. THE QUESTION was, Whether evidence of admiſſion, upon unſtamped paper, ought to have been received by the ſeſſions? In ſupport of the order of ſeſſions, quaſhing theſe appointments, the ſtat. 5 & 6 *W.* and *M.* c. 21. ſ. 3. which requires a ſtamp of one ſhilling upon every admiſſion to a corporation, was relied on; and it was contended that, to ſupport their juriſdiction, the magiſtrates of the borough ought to have ſhewn a good title to their offices: that they had not done this upon the appeal, and, conſequently, that their acts were void. Lord MANSFIELD, Ch. J. There can be no appeal to the quarter-ſeſſions from the acts of perſons calling themſelves juſtices, and who are not ſo. If perſons exerciſe a juriſdiction, who are not entitled, the whole is a nullity, and the party aimed at need not pay any regard to it. *Willes*, J. In their notice they ſtate them to be juſtices. *Buller*, J. The appeal is made, becauſe the juſtices have appointed, upon the ground of juriſdiction; and, at the hearing of the appeal, you ſay, they have no juriſdiction. You have concluded yourſelves.—*Aſhhurſt*, J. concurring, rule abſolute and order of ſeſſions quaſhed.

In action of treſpaſs, aſſault, and falſe impriſonment, againſt a juſtice of the peace, it was moved, that he might be permitted to pay twelve guineas into court, purſuant to the ſtatute 24 *Geo.* 2. he having omitted to tender amends: but, it not appearing that the action was brought againſt him, as a juſtice, for things done in the execution of his office, the Court only granted him a week's time to plead. Before the expiration of which time, the plaintiff's notice of action being produced, and proved by affidavit, and it appearing to be brought for a ſuppoſed miſconduct in his office, the Court granted the common rule for payment of the ſaid ſum into court.

Caſbourn *v.* Ball, Hil. Ter. 13 Geo. 3. C.B. 2 *Black. Rep.* 859.

No action can be brought againſt a juſtice of the peace for an act done by him in that character, without giving him a month's *notice of the writ, or proceſs, intended to be ſued out*, as well as of the *cauſe of action*.—This was an action of treſpaſs and falſe impriſonment againſt the defendant, for an act done by him as a juſtice of the peace. At the trial it was objected, on behalf of the defendant, that the notice (1) was not conformable to the ſtat. 24 *Geo.* 2. c. 44. (2) *in not ſtating what*

Lovelace *v.* Curry. Ea. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 631.

(1) The notice was thus, Should, at or ſoon after the expiration of one calendar month, *cauſe an action to be commenced and proſecuted againſt the defendant, in his majeſty's court of King's Bench, for*, &c.

(2) This act enacts, "that no writ ſhall be ſued out againſt, nor any copy of any proceſs at the ſuit of a ſubject ſhall be ſerved on, any juſtice of

*what particular writ, or proceſs, the plaintiff intended to ſue out, and what form of action he intended to commence*; and the caſe of *Strickland* v. *Ward* (1) was relied on in ſupport of the objection; but the objection was over-ruled. The cauſe then proceeded, and the defendant obtained a verdict on the merits. It was moved to ſet aſide the verdict, as being contrary to the weight of evidence; on which the counſel for the plaintiff ſuggeſted, that the preliminary objection taken at the trial, reſpecting the notice, was deciſive: in which caſe it would be immaterial to conſider, whether or not the jury had given a proper verdict on the merits; accordingly it was argued on the formal objection. Lord KENYON, Ch. J. Ever ſince the caſe of *Strickland* v. *Ward*, I believe it has been taken for granted, that ſuch a notice as the preſent is not a good one. And, if it is ſuppoſed that the learned judge, who held the objection to be fatal in that caſe, decided in favour of great men againſt perſons in inferior ſtations of life, his character is but little known to thoſe who make the ſuppoſition; for, if ever there exiſted a man who was a firm guardian of the liberties of his country, and a liberal ſupporter of thoſe who ſued for juſtice, it was the late Mr. Juſtice *Yates*. The learned judge ruled, that a notice under this act of parliament ought to be preciſe, and ſaid that the magiſtrate did right in not tendering amends, becauſe the notice was not conformable to the ſtatute; and if it were right then, *à fortiori*, it is right now, that deciſion having been acted upon for thirty years, and followed by ſeveral

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of the peace, for any thing by him done in the execution of his office, *until notice in writing of ſuch intended writ, or proceſs*, ſhall have been delivered to him, &c. at leaſt one calendar month before the ſuing out or ſerving of the ſame; *in which notice ſhall be clearly and explicitly contained the cauſe of action* which ſuch party hath, or claimeth to have, againſt ſuch juſtice, &c."

(1) "*Strickland* v. *Ward*, ſummer aſſizes at Wincheſter, 1767, cor. *Yates*, J.—Action of treſpaſs and falſe impriſonment againſt the defendant, who was a juſtice of the peace, and had committed the plaintiff for returning to the pariſh whence he had been removed. The notice given to the defendant, purſuant to ſtat. 24 *Geo.* 2. was, that an *action on the caſe for falſe impriſonment and aſſault* would be brought againſt him. The counſel for the defendant objected to the notice as inſufficient, becauſe not conformable to the words of the ſtatute, and tending to miſlead the juſtice, who might know that an action on the caſe was improper, and ſuch whereon the plaintiff might be nonſuited, and, therefore, neglect to tender amends.—To this it was anſwered, that the words "aſſault and falſe impriſonment" in the notice, ſufficiently ſpecified the cauſe of complaint; and that a juſtice, who would lie by and omit to tender amends, relying on ſo trivial a miſtake, was not entitled to any favour from the Court.—YATES, J. held the notice inſufficient, as not being conformable to the words of the ſtatute, and ſaid, that he could not blame any juſtice, who, being troubled with an unjuſt action, ſhould lay hold of this or any other trifling objection to nonſuit a plaintiff.—It was then deſired, that the point might be reſerved; but the plaintiff was afterwards nonſuited, upon the merits."

deter-

determinations at *Niſi Prius*; therefore, on the words of the act of parliament, requiring notice *of the writ, or proceſs, intended to be ſued out*, and on the authority of that caſe, followed up as it has been by other deciſions at *Niſi Prius*, I am of opinion that the notice given in this caſe was inſufficient, and that, therefore, the rule for a new trial muſt be diſcharged. ASHHURST, J. agreed. GROSE, J. The words of the act of parliament are clear and poſitive. It is impoſſible to read them, without obſerving that two things are required before an action can be brought againſt a magiſtrate; one, that the plaintiff ſhall give *notice in writing of the writ, or proceſs, that he intends to ſue out*; the other, that ſuch notice ſhall alſo contain the cauſe of action. The former words are not immaterial; it is well known that there are ſome writs that the party may, and ſome that he may not, ſue out in ſuch a caſe; and, if the plaintiff were to give notice that he intended to ſue out one of the latter kind, *e. g.* a *quo minus* in the court of King's Bench, the magiſtrate knowing that to be a deciſive objection, need not tender amends, but may take advantage of the objection at the trial. Now in this caſe there was no notice of any writ, or proceſs, that the plaintiff intended to ſue out. I accede to the doctrine laid down by Mr. J. *Yates* in the caſe cited, and I have ſeveral times acted upon it at *Niſi Prius*. The precedents of notices are alſo different from the notice given in this caſe. LAWRENCE, J. The only queſtion before the Court is, Whether or not the terms of the act of parliament have been complied with? for, if not, the action cannot be maintained. Now the act requires notice of the writ, or proceſs, intended to be ſued out, as well as of the cauſe of action; but no writ or proceſs whatever is mentioned in this notice, and, therefore, the plaintiff has not complied with the ſtatute. In addition to the caſe already cited, there was another caſe in this court ſome years ago, which ſhews, that the terms of the act of parliament muſt be purſued in the notice, *Taylor* v. *Fenwick*, M. 23 *Geo.* 3. B.R. The notice was written by the attorney, and ſigned by him thus, "given under my hand at Durham." The attorney, in fact, lived at Durham; but it was not expreſsly ſtated, that Durham was the place of his reſidence. On a motion in this court to enter a nonſuit, *Wallace* and *Lee* contended, that what appeared on the notice was equivalent to a poſitive allegation, that the attorney lived at Durham. *Sed per Curiam:* The ſtatute has preſcribed a form which muſt be implicitly followed, and it admits of no equivalent. The ſtatute was made to introduce a ſtrictneſs of form in favour of juſtices, and it muſt be obſerved literally; and a nonſuit was entered. So here, as the terms of the act of parliament have not been attended to, this rule muſt be diſcharged.—Rule diſcharged.

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# TABLE

OF

## THE PRINCIPAL MATTERS

CONTAINED IN

## *THIS VOLUME.*

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### ACTION.


A PLAINTIFF cannot recover for the value of goods which he has agreed to ſell and taken earneſt for, if it appears that he afterwards refuſed to let the goods go off his premiſes till he had the money for them. *Goodall* v. *Skelton.* Page 1

2. An action for dilapidations of a prebendal houſe may be maintained by a ſucceeding prebendary againſt his predeceſſor. *Radcliffe* v. *D'Oyly.* 257

3. If one tenant in common recovers againſt another in ejectment by default, he may maintain treſpaſs for the meſne profits. *Goodtitle* v. *Tombs.* 323

4. An action upon the caſe will lie againſt the keeper of a priſon, for an eſcape upon meſne proceſs, though the priſoner returns the ſame day, and the plaintiff proceeds to final judgment againſt him. *Ravenſcroft* v. *Eyles, eſq. warden of the Fleet.* 348

5. The bailiff of a liberty who has the return and execution of writs, is liable to an action of debt for an eſcape, if he remove a priſoner, taken in execution, to the county gaol, ſituate out of the liberty, and there deliver him into the cuſtody of the ſheriff. *Boothman* v. *the Earl of Surrey.* 354

6. Debt lies againſt a ſheriff for an eſcape, to recover the whole debt and damages, if a defendant, taken in execution, be afterwards ſeen at large, for any the ſhorteſt time, even before the return of the writ. *Hawkins* et al. *Aſſignees of Froſt,* v. *Plomer and Hart.* 357

7. And an action of debt will lie againſt a gaoler, for the eſcape of a priſoner in execution, though the eſcape were without the knowledge of, and without any fault whatever on the part of, the gaoler, who, in ſuch caſe, can avail himſelf of nothing but the act of God, or the king's enemies, as an excuſe. *Alſept* v. *Eyles.* 360

8. If a debtor make his creditor and another perſon executors, and the creditor neither proves the will nor

nor acts as executor, he may maintain an action againſt the other for his demand on the teſtator. *A. and J. Rawlinſon* v. *Shaw, executor of Woodhouſe.* 510

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10. Whether an action can be ſupported in England, on a contract which is void by the law of England, but valid by the law of the country where the matter was tranſacted, is a great queſtion, and has not yet been determined. *Robinſon* v. *Bland.* 617

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3. Nor will the Court amend a fine by a change of the chriſtian name of a party. *Robert Dixon* v. *Lawſon et ux.* 573

4. A fine cannot be amended by increaſing the number of acres, the deed of uſes being general, and the intent only proved by affidavit. *Powel* v. *Peach.* 61

5. On reading the deed to lead the uſes, and a fine levied in conſequence of the ſame, the common recovery ſuffered in this caſe was amended by changing Ann, the wife of Henry Goodwin, to Elizabeth. *Mayne* v. *Coulthard.* 60

6. Alſo a recovery was in this caſe amended by a more accurate deſcription of the vill and county from the deed to lead the uſes. *Watſon* v. *Cox.* 60

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8. T

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A corporation being lord of a manor, and having approved part of a common, and leaſed it, a freeman is not a competent witneſs, to prove that a ſufficiency of common was left for the commoners; for the rent muſt be reſerved for the uſe of the corporation, and, therefore, the objection muſt prevail, however ſmall the intereſt may be in reality. *Burton* v. *Hinde.* 403

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AWARD.

1. Where the defendant bound himſelf as adminiſtrator to abide by an award to be made touching matters in diſpute between his inteſtate and another, and the arbitrators awarded that he, as adminiſtrator, ſhould pay, &c. it was held that he could not plead *plene adminiſtravit* to debt on the bond. *Barry* v. *Ruſh.* 497

2. But a mere ſubmiſſion to an award by an adminiſtrator is not an admiſſion of aſſets: and a promiſe by an adminiſtrator to pay the debts of the inteſtate, if there be no aſſets, is *nudum pactum*. *Pearſon* et al. *aſſignees of Scott* v. *Henry, adminiſtrator of Henry.* 497

3. But if an arbitrator, under a reference between *A.* and *B.* adminiſtrator, award that *B.* ſhall pay a certain ſum as the amount of *A.*'s demand, *B.* cannot afterwards object that he had no aſſets, but may be attached for non-payment. *Worthington* et al. v. *Barlow, adminiſtratrix.* 499

BAIL.

1. In error on a judgment, after a verdict upon a *ſcire facias* againſt bail, there muſt be bail to the writ of error; the *ſcire facias* being a perſonal action. *Pulteney* v. *Townſon.* 330

2. The bail in error are liable to intereſt, from the time of the affirmance of the writ of error. *Welford* v. *Davidſon.* 345

3. But the bail are not liable to pay intereſt on the judgment, between the ſigning of the judgment, in B.R. and the affirmance of it in *Cam. Scacc. Frith* v. *Leroux* et al. 345

BANKERS.

An indictment will not lie at common law charging that the defendant deceitfully intending by crafty means and devices to obtain poſſeſſion of certain lottery tickets, the property of *A.* pretended that he wanted to purchaſe them for a valuable conſideration, and delivered to *A.* a fictitious order, &c. purporting to be a draft upon a banker for the amount, which he knew he had no authority to draw, and that it would not be paid, by virtue of which he obtained poſſeſſion of the tickets and defrauded the proſecutor of the value. *The King* v. *B. Lara.* 745

BANKRUPTS.

A creditor, having ſold his chance of recovering his debt, is a good witneſs to ſupport a commiſſion of bankrupt. *Granger* et al. *aſſignees of Lloyd* v. *Ealing.* 392

BARON AND FEME.

1. When a deviſe is to the huſband and wife they take by entireties and not by moieties, and the huſband alone cannot by his own conveyance, without joining his wife, diveſt the eſtate of the wife. *Doe ex dim Freeſtone* v. *Parratt.* 32

2. *A.* deviſed lands in truſt, to pay the rents and profits to his daughter (whoſe huſband was then living) for her life, notwithſtanding her coverture, and not to be ſubject to any control, &c. of her huſband, nor liable to any debts which he had or ſhould contract; afterwards the deviſor made a codicil, taking notice of the death of his daughter's huſband, wherein he ratified and confirmed his ſaid will: held that the daughter was entitled, under this deviſe, to the rents and profits, &c. *free from the control of any future huſband.* *Beable* v. *Dodd.* 24

3. A fine may be acknowledged *de bene eſſe*, by a feme covert without her huſband, where her huſband has previouſly acknowledged it and is abroad. *Moreau's Caſe.* 563

See alſo SETTLEMENT.

BASTARDS.

See MARRIAGE, and LYING-IN WOMEN.

BILLS OF EXCHANGE.

1. A power of attorney, given by an executrix to act for her as executrix, does not authoriſe the accepting of bills of exchange to charge her in her own right, though for debts due from her teſtator. *Gardner* v. *Baillie.* 499

2. But where the evidence was that the executrix had admitted that a bill, which had been accepted by Thornton, with the knowledge of the executrix, was for a juſt debt, and that it ought to be paid; this was held to be ſufficient evidence of an authority given, to accept that particular bill, without reſorting to the letter of attorney. *Howard* et al. v. *Baillie, executrix of Baillie.* 105

BOND.

Where an obligor is ſeiſed of a reverſion in fee, expectant on ſeveral eſtates tail; this reverſion, coming into poſſeſſion in the hands of his heir, is then affets by deſcent, to charge him with the debt. *Smith* et al. *executors* v. *Parker* et al. 689

BOOKS.

See INSPECTION OF BOOKS.

BRIBERY.

An information was granted for attempting to bribe a privy counſellor to procure a reverſionary patent of an office grantable by the king, under the great ſeal. *Rex* v. *Samuel Vaughan.* 767

See alſo INFORMATION, No. 20.

CHALLENGE TO FIGHT.

See INFORMATION.

COCK-FIGHTING.

See INDICTMENT, No 1.

COMMON.

See APPROVEMENT. EVIDENCE. COMMON.

## COMMON-PLEAS.

See HABEAS CORPUS, No. 1.

## CONCEALMENT.

See INSURANCE ON LIVES.

## CONSIDERATION.

See FRAUDULENT CONVEYANCE.

## CONSIGNMENT.

See FACTOR.

## CONSPIRACY.

See INDICTMENT, INFORMATION.

## CONVICTION.

It was objected to a conviction, 1ſt. That he was not ſummoned to anſwer to the charge: but it was held, that as he did appear, and denied the guilt, he waived the objection. 2dly, That it did not appear that the witneſs was examined in the preſence of the defendant: but it was held, that it may be preſumed, that the witneſs was examined in his preſence. *Rex* v. *Roger Aikin.* 681

See alſo FISH, HAWKERS and PEDLARS.

## COPYHOLD.

1. If the heir apparent of a copyholder in fee ſurrender in the life-time of his anceſtor, and ſurvive him, the heir of ſuch ſurrenderor is not eſtopped, by that ſurrender of his anceſtor, from claiming againſt the ſurrenderee. *Goodtitle,* ex dim. *Faulkner, James Shade and Mary his wife, Samuel Ward and Hannah his wife, and Ann Robinſon* v. *Ann and William Morſe.* 300

2. One claiming as lord by *eſcheat,* may be admitted defendant in an ejectment, brought againſt the tenant in poſſeſſion, by the leſſor of one claiming as heir at law. *Fairclaim* ex dim. *Fowler* et al. v. *Shamtitle.* 305

3. A ſingle admittance to a copyhold, is evidence to prove the cuſtom of a manor, for lands to deſcend to the youngeſt nephew. *Doe* ex dim *Maſon* v. *Maſon.* 320

4. An entry in the court rolls of a manor, ſtating the mode of deſcent of lands in the manor, is admiſſible evidence of the mode of deſcent, though no inſtances of any perſon's having taken according to it be proved. *Roe* ex dim. *Beebee* v. *Parker.* 411

See alſo INSPECTION of BOOKS.

## COPY-RIGHT.

See ENGRAVINGS.

## CORPORATIONS.

An infant is not eligible to the office of a burgeſs in a corporation, where the charter does not expreſsly authoriſe the corporation to grant incohate rights. *Rex* v. *Carter.* 763

See alſo JUSTICES OF THE PEACE.

## COSTS.

1. If an action of *aſſumpſit* is brought againſt an inhabitant of Middleſex by an adminiſtrator, and the damages found are under 40s. the defendant is entitled, under the ſtat. 23 *Geo.* 2. c. 33. by which, in ſuch caſes, the plaintiff is not to have his coſts, but to pay double coſts to the defendant, to have that ſuggeſted on the roll in the ſame manner as if the plaintiff had ſued in his own right; for there is no exception as to adminiſtrators in the ſtatute. *Waſe* v. *Wyburd.* 531

2. But if an executor or adminiſtrator be ſued, it is otherwiſe. *Ailway* v. *Burrows.* 531

3. The Court ſet aſide a judgment and warrant of attorney given to ſecure an annuity for a defect in the memorial; but (it being the caſe of an executor) without coſts. *Dickenſon, executor* v. *Boyne.* 531

4. In this caſe, it was decided that if an executor declare on a trover and converſion in the teſtator's life-time, and alſo on a trover and converſion after his death, and be nonſuited at the trial, he is not liable to pay coſts. *Cockerill and wife, executrix of Moody* v. *Kynaſton.* 532

5. But, in this caſe, where the plaintiffs

plaintiffs declared in trover for the goods of the inteſtate, of which the wife, as adminiſtratrix, was poſſeſſed, and which came to the defendant's hands by whom they were converted, &c. The plaintiffs being nonſuited at the trial, the defendant obtained a rule for referring it to the maſter to tax the coſts for him, which rule was made abſolute without any cauſe being ſhewn. Afterwards it was moved to diſcharge that rule, on the ground that the adminiſtratrix, having ſued of neceſſity in that character, becauſe it appeared at the trial that the goods had never come to her poſſeſſion ſince the inteſtate's death, though the converſion was in her time), was not liable to pay coſts. The rule to diſcharge the former rule diſcharged. *Ballard and wife, adminiſtratrix* v. *Spencer.* 533

6. If an executor ſue as executor for money received by the defendant ſince the teſtator's death to the plaintiff's uſe, and fail, he is liable to pay coſts. *Goldthwayte and wife, executrix* v. *Petrie.* 533

7. An executor on diſcontinuing his action, ſhall pay coſts, where he has knowingly brought it wrong. *Harris* v. *Jones.* 535

8. An executor ſhall pay the coſts of a *non-pros. Hawes, executrix* v. *Saunders.* 535

9. But when this action is brought by miſtake, by a plaintiff, adminiſtrator, he may have leave to diſcontinue, without payment of coſts. *Bennet* v. *Coker.* 535

10. Executors and adminiſtrators, plaintiffs, are liable to pay the coſts of a *non-pros. Higgs, adminiſtratrix*, v. *Warry.* 535

11. Executors are not liable to coſts on a judgment as in caſe of a nonſuit, under the ſtatute 14 *Geo.* 2. c. 17. *Booth* et al. *executors*, v. *Holt.* 536

12. Executors and adminiſtrators are liable to coſts in error in caſes where they would be liable in the original action. *Williams* et al. *executors of Braham* v. *Riley.* 536

See alſo HIGHWAYS and TURNPIKES, INDICTMENT, INFORMATION.

## COUNTY-RATE.

The ſtat. 18. *Geo.* 3. c. 19. which enables the Court, in certain caſes, to make an order on the treaſurer of the "*county, riding, or diviſion*," where the offence was committed, to pay the proſecutor and his witneſſes their expences, extends to *inferior diſtricts, having juriſdiction to try felons*, and raiſing their own rates, ſimilar to the county rates. *The King* v. *John Myers.* 561

## CREDITORS.

A creditor has a right, *ex debito juſtitiæ*, as well as the next of kin, to ſue upon an adminiſtration bond, in the name of the archbiſhop, or his ordinary. *The Archbiſhop of Canterbury* v. *Houſe.* 515

See alſo INSOLVENT DEBTORS.

## DAMAGES.

If, on an execution againſt one of two partners, the partnerſhip goods are taken and ſold, the ſheriff is to pay over to the other a ſhare of the produce, proportioned to his ſhare in the partnerſhip effects.—And the Court will direct it to be referred to the maſter, to take an account of the ſhare of the partnerſhip effects; and that the ſheriff ſhall pay a part of the money levied, equal to the amount of ſuch ſhare. *Eddie* v. *Davidſon.* 471

But if *A.* recover in tort againſt two defendants, and levy the whole damages on one, that one cannot recover a moiety againſt the other for his contribution; although it is otherwiſe in aſſumpſit. *Merryweather* v. *Nixan.* 471

## DEAD BODIES.

An indictment charging the defendant with entering a certain burying ground, and taking a coffin out of the earth, from which he took a dead body, and carried it away for the purpoſe of diſſecting it: was on motion in

in arreſt of judgment, held good. *The King* v. *Lynn.* 735

DEBTORS.

See CREDITORS and INSOLVENT DEBTORS.

DEEDS.

A limitation in a deed, cannot be united with one contained in a will. *Doe, leſſee of Fonnereau* v. *Fonnereau.* 144

The like point, *Habergham* et al. v. *Vincent* et al. 152.

A conveyance of an infant mortgagee is binding, and cannot be avoided by entry during infancy. *Zouch* ex dim. *Abbot and Hallet* v. *Parſons.* 751

See alſo FRAUDULENT CONVEYANCE.

DELIVERY of GOODS.

A plaintiff cannot recover the value of goods ſold, although he has taken earneſt for the ſame, if he afterwards refuſed to deliver them, till they were wholly paid for. *Goodall* v. *Skelton.* 1

DEMURRER TO EVIDENCE.

1. On a demurrer to evidence, every fact which the jury can infer, in favour of the party offering it, from the evidence demurred to, is to be conſidered as admitted. *Cockſedge* v. *Fanſhaw.* 1

2. On a demurrer to circumſtantial evidence, the party offering the evidence is not obliged to join in demurrer, unleſs the party demurring will diſtinctly admit upon the record every fact and every concluſion, which the evidence offered conduces to prove. *Gibſon and Johnſon.* v. *Hunter.* 2

DESCENT.

See DEVISES, ESTATE, GAVELKIND, and HEIR.

DEVISES.

*Who may deviſe.*

1. Lands will paſs by a will made before a recovery is completely ſuffered, if the will be after the deed to lead the uſes. *Selwyn* v. *Selwyn* 9

2. A perſon, having a poſſibility coupled with an intereſt, may deviſe the ſame. *Roe* ex dim. *Perry* v. *Jones* et al. 16

3. The teſtator ſurrendered copyhold premiſes to the uſe of his will; afterwards he ſurrendered the premiſes, to the intent that they might be ſettled to certain uſes, but no admiſſion was had under this ſurrender; afterwards he deviſed the premiſes by his will, and it was held that the old uſe in fee was not taken out of him by the new limitations and ſurrender of his will; and, therefore, that he had no occaſion to be re-admitted to it, for the purpoſe of ſurrendering to the uſe of his will, but ſhould be conſtrued to be in, as of his old eſtate. *Thruſtout*, ex dim. *Gower* v. *Cunningham.* 16

*Who may take.*

4. Lands, &c. are deviſed to *B.* for life, and, after his deceaſe, to all and every ſuch child or children of *B.* as ſhall be living at the time of his deceaſe: held that a poſthumous child of *B.* ſhall ſhare equally with thoſe who were born in his life-time; for an infant *en ventre ſa mère* is conſidered as born, for all purpoſes which are for his benefit. *Doe, on the demiſe of Clarke*, v. *Clarke.* 17

5. If a deviſe be to *A.* by name, with a deſcription annexed, not applicable to *A.* but ſhewn by parol evidence to be applicable to *B.* ſo that it is uncertain which was intended, the deviſe is void, and the heir at law ſhall take; and no parol evidence can be admitted to ſhew, that previous to the making of his will the deviſor had declared that he meant to leave the premiſes to *A.* But parol evidence may be admitted, to ſhew that the name of *A.* was inſerted, by miſtake, for the name of *B.* *Thomas* v. *Thomas.* 18

6. A deviſe to the heir of *M.* may be good as *deſignatio perſonæ*, and he may take in the life-time of *M. Goodright, on the demiſe of Brooking*, v. *White.* 21

7. The teſtator deviſed his eſtate in truſt to receive the rents and profits during the lives of his four daughters, and the ſurvivor of them, and afterwards

wards to pay such rents and profits to and amongst such survivor, and the child and children of such my daughters, who shall first happen to die, held that the rents and profits should be divided among the four daughters immediate, and not left to accumulate. *Saunders* et al. v. *Lowse.* 22

8. The testator devised to trustees in trust to and for the use and behoof of the heirs male of the body of my nephew, John Ashwin; and in default of such issue male, then to the use and behoof of the heirs male of the body of my nephew, Richard Ashwin; and in default of such issue, then to and for the use and behoof of all and every the grandchildren of my late brother, John Ashwin, deceased, and the grandchildren of my late sister, Sarah Morris, deceased; held that all the grand-children in *esse*, at the time when the devise vested, were equally entitled to take. *Baldwin* v. *Karver.* 23

9. *A.* devised lands in trust, to pay the rents and profits to his daughter (whose husband was then living) for her life, notwithstanding her coverture, and not to be subject to any control, &c. of her husband, nor liable to any debts which he had or should contract; afterwards the devisor made a codicil, taking notice of the death of his daughter's husband, wherein he ratified and confirmed his said will: held that the daughter was entitled, under this devise, to the rents and profits, &c. free from the control of any future husband. *Beable* v. *Dodd.* 25

10. A devise to the right heirs of husband and wife, is a devise to such person as answers the description of heir to both, namely, a child of both; and if no preceding estate be given to the father and mother, such child shall take as a purchaser. *Roe* ex dim. *Nightingale and Mary his wife*, v. *Quartley and Constantia his wife.* 28

11. A devise to trustees till *A.* shall attain the age of twenty-four, and when he shall attain that age, to him in fee, gives him a vested interest, which will descend to his heirs, though he die before. *Doe* ex dim. *Wheedon* v. *Lea.* 31

12. On a devise to her nephew-in-law, John Freestone and Lucy his wife, and to their heirs and assigns for ever, held that they took by entireties and not by moieties, and that the husband alone could not by his own conveyance, without joining his wife, divest the estate of the wife. *Doe* ex dim. *Lucy Freestone* v. *Edward Parratt and Mary his wife.* 32

13. A devise to a child in *ventre sa mère* at the time of the father's death is good, because as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction will introduce no inconvenience. *Long* v. *Blackall.* 34

14. Where there is an express limitation of a chattel by words, which, if applied to a freehold, would create an express estate-tail, the whole interest vests absolutely in the first taker, and a limitation over of such a chattel is too remote to take effect. *Doe* ex dim. *Mary Lyde* v. *Ann Lyde.* 35

15. The testator devised to his grandson, T. B. Peake, and the heirs lawful of him for ever; but in case he should happen to die and leave no lawful heir, then to the next eldest son or heir of D. P.; held that this devise over to the next eldest son was good. *Gooatitle* ex dim. *Peake* v. *Pegden.* 37

16. If a freehold lease for lives be limited to *A.* and the heirs of his body, with remainders over, *A.* may dispose of the whole and defeat the remainders, by any conveyance during his life-time. *Doe* ex dim. *Blake* v. *Luxton.* 37

17. *A.* having three daughters, *B. C.* and *D.* by will gave a small legacy to *B.* and *C.* and then gave a leasehold estate to *D.* but if she died without having child or children, then to *B.* and after her, to her child or children: *D.* had a child, who died in her life-time:—held that *D.* took the absolute

intereſt in the term, and, conſequently, that ſhe might diſpoſe of it by will. *Weakley* ex dim. *Knight and Ann his wife* v. *J. Rugg.* 39

*What will paſs under general Words.*

18. *A.* being *ceſtui que* truſt of a term, afterwards purchaſes the fee in his own name, and deviſes the premiſes in fee to his heir, whom he makes executor and reſiduary legatee, and dies: held clearly that the term ſhall go with the fee to the heir, and not to the perſonal repreſentative. *Goodright* ex dim. *Francis Hooke* v. *Joſeph Sales.* 41

19. A meſſuage, &c. will, under ſpecial circumſtances, paſs lands in a deviſe by will. *Gulliver* ex dim. *of Jeffreys* v. *Poynts.* 43

20. Lands uſually occupied with a houſe, will not paſs under a deviſe of "a meſſuage, with the appurtenances," unleſs it clearly appears that the teſtator meant to extend the word "appurtenances" beyond its technical ſenſe. *Buck, leſſee of Whalley Clark and wife,* et. al. v. *Burton.* 44

21. The like point where the teſtator deviſed to Catharine Whitburne and her heirs, all that his copyhold meſſuage with all outhouſes, gardens, and appurtenances to the ſame belonging. *Doe* ex dim. *Lempriere* v. *Martin.* 46

22. The like point. *Doe* ex dim. *Hannah Clements* v. *Collins.* 47

23. The teſtator being ſeiſed *in fee* of 230 acres of land, part of a farm in the county of Kent, which farm contained 390 acres, and alſo poſſeſſed of 160 acres the reſidue of ſuch farm, under a leaſe; and the whole of the farm being in the occupation of one tenant, deviſed all his meſſuages or tenements, houſes, farms, lands, woodlands, hereditaments, and real eſtate, whatſoever and whereſoever, unto Richard Bettinſon, &c.: and it was held that the leaſehold part of the farm paſſed. *Thomas Lane* v. *Earl Stanhope.* 49

24. But where the teſtator being ſeiſed of freehold eſtates, and alſo poſſeſſed of two leaſehold farms, deviſed all his manors, &c. and all and every his ſeveral meſſuages, lands, tenements, and hereditaments, which he was ſeiſed of, intereſted in, or entitled to, to his ſon for life, with ſeveral limitations over, it was held that the deviſe did not paſs the leaſehold property. *Piſtol* v. *Riccardſon.* 49

25. By a deviſe, "all the reſt and reſidue of my eſtate, of what nature or kind ſoever," freehold and copyhold lands not particularly deviſed by the will, will paſs. *Doe* ex dim. *Burkit,* et al. v. *Chapman.* 52

26. The teſtator, after directing a ſale of his real eſtate in caſe his perſonal eſtate ſhould not be ſufficient to pay all his debts, legacies, and funeral expences, deviſed all the reſt, reſidue, and remainder, of his real and perſonal eſtate whatſoever and whereſoever, to his wife, her heirs, executors, and adminiſtrators. After his death the will was proved, and out of his perſonal eſtate all his debts and legacies were paid, and there was no occaſion to call in the aſſiſtance of the real eſtate: held that his wife was entitled to the real eſtate. *Goodtitle* ex dim. *Hart* v. *Knot.* 35

27. A general reſiduary deviſe will not carry a reverſion which is, in the ſame will, deviſed to the teſtator's right heirs, unleſs under ſpecial circumſtances. *Smith* ex dim. *Davis* v. *Saunders.* 54

28. A deviſe of all his real eſtates in the counties of Glouceſter and Worceſter, and elſewhere in England, and the reverſion and reverſions of ſuch eſtates, was held to paſs the reverſion of eſtates in Oxfordſhire and Wiltſhire. *Freeman* v. *Duke of Chandois.* 57

29. The like point. *Atkyns* v. *Atkyns.* 57

30. A deviſe of all that my part, purpart, and portion, of and in the tenement called and known by the name of Henſon, the teſtator being ſeiſed only of one moiety, will paſs a moiety in reverſion, as well as that in poſſeſſion. *Doe* ex dim. *Philips* v. *Philips.* 59

31. The teſtator having deviſed his real eſtate, added, "but in caſe either

or both of my children ſhould die before the deceaſe of my wife, then thoſe legacies which are here left them, ſhall return unto my wife Elizabeth for her ſole uſe and benefit, and for her to diſpoſe of freely as ſhe might think fit." And it was held that thoſe words of remainder operated on the real eſtates before given to the ſon. *Hardacre* v. *Naſh.* 59

32. The teſtator gave to his ſervant, J. Lemon, an annuity of 40l. to be paid him yearly by his truſtees and executors, for his life, directing that J. Lemon's receipt only ſhould be a ſufficient diſcharge to his truſtees and executors; and charging his freehold meſſuage in Wincheſter with the payment of the annuity: "and alſo, all the reſt, reſidue, and remainder of my eſtate and effects, of any and what nature or kind ſoever, or whereſoever, I give and bequeath the ſame unto C. Buckner and J. Robinſon, their executors or adminiſtrators in truſt, that they ſhall from time to time add the intereſt thereof to the principal;" held that the houſe at Wincheſter, there being no ſpecific deviſe of it in the will, did not paſs to the defendant C. Buckner, the ſurviving truſtee and executor, but that the ſame deſcended as being undeviſed and undiſpoſed of by the will to the teſtator's heir at law. *Doe* ex dim. *Spearing* v. *Buckner.* 61

33. A naked truſt does not paſs under a general deviſe. *Roe* ex dim. *George Reade* v. *W. Reade.* 62

34. A deviſe as follows: "I give and deviſe to my dear wife my farm at Bovington in the tenure of John Smith, ſubject to her diſpoſal in as full and abſolute a manner as I could diſpoſe of the ſame if living," will paſs woodlands forming a part of that farm, though the teſtator had excepted the ſame in a leaſe to the tenant, and kept them in his own hands. *Goodtitle* ex dim. *Paul, eſq.* v. *Paul.* 63

35. By a deviſe of all the advowſons for the purchaſe of which I have contracted, with directions for completing ſuch contracts (the teſtator being then under contract for the purchaſe of one advowſon), an advowſon formerly purchaſed before the making of the will, ſhall paſs. *Goodyer St. John, eſq.* v. *Lord Biſhop of Wincheſter, and Robert Hill, clerk.* 65

36. A deviſe to *H.* of an entire farm in the occupation of *B.* which included a ſmall parcel of marſh land, was held not to be diſmembered by a ſubſequent deviſe in the ſame will of all the teſtatrix's marſh lands to *M.* ſhe having a large eſtate in marſh lands beſides, which was let to a ſeparate tenant. *Holdfaſt* ex dim. *Hitchcock* v. *Pardoe, eſq.* 68

37. A deviſe of all my eſtates in A. to my niece and her heirs (the teſtator having only a copyhold in fee, and a long term of years in that pariſh), will carry both thoſe intereſts to the niece, if ſo intended by the teſtator, though there is a bequeſt of all his goods and perſonal eſtate to *B. Roe,* ex dim. *Pye* v. *Bird.* 69

38. *A.* being ſeiſed in fee of ſeveral freehold eſtates, and alſo poſſeſſed of a leaſehold rectory for lives, deviſed "all his manors, meſſuages, lands, tenements, tithes, and hereditaments, and all his real eſtate whatſoever (except what is thereinafter mentioned and deviſed), to truſtees" in ſtrict ſettlement: he charged his leaſehold with rent-charges to two of his younger children, and directed that when any of the lives dropped the leaſe ſhould be renewed, and the names of thoſe two children put in, of whom a ſon was to have the preference; it was held that the rectory did not paſs by the general words of the deviſe, but that *A.*'s eldeſt ſon and heir took, as ſpecial occupant, on the death of *A. Sheffield, bart.* v. *Lord Mulgrave.* 70

39. Lands purchaſed ſubſequent to a general deviſe, may, under particular circumſtances, paſs thereby. *Roe* ex dim. *W. Hale* v. *Wegg,* et al. 73

40. Premiſes will not paſs under a falſe recital. *Mary Skerrat* v. *Calley.* 75

*What words will paſs an eſtate in fee.*

41. "Alſo I give and deviſe one other equal undivided fourth part,

&c. unto my niece Anne, now wife of William Corniſh, and to the heirs of her body lawfully begotten or to be begotten, as well females as males, and to their heirs and aſſigns for ever, to be divided equally ſhare and ſhare alike, as tenants in common, and not as joint tenants," will paſs the fee. *Doe* ex dim. *Long* v. *Laming*. 76

42. The deviſing of an eſtate, and charging it with the payment of a ſum of money, will create a fee ſimple, though there be no words of limitation. *Baddeley* v. *Leppingwell*. 81

43. "I give, deviſe, and bequeath, unto my ſon, John Haſſelwood, all that houſe and garden now in the tenure and occupation of Edward Gibſon, mariner; charged and chargeable, nevertheleſs, with the payment of the ſum of 50l." and if John died in his minority, then a deviſe over: held that John took a fee. *Frogmerton* ex dim. *Bramſtone* v. *Holliday* et al. 84

44. An eſtate in fee was held to paſs to a truſtee by neceſſary implication of the teſtator's intention without the word heirs or any other technical form. *Oates* ex dim. *Markham* v. *Cooke*. 86

45. The teſtator deviſed his freehold houſe, with the appurtenances, &c. and all the furniture thereto belonging, to Elizabeth Gibſon, "whom I make executrix of this my laſt will, ſhe paying all my juſt debts and funeral expences, and the legacies;" held that the deviſee took an eſtate in fee. *Doe* ex dim. *Willey* v. *Holmes*. 87

46. A deviſe of "all the reſidue of my goods, chattels, rights, credits, perſonal and teſtamentary eſtate whatſoever, whereſoever, and in whoſe hands ſoever, not hereinbefore particularly given and bequeathed," held to paſs a fee. *Smith*, et al. *aſſignees of Euſtace* v. *Coffin*. 87

47. A deviſe of a life annuity to *A.* to be paid by my executor after named, with a general deviſe of a copyhold to *B.* whom he alſo makes executor and reſiduary legatee of his perſonal eſtate, charged with debts and legacies, gives *B.* a fee ſimple in the copyhold. *Goodright* ex dim. *Philips* v. *Allin*. 89

48. "I alſo give to my mother, all the remainder and reſidue of all the effects, both real and perſonal, which I ſhall die poſſeſſed of," held that the teſtator meant that his mother ſhould take the whole of his property; that the words uſed were ſufficient to effectuate that intention; and conſequently that ſhe took a fee in the fee ſimple eſtates, and the whole of the teſtator's intereſt in the reſt of his real property, ſubject to the charges thereon. *Hogan, leſſee of Wallis* v. *Jackſon*. 89

49. "Item, I give unto John Mudge and Robert Mudge, my two ſons, whom I make my and ordain my ſole executors of this, my laſt will and teſtament, all and ſingular, my lands and meſſuages, by them freely to be poſſeſſed and enjoyed alike:" held that the teſtator's intention was to give his ſons, John and Robert, a fee: and that this was a tenancy in common. The word alike is the ſame as the word equally. *Loveacres* ex dim. *Mudge* v. *Blight*. 93

50. The teſtator, Thomas Spooner, by his will, deviſed in the words following: "I give and bequeath to Mrs. Marten, daughter of my late uncle, Dr. Benjamin, my eſtate at Braywick, Berks:" and it was held that the fee paſſed. *Holdfaſt* ex dim. *Cowper* v. *Marten*. 94

51. "All the reſt, reſidue, and remainder of my meſſuages, lands, tenements, hereditaments, goods, chattels, and perſonal eſtate whatſoever, my legacies and funeral expences being thereout paid, I give, deviſe, and bequeath, unto my ſaid ſiſter Jane Dewdney:" held that the deviſee took an eſtate in fee. *Doe* ex dim. *Palmer, Skinner, Brutton*, v. *Ricards*. 95

52. A deviſe of a houſe to *A.* paying yearly and every year out of the ſaid houſe the ſum of 15s. to *B.* will paſs a fee. *Goodright* ex dim. *John Baker* v. *Stocker*. 96

53. "And from and after her deceaſe I give and deviſe the ſame unto E. Southouſe, grand nephew of my late huſband, charged and chargeable nevertheleſs to and with the payment of one annuity or yearly rent-charge of 20l. per annum to James Tooth, grand nephew to Chriſtie Southouſe, eſquire, and his aſſigns for and during the term of his natural life, to commence from and immediately after my deceaſe, and payable quarterly by even and equal portions:" held that the deviſee took an eſtate in fee. *Andrew* v. *Southouſe*. 97

54. The teſtator after giving the reſidue of his perſonalty, gave ſpecific annuities, to be paid out of his whole eſtate: held that by "whole eſtate" the deviſor meant his real eſtate, the deviſe of the remainder of the profits out of his whole eſtate muſt paſs the fee. *Doe* ex dim. *Beezley* v. *Woodhouſe*. 98

55. The word eſtate carries every thing; unleſs tied down by particular expreſſions. *Roe* ex dim *Thomas Urry and Elizabeth Haldane* v. *Harvey*. 99

56. A deviſe of all the reſt of my eſtates, will paſs the fee. *Fletcher* v. *Smiton*. 100

57. On a deviſe to *A.* for the uſe of *B.* till *B.* attains the age of twenty-one, and then to *B.* in fee: held that the fee veſted immediately in *B.* *Denn* ex dim. *Edward Satterthwaite* v. *Charles Satterthwaite*. 102

58. A deviſe, after an eſtate tail in *A.* is ſpent, of the teſtator's lands, eſtate, and premiſes, to *A.* if he ſurvives *B.* his wife and his heirs; but if *B.* ſurvives *A.* then (ſubject to an annuity for *B.*) to *C. D. E* and *F.* is a fee-ſimple to *C.* &c. *Stiles* ex dim. *Rayment and wife* v. *John and Mary Walford*. 102

59. A deviſe to his ſon Francis, and his heirs, &c.; and the reſt of his eſtates to his ſon Charles and his heirs, &c. and if either Francis or Charles ſhould die without having ſettled, or otherwiſe diſpoſed of the eſtates ſo deviſed, or without leaving iſſue of his or their reſpective body or bodies lawfully begotten, &c. then over: held to paſs the fee. *Beachcroft* et al. v. *Broome*. 103

*What Words will create an Eſtate Tail.*

60. "It is my intent and meaning, that none of my children ſhall ſell or diſpoſe of my eſtate for longer time than his life; and to that intent, I give, deviſe, and bequeath all the reſt and reſidue of my eſtate to my ſaid ſon, John Williams, and the ſaid infant, for and during the term of their natural lives, the remainder to my brother-in-law, J. G. and his heirs, for and during the natural lives of my ſaid ſon, John Williams, and the ſaid infant, and the remainder to the heirs of the bodies of my ſaid ſons, John Williams, and the ſaid infant, lawfully begotten, or to be begotten: remainder over: John Williams took an eſtate tail. *Perrin*, et al. v. *Blake*. 103

61. A deviſe to *G. G.* for life, and after his death to the iſſue of his body and the heirs of the body of ſuch iſſue, is an eſtate tail in *G. G.* *Roe*, ex dim. *Geo. Dodſon, eſq.* v. *Grew*, et al. 106

62. By a deviſe of the fee ſimple and inheritance to *A.* and his child or children for ever when he ſhall be twenty-one years of age, but if he die before that time, then the fee ſimple and inheritance to *B.*; *A.* takes only an eſtate tail. *Davie*, et al. v. *Stevens*, et al. 107

63. Under a deviſe to every ſon and ſons of Charles Duckenfield, which ſhall be begotten on the body of Sarah his now wife; and for want of ſuch iſſue, then over: the ſon took an eſtate tail. *Evans* ex dim. *Brooke, bart.* v. — *Aſtley, eſq.* 108

64. If a deviſe be to one for life, and afterwards a limitation, either immediate or mediate, to the heirs of his body, the deviſee takes an eſtate tail. *Chapman* ex dim. *Oliver* v. *Brown*. 110

65. A will ſhall be conſtrued according to the intention of the teſtator if the words will bear ſuch a conſtruction:

ſtruction: accordingly an imperfect ill-worded will was conſtrued to carry an eſtate tail. *Fenn*, ex dim. *Wm. Lowndes the younger, and Henry Lowndes, eſqrs.* v. *Wm. Lowndes the elder, and Wm. Lowndes Stone, eſqrs.* 115

66. A deviſe to the heirs male of *J. S.* in a will, and afterwards in a ſchedule annexed, this eſtate being recited to be given to *J. S.* ſhews the intent of the teſtator to give him an eſtate for life, which the law will conjoin to the eſtate given to his heirs male, and conſtrue him to be tenant in tail. *Hayes* ex dim. *Abraham Foorde* v. *Nicholas Foorde.* 117

67. A deviſe to *A.* for life; and after his death to his ſon Thomas, and his heirs male for ever. But if the ſaid Thomas ſhould die without iſſue, then to his next heir male for ever, the elder to be preferred before the younger: and if no male iſſue left behind ſaid *A.* then the eſtate to devolve to the females; and, if no females, then my ſaid couſin, *A.* to give and diſpoſe of the ſame as he ſhall think fit: held that *A.* took an eſtate for life, and his ſon Thomas being dead without iſſue, the daughter had an eſtate in tail general veſted in her, in remainder expectant upon the death of *A.* and that the ſaid *A.* had the remainder in fee thereupon. *Harriot Pleaſance Fell* v. *Solomon Fell.* 118

68. A deviſe to the heirs of the body of *A.* (the elder of ſuch iſſue, and his, her, and their heirs, to take before the younger, &c.) veſts an eſtate tail in the eldeſt daughter of *A.* there being no ſon, remainder in tail to the youngeſt. *Heny* v. *Purcel.* 119

69. A deviſe to a man and his ſons in tail male, and for want of ſuch iſſue male, remainder over; the deviſee having then no iſſue, gives an eſtate in tail male to the father. *Wharton*, et al. v. *Greſham*, et al. 120

70. A deviſe unto Thomas Griffiths, my grandchild, for and during his natural life, and, after his deceaſe, to his right and lawful heirs and aſſigns for ever, and for want of ſuch lawful heirs, I do give the ſaid lands, as before expreſſed, to Thomas Evan, his heirs and aſſigns for ever: held that the grandſon, Thomas Griffiths, took an eſtate tail in the tenement. *Morgan*, et ux. v. *John Griffiths.* 120

71. There is a diſtinction between a deviſe of lands and perſonal eſtate where a limitation is upon a dying without iſſue; in the latter caſe, the words are taken in their vulgar ſenſe, that is, dying without leaving iſſue at the time of his death; in the former they are taken in a legal ſenſe, and that is, whenever there is a failure of iſſue. *Denn* ex dim. *Geering* v. *Shenton.* 121

72. The words, heirs, relative to the redemption of a term veſted in the executors, ſhall not be conſtrued to introduce a new and more general denomination of heirs, and to amount to a revocation of an expreſs tail given in the beginning of a will. *Doe* ex dim. *Hanſon* v. *Fyldes.* 121

73. Under a deviſe, to the teſtator's ſon for life, remainders in tail to his firſt and other ſons, &c. by any future wife, but, if he married any perſon related to his preſent wife, in ſuch caſe to go over to the children of the teſtator's brother, the event of the ſon's marrying a ſecond wife related to his firſt, is not a condition precedent; and, on his death without marrying again, the eſtate veſts in the children of the teſtator's brother, and does not deſcend to the teſtator's heir at law. *Bradford* v. *Foley*, et al. 125.

74. Where the deviſor had three ſiſters (one of whom was married), and deviſed land to truſtees and their heirs, in truſt that they and their heirs ſhould, during the life of the married ſiſter, receive the rents and profits, and pay the ſame to the two other ſiſters their heirs and aſſigns, and from and after the deceaſe of the huſband, in caſe the married ſiſter ſhould be then living, to the uſe of the three ſiſters ſeverally in thirds for life,

life, with ſeveral remainders to their firſt and other ſons, in tail, remainder to the daughters as tenants in common, with croſs-remainders between the ſiſters on default of iſſue of their bodies reſpectively, remainder over in tail. The condition of the married ſiſter's ſurviving her huſband is not annexed to any of the limitations ſubſequent to the limitation of the life eſtate. And the remainder-man in tail can alone make a good tenant to the præcipe upon the death of the three ſiſters without iſſue, notwithſtanding the huſband be then living. *Eorton* v. *Whittaker*. 127

75. The teſtator began his will, by giving different annuities to his ſon, varying according to the different periods of his life, and increaſing till it amounted to 600l. per annum, directing that the laſt annuity ſhould be paid to the ſon until he ſhould marry; and then he added, "and in caſe my ſaid ſon ſhall happen to marry before he attains unto the age of thirty years, then my will is, and I do hereby give and deviſe unto my ſon J. Daintry, to him and the heirs of his body, &c. all my real and perſonal eſtates, &c.;" held that the words of his will, would be beſt anſwered by giving an eſtate tail to John Daintry, in the real eſtates of inheritance. *Daintry* v. *Daintry*. 128

76. A. Dymock deviſed as follows: "I give and bequeath unto my nephew, William Dymock, all that my freehold eſtate that I bought of Mr. Kingſtone, ſituate at Alhampton, in the county aforeſaid, to hold to him during his natural life, and, after his deceaſe, to and amongſt his iſſue, and, in default of iſſue, to be divided between my nephew, Elias Dymock, and my niece, Mary Dymock, and to their heirs and aſſigns for ever;" held that William Dymock took under the will an eſtate tail. *Doe* ex dim. *Blandford and wife, and Elias Dymock*, v. *Applin*. 130

77. The teſtator deviſed to his wife for life, and after her deceaſe to be equally divided between his four children, Henry, John, Elizabeth, and Sarah, and to each of them and their heirs for ever, ſhare and ſhare alike; and in caſe they ſhould be minded, and agree among themſelves to ſell the ſaid eſtate, then every one of his ſaid children ſhould have their equal ſhares of monies from thence ariſing; but if they conſented and agreed to keep the eſtate whole together, then and in ſuch caſe all the rents, iſſues, and profits thereof, from time to time, as they ſhould become due and payable, ſhould be equally paid and divided between his four children, and to the ſeveral and reſpective heirs of them, on their bodies lawfully begotten, ſhare and ſhare alike; held that the children of the common anceſtor took only eſtates tail in the reſpective fourths. *Roe* ex dim. *James* v. *Avis*. 132

78. The teſtator deviſed all his manors, lands, &c. in the counties of Wilts, Yorkſhire, Southampton, and elſewhere, to his daughter Martha, the wife of P. Legh, for life, remainder to his grandſon, Benet Legh, ſon of M. Legh, for life, remainder to truſtees to preſerve contingent remainders, remainder to the heirs male of the body of his grandſon, lawfully to be begotten; and for default of ſuch iſſue, to the ſecond, third, and other ſon and ſons, of his daughter Martha ſeverally and ſucceſſively, and to the ſeveral and reſpective heirs male of the ſeveral and reſpective bodies of ſuch ſon and ſons, &c.; and in default of ſuch iſſue, to all and every the daughter and daughters of the body of his daughter, Martha, and the heirs male of the body of ſuch daughter or daughters, equally between them, if more than one, as tenants in common, and not as joint-tenants; and for and in default of ſuch iſſue, he gave and deviſed all his ſaid premiſes unto his right heirs for ever: held that upon the death of Benet Legh, and his mother, Martha Legh, the daughters of the ſaid Martha took under the will of Thomas Benet, the teſtator, eſtates in tail male, with

with croſs-remainders. *Atherton* v. *Pye.* 133

79. The teſtator deviſed to *A.* for life, without impeachment of waſte, and, after his deceaſe, to the iſſue male of his body, and to the heirs and aſſigns of ſuch iſſue male for ever, and for default of ſuch iſſue male to *B.* &c. held that *A.* took an eſtate tail: but ſuppoſing he only took for life, yet, as the remainder to his iſſue, and the ſubſequent remainders, were contingent, they may be barred by a recovery ſuffered by *A.* before any iſſue born. *Denn* ex dim. *Webb* v. *Puckey.* 135

80. The teſtator, John Slater, deviſed as follows: "As touching the diſpoſition of all ſuch temporal and wordly eſtate as it hath pleaſed God to beſtow upon me, I diſpoſe thereof as followeth [after directing the payment of his debts, &c.] Alſo I give and bequeath all my copyhold lands, lying in Hazlewood, to my nephew Iſaac Slater; but if the aforeſaid Iſaac Slater ſhould die without male heir, then my will is, that my nephew, John Slater, ſhall enter upon and enjoy the ſaid copyhold lands, his heirs or aſſigns for ever; charging the eſtate with an annuity of 8l. a year to his wife during life, and ſeveral legacies to be paid at a diſtant time;" held that Iſaac Slater took an eſtate tail. *Denn* ex dim. *John Slater* v. *Joſeph Slater.* 138

81. The teſtator deviſed the reſidue of an unſettled eſtate to his daughter and only child, Mary Fifield, on her attaining twenty-one, and to her heirs; and as to that part which was ſettled on his wife, he deviſed the ſame to his ſaid daughter after the death of his widow. In caſe the widow ſhould die before the daughter attained twenty-one, then he willed that both parts of the eſtate ſhould go immediately to his daughter and her heirs for ever; but he willed that his wife ſhould hold and enjoy both parts until his daughter ſhould attain the age of twenty-one; and in caſe his daughter ſhould die without iſſue, then he impowered her to diſpoſe of the whole by will, or any other inſtrument in writing, atteſted by three witneſſes, as ſhe ſhould direct, limit, or appoint; and for want of ſuch iſſue and direction, &c. then that the ſame ſhould deſcend and go to his own right heirs: held that the daughter took only an eſtate-tail under her father's will. *Doe* ex dim. *Neville* v. *Rivers and Bradley.* 139

82. The teſtator deviſed as follows: "I hereby give and deviſe all my freehold meſſuages, lands, &c. (ſubject to the payment along with my perſonal eſtate of all my debts, legacies, and funeral expences), unto my daughter Mary Aſcough, and the heirs of her body lawfully to be begotten for ever, as tenants in common, and not as joint tenants, and in caſe my ſaid daughter ſhall happen to die before twenty-one, or without leaving iſſue on her body lawfully begotten, then I give and deviſe all thoſe my ſaid freehold meſſuages, lands, &c.: held that Mary took an eſtate tail in the premiſes. *Doe* ex dim. *Candler* v. *Smith.* 140

83. The teſtator ſeiſed in fee, deviſed a copyhold eſtate of inheritance to truſtees for a charitable purpoſe, and declared as follows; "Alſo my will and deſire is, that the rent of the ſaid copyhold lands, being 11l. per annum, ſhall never be improved or raiſed, but ſhall continue at 11l. per annum, and that the ſaid Robert Weſton who is now tenant, and his children and poſterity which ſhall ſucceed, ſhall never be put forth, or from the ſame, but always continue in the poſſeſſion of the ſaid copyhold premiſes, paying the ſame yearly rent, duly from time to time, and to and for the purpoſes aforeſaid, and not otherwiſe:" held that the words "to his children and poſterity who ſhould ſucceed," muſt confine it to an eſtate tail. *Roe* ex dim. *Eberall* et al. v. *Lowe.* 141

84. A limitation in a deed cannot be united with one contained in a will. *Doe, leſſee of Fonnereau,* v. *Fonnereau.* 144

85. The like point. *Habergham* et al. v. *Vincent.* 151

86. A child in *ventre ſa mère* may take an eſtate tail. *Whitelock, adminiſtrator, &c.* et al. v. *Heddon* et al. 153

*Eſtate for Life.*

87. After theſe words: "as touching the diſpoſition of all my temporal eſtate, I give and diſpoſe thereof as followeth. Item, I give unto William Wright, my nephew, two houſes at Seacroft, with a croft and appurtenances belonging to them, now in the occupation of John Carter and Elizabeth Thornton:" held that the nephew took an eſtate for life only. *Frogmorton* ex dim. *William Wright* v. *Sarah Wright.* 156

88. The teſtator, after the introductory words (as touching ſuch eſtate wherewith it hath pleaſed Almighty God to bleſs me with), deviſed all his real and perſonal eſtate to his wife, for her natural life. Item, "I give unto my ſon, Paul Cardale, all that my land lying and being in the pariſh of Dudley, in the county of Worceſter, near unto a certain place called Tinſly Hill, into three parts divided, at or immediately after my wife's deceaſe:" held that Paul took only an eſtate for life under this will. *Roe* ex dim. *Callow* et al. v. *Eolton.* 157

89. The teſtator deviſed as follows: "As to all ſuch worldly eſtate as God has endued me with, I give and bequeath as follows: I give, bequeath, and deviſe, all that my freehold meſſuage and tenement lying in G. together with all houſes, &c. unto Matthew Robinſon, George Robinſon, and Thomas Robinſon, equally to them my ſiſter's ſons." The teſtator, then, after bequeathing ſeveral ſmall pecuniary legacies to moſt of his relations, gave to John Gaſkin (the leſſor of the plaintiff, and his heir at law) ten ſhillings; all the reſt of his goods, chattels, and perſonal eſtate whatſoever, he gave to Matthew, George, and Thomas Robinſon: held that the deviſors took only an eſtate for life. *Denn* ex dim. *Gaſkin* v. *Gaſkin.* 158

90. The like point. *Wright* ex dim. *Shaw* v. *Ruſſel.* 159

91. The teſtator deviſed as follows: "For thoſe worldly goods and eſtates, wherewith it hath pleaſed Almighty God to bleſs me, I give and diſpoſe in manner following; I give and bequeath to my loving wife aforeſaid, all my lands, tenements, and houſes, lying in the pariſh of Chipping-Norton; to wit, the houſe I now live in, the ſign of the Plough, ſtanding between the houſes of *W. W.* and *T. A.* and now in my occupation, with the yard, garden, and outhouſes, and all other appurtenances thereto belonging:" held that the laſtmentioned premiſes were deviſed to the widow only for life. *Right* ex dim. *Mitchell* et ux. v. *Sidebotham.* 159

92. Nicholas Cole being ſeiſed of an eſtate in fee, deviſed to his ſon, Thomas Cole, and his daughter, Lucy Hopkins, all his real and perſonal eſtate, to be equally divided between them, or the longeſt ſurvivor, paying his (the teſtator's) lawful debts and legacies, and, after their deceaſe, to the male heir; and gave his ſon, Henry Cole, one ſhilling, to be paid by his executors or executrix: held that Thomas and Lucy were made tenants in common for life, which the ſubſequent words of ſurviverſhip would not change into a joint-tenancy. *Doe* ex dim. *Cole* v. *Weſton.* 160

93. "I give, deviſe, and bequeath, the ſaid meſſuages, houſes, lands, and tenements, to my ſiſters-in-law, Mrs. Elizabeth Smart, and Mrs. Martha Bellaſyſe, as tenants in common:" held that the deviſees took only for life. *Roe* ex dim. *Bowes* v. *Blacket.* 161

94. Only an eſtate for life paſſed under theſe words, "All the reſt of my lands, tenements, and hereditaments, either freehold or copyhold, and alſo all my goods, &c. after payment of my juſt debts and funeral expences, I give to *A.* &c.;" but it ſeems

ſeems that this judgment of the Court of B. R. was afterwards reverſed on a writ of error in the Exchequer Chamber. *Denn* ex dim. *Moor* v. *Meller*. 162, 165

95. "I give and deviſe unto my grandſon, James Wright, all my lands, freehold, copyhold, and leaſehold, in the county of Eſſex; alſo I give and deviſe unto my grandſon, James Wright, all my eſtate, freehold and copyhold, lying and being in Ellington in Huntingdonſhire:" held that James Wrigh, the grandſon, took only an eſtate for life. *Doe* ex dim. *Edward Child and Mary his wife* v. *Wright* et al. 165

96 The teſtator deviſed to lady Frances Carteret for life; remainder to truſtees to preſerve contingent remainders; remainder to the firſt and other ſons of the ſaid lady Frances Carteret, in tail male, and in default of ſuch iſſue to the uſe of all and every the daughter and daughters of the body of the ſaid lady Frances Carteret lawfully iſſuing, as tenants in common, and not as joint tenants.—PER CURIAM: The teſtator has uſed no words teſtifying his intention to give an eſtate of inheritance to the daughters, and we cannot ſupply them. WE are, therefore, of opinion, that lady Cath. Hay, deceaſed, the plaintiff's late mother, took an eſtate for life in the eſtates in queſtion. *Hay* v. *the Earl of Coventry* et al. 167

97. *A* deviſed his eſtates real and perſonal in truſt to truſtees for his brother *B.* and his firſt and every other ſon in tail male; failure of ſuch iſſue, to his brother *C.* and his firſt and every other ſon in tail male, &c. &c.; in all the foregoing caſes without impeachment of waſte, other than wilful; and directed the renewals of a leaſehold eſtate to be made by the tenant for life: held that *B.* took only a life eſtate, with remainder in tail to his children. *Doe* ex dim. *E. Phipps* v. *Lord Mulgrave*. 169

98. The teſtator deviſed to his wife during the term of her natural life only; remainder to his daughters, Eleanor Newſom and Suſannah, the wife of William Head, to be equally divided between them, not as joint-tenants, but as tenants in common, viz. the one moiety, or half part thereof, to his daughter, Eleanor Newſom, and her heirs, for ever, and the other moiety to his daughter, Suſannah, the wife of William Head, during the term of her natural life; and, after her deceaſe, to the iſſue of her body lawfully begotten, and their heirs for ever:" held that Suſannah Head took an eſtate for life only, with veſted remainders to her children as purchaſers. *Doe* ex dim. *Cooper* v. *Collis*. 170

99 *A.* deviſed two houſes to his wife for life, and willed that, on payment of a ſum of money to the wife by *B.* (one of his ſons), *B.* ſhould ſhare equally alike with the reſt of his brothers and ſiſters, *C. D.* and *E.*; and if any of his children ſhould die, then the ſhare of him or her ſhould go among the ſurvivors: held that the children, *B. C. D.* and *E.* took only eſtates for life under the will. *Goodtitle* ex dim. *Richardſon* v. *Anthony Edmonds*. 172

100. Benjamin Bendale, being poſſeſſed of a term for ninety-nine years, if he, or his daughter Betty, or John Bendale, ſhould ſo long live, deviſed the premiſes, granted by ſuch leaſe, as follows, viz. "Item, I give to my daughter Mary, after the deceaſe of my daughter Betty, my houſe, &c. during the life of John Bendale:" held that Betty took an eſtate for life, by implication. *Roe* ex dim. *Bendale* v. *Summerſet*. 174

*Executory Deviſe.*

101. A deviſe to *A.* for ninety years, if he ſo long live, remainder to the heirs of his body, and ſubject to theſe eſtates and contingencies to *B.* in tail, remainder to *C.* in fee: held that the heirs of the body of *A.* took an eſtate tail by executory deviſe. *Harris* v. *Barnes*. 175

102. A deviſe in default of iſſue of the teſtator's own body, he being a

bachelor, is merely a conditional deviſe, and good, if the teſtator dies without marrying. *Wellington* v. *Wellington.* 176

103. By a deviſe to the ſecond ſon (then unborn) of *A.* for life, and after his deceaſe, or the acceſſion of his paternal eſtate, to his ſecond ſon, and his heirs male, with remainders over, ſuch ſecond ſon of *A.* when born, will take an eſtate in tail male, by way of executory deviſe, determinable on the acceſſion of the family eſtate, and in the interim, the lands will deſcend to the heir of the teſtator. *Nicholl* v. *Nicholl.* 177

104. If lands be deviſed to *A.* his heirs and aſſigns for ever, and if he die, leaving no iſſue behind him, then over, the limitation over is good by way of executory deviſe. *Porter* v. *Bradley.* 178

105. Under a bequeſt of a term of years to *A.* and the heirs of his body, and to their heirs and aſſigns for ever, but in default of ſuch iſſue, then after his deceaſe to *B.* and his heirs, the limitation over to *B.* is good by way of executory deviſe. *Wilkinſon* v. *South.* 180

106. Under a diviſe to *T. F.* and his heirs for ever, and in caſe he ſhould depart this life, and leave no iſſue, then to *E. M.* and *S.* or the ſurvivor or ſurvivors of them, ſhare and ſhare alike: held that the deviſe to *E. M.* and *S.* is a good executory deviſe. *Doe* ex dim. *Elizabeth Sheers and John Mawſon, and Mary his wife,* v *William Jeffery, Richard Butler, and Elizabeth Goodyer.* 181

107. A proviſion made by the teſtator, being for children which were to be born after the making of his will, was held to comprehend all the children which ſhould be born of his then wife (whether before or after his deceaſe). *White* v. *Barber.* 182

108. The teſtator made his will: "Whereas my wife is now pregnant, if ſhe bring forth a ſon, I will, &c.; but if it be a daughter, I give one moiety to my wife, and the other to my two daughters. If either died before that time, the ſurvivor to have her ſiſter's ſhare: if both died before that time, I give both ſhares to my wife, and her heirs for ever. If ſhe die, then I give her ſhare to my two daughters:" the wife was not *enſient*; and the teſtator's daughter died under age; and it was held that the wife was entitled to the eſtate. *Statham* v. *Bell.* 184

*Contingent Remainders.*

109. A deviſe of all the teſtator's real eſtate in A. to *B.* during life, and at *B.*'s death, to the children of *B.* with remainder over, gives either an eſtate-tail to *B.* or an eſtate for life to *B.* remainder in tail to the children of *B.* *Hodges* v. *Middleton,* et al. 184

110. On a deviſe to the teſtator's ſeven ſiſters, ſhare and ſhare alike; on the death of any of them, her ſhare to go to her firſt and other ſons in tail male; and for default of ſuch ſons, to her daughters, as tenants in common. In caſe of any of the ſeven ſiſters dying without iſſue, or ſuch iſſue dying under twenty-one, the ſurviving ſiſters to take her ſhare; and if all the ſiſters ſhould die without iſſue, or ſuch iſſue die under twenty-one, then over. It was held, that the words for default of ſuch ſons, did not make the remainder to the daughters *contingent*, which took effect notwithſtanding the birth of a ſon. *Doe* ex dim. *Gertrude Baroneſs Dacre* v. *Mary Jane Roper, dowager Lady Dacre,* 185

111. Tenant for life, remainder to the heirs male of his body in fee, remainder over, in a will, is a contingent remainder with a double aſpect, and may be barred by the recovery of tenant for life. *Doe* ex dim. *Brown* v *Holme and Longmire.* 200

112. The like point. *Goodright, leſſee of Docking,* et al. v. *Dunham* et al. 201

113. Theſe words, "the reſt of my ſurviving children," take in all the ſurviving children, and, conſequently, include

include the eldeſt ſon. *Denn* ex dim. *Balderſton* v. *Balderſton*. 202

114. Where an eſtate can take effect as a remainder, it ſhall never be conſtrued to be an executory deviſe, or ſpringing uſe. *Goodtitle, leſſee of Wincles*, v. *Billington* et al. 203

115. If an eſtate be deviſed to *B.* the wife of *A.* for life, remainder to truſtees to preſerve, &c. remainder to the children of *A.* and *B.* and their heirs for ever, to be divided among them equally, and if but one child, to ſuch only child, and his, or her, heirs for ever, and for default of ſuch iſſue, remainder over; and at the death of the deviſor *A.* and *B.* have no child, the eſtate limited to their children is a contingent remainder in fee, which on the birth of a child will veſt in that child, ſubject to open and let in thoſe who may be born afterwards; and the remainders over will be defeated by that eſtate becoming veſted. In ſuch a caſe the words, "for default of ſuch iſſue," mean for default of ſuch children. *Doe* ex dim. *Helen Comberbach* et al. v. *Sir R. Perryn*. 204

116. *A.* deviſed to *B.* for life, remainder to *C.* for ninety-nine years, if he ſhould ſo long live, remainder to the heirs of the body of *C.*: the remainder to the heirs of the body of *C.* was held a contingent remainder, and not an executory deviſe, and was defeated by *C.*'s ſurviving *B.* there being no preceding eſtate of freehold to ſupport it. *Doe* ex dim. *Muſſell* v. *Morgan*. 209

117. Under a deviſe to *A.* for life without impeachment of waſte, remainder to his eldeſt ſon, and the heirs of ſuch eldeſt ſon; and in default of iſſue male of *A.* then to *B.* &c. *A.* takes an eſtate for life, remainder to his eldeſt ſon in tail, remainder to himſelf in tail. *Doe* ex dim. *Bean* v. *Halley*. 211

118. The teſtator deviſed unto his niece, Mary Owſtwick, otherwiſe Ellard, and the iſſue of her body lawfully to be begotten, as tenants in common (if more than one); but, in default of ſuch iſſue, or being ſuch, if they ſhall die under twenty-one years, and without leaving lawful iſſue of any of their bodies, then I deviſe the ſame unto my couſin, Peter Davy, and the iſſue of his body lawfully to be begotten, as tenants in common (if more than one); but, in default of ſuch iſſue, or being ſuch, if they ſhall all die under the age of twenty-one years, and without lawful iſſue of any of their bodies, remainder over: held, 1ſt, That under the will of this teſtator, Mary Owſtwick, otherwiſe Ellard, took an eſtate for life in the teſtator's freehold eſtates, with contingent remainders to the other perſons mentioned in the ſaid will, which contingent remainders were barred by fines and recoveries levied and ſuffered by Mary Owſtwick, by force whereof, Mary Owſtwick became ſeiſed of an eſtate in fee in the ſaid eſtates.—2dly, That Mary Owſtwick took an eſtate for life in the ſaid teſtator's leaſehold eſtates.—3dly, That under the ſaid will, Peter Davy took an eſtate for life in remainder, in the ſaid freehold eſtates, on the contingency therein expreſſed, which eſtate with all the ſubſequent limitations were afterwards barred by the fines and recoveries ſuffered by Mary Owſtwick.—4thly, That under the ſaid will, Peter Davy became abſolutely entitled to the teſtator's leaſehold eſtates on the death of Mary Owſtwick, without iſſue. *Doe* ex dim. *Davy* v. *Burnſall, and Burnſall* v. *Davy*. 213. 215

119. The deviſor who was a younger brother, left his eſtate to his eldeſt ſon for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail, with a proviſo that, if the larger eſtate ſhould deſcend from the elder branch of the family to his eldeſt ſon, his own eſtate ſhould go to the younger branch of his family: held that the truſtees had a right of entry during the whole of G. F. Heneage's life. *Doe* ex dim. *Heneage* v. *Heneage*. 216

*Conditional Deviſes.*

120. A conditional limitation cannot

not be implied, unleſs neceſſary to effectuate the intention of the teſtator. *Gulliver* ex dim. *Corrie* v. *Aſhby*. 219

121. A deviſe on condition precedent, that if *A.* marries without competent fortune, or without conſent of truſtees, the iſſue ſhall not inherit, is performed by having a portion only, without conſent. *Long* v. *Dennis*. 222

122. Under a deviſe of land to truſtees to pay 20l. of the rents and profits to the teſtator's daughter, and the reſt to her huſband, and the whole rents and profits to the huſband after the daughter's death; and, in caſe the daughter ſhould ſurvive her huſband, then (the land) to the uſe of the daughter for life; and, after her death, to the uſe of her ſon in tail, then to the heirs of the body of the huſband, by the daughter, then to the heirs of her body, then to the heirs of the huſband; the daughter dying before her huſband, the limitations over ſhall not take effect, the contingency not being confined to her life-eſtate, but affecting all the other limitations, and operating as a condition precedent. *Doe, leſſee of Watſon*, et al. v. *Shipphard*. 225

123. Under a deviſe to a wife for life, provided ſhe remains a widow, but in caſe ſhe marries a ſecond huſband, then to *J. S.* when he ſhall attain his age of twenty-three years, the wife has an abſolute eſtate till *J. S.* is twenty three, though ſhe marry before. *Doe* ex dim. *Dean and Chapter of Weſtminſter*, et al. v. *Freeman and Wife*. 227

*Void Deviſes.*

124. *Lade, Bart.* v. *Holford, eſq.* 228. *Ruſdell* v. *Ruſdell*, 229

125. *A.* deviſes an advowſon to the firſt or other ſon of *B.* that ſhould be bred a clergyman, and be in holy orders, in fee; but in caſe *B.* ſhould have no ſuch ſon, then to *C.* in fee. Both deviſes are void, as depending on too remote a contingency; therefore, though *B.* dies without having had a ſon, the heir at law of the deviſor, and not *C.* is entitled. *Proctor* v. *The Biſhop of Bath and Wells*. 230

126. A deviſe for the uſe and ſupport of the preaching of the word of God at the meeting-houſe at L. for ever, held void. *Doe* ex dim. *Phillips* v. *Aldridge*. 231

127. *A* deviſed to *B.* and the heirs of her body; and for default of ſuch iſſue, then over; *B.* died in the life-time of *A.* and then *A.* by a codicil, confirmed the will: held that the heir of *B.* took nothing, though it appeared that *A.* knew of the death of *B.* and of the birth of her ſon, before the making of the codicil. *Doe* ex dim. *Turner and Wife and Ward* v. *Kett*. 231

128. A caſe on a queſtion on the bequeſt of monies in the funds to truſtees, in truſt; on a caſe from the court of Chancery, was altered in form, before the Court could certify: for, of a limitation of money, they cannot take judicial notice. *Doe* et al. v. *Brabant* et al. 233

129. Under a deviſe of lands to truſtees in fee, in truſt for *A.* (an infant), for ninety-nine years, if he ſhall ſo long live, and, after that term, to his firſt, ſecond, third, and fourth ſons, and the iſſue male of their bodies, for the like term of ninety-nine years, as they ſhall be in ſeniority of birth; and in default of ſuch iſſue male in him or them, then to *B.* and the iſſue male of his body, for the like term of ninety-nine years, and in default of ſuch iſſue male, then to the right heirs of the deviſor. *A.* takes an eſtate for ninety-nine years, determinable with his life, and, upon his death, his firſt ſon takes a like eſtate; but the ſubſequent limitations to his other ſons, and to *B.* are void. *Somerville* v. *Lethbridge*. 234

130. If a deviſor give a fee-ſimple to the wife, to be enjoyed by her to her ſole and ſeparate uſe, without the intervention of truſtees, it is void as to the direction. *Goodill* v. *Brigham*. 235

131. On a remainder after an eſtate tail, if the firſt eſtate never takes place,

place, the remainder vests in possession immediately. *Hodgson and wife* v. *Ambrose*. 237

132. In case the devisee dies before the devisor, the devise is void. *Hamilton White*, v. *Warner, lessee of Richard White*. 241

133. A devise to Margaret (an only child) for life, remainder to the first son of her body, "if living at the time of her death," and the heirs male of such son, and for default of such issue to the second son of her body, "if living at the time of her death," and the heirs male of such second son, &c. and for default of such issue male, remainder to *A.*; Margaret had one son, who died in her life-time, leaving a son; held that Margaret only took an estate for life, and that neither her son or grandson took any estate, but that the remainder to *A.* took effect. *Denn* ex dim. *Radclyffe* v. *Bagshaw* et al. 243

134. Courts of law have always so far favoured the title of heir at law, as to lay it down as a rule, that he shall not be disinherited but by a plain intention, and not by probable intention. *Doe* ex dim. *Vessey* v. *Wilkinson*. 245

135. A devise to be divided amongst the said children of my cousins, *T. B.* and *S. W.* held, that upon the whole will there was enough to shew, that the testatrix intended the value of the house and stable to be divided amongst the children. *Oates* ex dim. *Wigfall* v. *Brydon*. 250

136. If the intention of the testator be to prevent a common recovery being suffered, this is that which by law he cannot do, and the law will not allow his intention to take effect. *Driver* ex dim. *Edgar* v. *Edgar*. 574

## DILAPIDATIONS.

An action for dilapidations of a prebendal house may be maintained by a succeeding prebendary against his predecessor. *Radcliffe* v. *D'Oyly*. 251

## DISPENSATION.

On a dispensation to hold two ecclesiastical benefices, the distance by the temporal law is immaterial. *The King* v. *The Bishop of Litchfield and Coventry and Clive*. 253

## DISSENTERS.

Methodists have a right to the protection of the Court, if interrupted in their decent and quiet devotion; and so have dissenters from the established church likewise, if so disturbed. The license must be a license from the bishop of the diocese (though, in practice, it is not so used); for strictly, the bishop of the diocese is to license all who preach in it. *Rex* v. *Wroughton*. 254

## DISTRESS.

1. A gentleman's chariot, standing in a coach-house belonging to a common livery-stable keeper, is distrainable for rent due to the landlord from the livery-stable keeper. *Francis* v. *Wyatt*. 255

2. Implements of trade may be distrained for rent, if they be not in actual use at the time, and if there be no other sufficient distress on the premises. *Gorton* et al. v. *Falkner*. 256

3. An annuitant may distrain. *Fairfax* v. *Gray*. 259

4. A person who rents the milk of cows, which the owner covenants shall be fed in particular pastures, may distrain extra cattle belonging to the owner, damage feasant, in the same closes in which the cattle were to feed. *Burt* v. *Moore*. 260

5. A tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put upon the premises, by way of taking possession. *Taunton* v. *Costar*. 261

6. A custom that a tenant may leave his away-going crop in the barns, &c. of the farm, for a certain time after the lease is expired, and he has quitted the premises, is good: and the landlord may distrain the corn so left, for rent arrear, after six months have expired,

expired from the determination of the term. *Bevan* v. *Delabay and Lewis.* 261

7. If *A.* be poſſeſſed of a quantity of land in a common field, with a right of common over the whole field; and *B.* hath alſo a right of common over the whole field, and they enter into an agreement for their mutual advantage and convenience, not to exerciſe their reſpective rights for a certain term of years, and each party covenants to that effect. If, during the term, the cattle of *B.* come upon the land of *A.* he may diſtrain them, damage feaſant: and may, in his replication (in anſwer to a plea pleaded by *B.* of his right of common, in bar of the cognizance of *A*) ſet forth the ſpecial circumſtances of the agreement and covenants. *Whiteman* v. *King.* 263

8. If a leſſee for years aſſigns his term, he cannot diſtrain for rent. —— v. *Cooper.* 265

9. A diſtreſs cannot be made for the toll of goods fraudulently ſold out of the market to avoid the toll: but the party injured muſt bring a ſpecial action on the caſe. *Blackey* v. *Dimſdale.* 266

10. An averment in a declaration on the 11 *Geo.* 2. c. 19. ſ. 3. to recover double the value of goods removed, in order to prevent a diſtreſs, that a certain ſum was due for rent before the goods were removed, need not be preciſely proved as laid. And the notice of diſtreſs, which alleged a different ſum to be due, was held immaterial. *Gwinnet* v. *Phillips.* 267

11. One warrant of diſtreſs, for the amount of ſeveral duties, impoſed by different acts of parliament, each giving a power of diſtreſs, is legal. And the judgment of the commiſſioners of land-tax on appeal is concluſive in an action of treſpaſs brought againſt the officer, for levying under a warrant of diſtreſs. *Patchet* v. *Bancroft.* 267

## DOWER.

1. A marriage celebrated in Scotland (but not between perſons who go thither for the purpoſe of evading the laws of England), will entitle the woman to dower in England. The lawfulneſs of ſuch a marriage may be tried by a jury: a replication, therefore, to a plea of "*ne unques accouple*" in a writ of dower, alleging a marriage in Scotland, may conclude to the country: and in ſuch replication, it is not neceſſary to ſtate that the marriage was had in any place in England, by way of *venue*. *Ilderton* v. *Ilderton.* 268

2. A leaſe for years, by a copyholder, with the licenſe of the lord, where the widow, by cuſtom, would be entitled to her free bench, if the copyholder had died ſeiſed, defeats the widow of her free bench. *Saliſbury* ex dim. *Cooke* v. *Hurd.* 277

3. But the widow is entitled to her free bench in copyhold lands, ſurrendered to the uſe of the huſband, though he may never have been admitted thereto. *Vaughan* ex dim. *Atkins, eſq.* v. *Atkins, widow.* 278

## EAST-INDIA COMPANY.

1. A military officer in the ſervice of the Eaſt-India company has not a right to reſign whenever he pleaſes. *Capt. Parker* v. *Lord Clive,* 281. *Vertue* v. *Lord Clive,* 282.

2. The excluſive trade granted to the Eaſt-India company means the inland trade as well as mere exports and imports; and a perſon going to, or trafficking in India, without licenſe, though it be in an independent province, not ſubject to the company, may, for ſuch offence, be ſeized by the company's ſervants. *Nicoll* v. *Vereliſt.* 282

3. And the being an alderman of Calcutta does not authoriſe the trafficking and trading in the Eaſt-Indies without licenſe. *Bolts* v. *Purvis.* 283

4. A bond given for goods ſhipped by the plaintiff, a Britiſh ſubject at Calcutta, in the Eaſt-Indies, on board an American ſhip, homeward bound, from thence to Rhode Iſland, in America, which had previouſly landed

landed in Bengal a cargo from Europe, is void. *Sumner* v. *Green.* 283

5. A ſale (by the owner) of the command of a ſhip employed in the Eaſt-India company's ſervice, without the knowledge of the company, is illegal; and the contract of ſale cannot be the foundation of an action. *D. Blachford* et al. *executors of G. Blachford,* v. *Preſton.* 284

6. A mandamus to the mayor's court at Bombay to examine witneſſes in a cauſe, according to the ſtat. 13 *Geo.* 3. c. 63. will not be granted unleſs the cauſe of action aroſe in India. *Franſciſco* v. *Gilmore.* 286

## EJECTMENT.

1. In ejectment, the plaintiff muſt recover on a legal title. *Doe* ex dim. *Holdſden* v. *Staple.* 288

2. Under certain circumſtances, the jury may preſume a ſatisfied term to have been ſurrendered to the *ceſtui que uſe;* but if no ſuch preſumption be made, and it appear in a ſpecial verdict in ejectment that ſuch a term is ſtill outſtanding in a truſtee who is not joined in bringing the ejectment, the *ceſtui que uſe* cannot recover. *Goodtitle* ex dim. *Owen Jones* v. *Evan Jones* et al. *in error.* 293

3. On an ejectment to recover premiſes in mortgage, on the ſeveral demiſes of the truſtees, for the mortgagor, under a marriage ſettlement, and the perſonal repreſentatives of the mortgagee: the Court held that the leſſors of the plaintiff were not truſtees for the defendant, but for the mortgagees. And, therefore, they gave judgment for the plaintiff. *Armſtrong* ex dim. *Tinker* et al. v. *Peirſe* et al. 295

4. An ejectment cannot be maintained contrary to the leſſor's own covenant. *Right* ex dim. *Green* v. *Proctor.* 297

5. In ejectment, which is a fictitious action to recover the poſſeſſion, the leſſor of the plaintiff ſhall not be permitted to defeat a ſolemn deed under his own hand, covenanting that the defendant ſhall enjoy the premiſes, and alſo for further aſſurance. *Goodtitle* ex dim. *Robert Edwards* v. *Peter Bailey.* 297

6. In ejectment, and a verdict for the leſſors of the plaintiffs, the Court were of opinion, that tenants in common cannot join in making a leaſe. *Heatherly* ex dim. *Worthington and Tunnadine* v. *Weſton* et al. 298

7. A clear poſſeſſion under a will for twenty years, will be evidence of a fee, if no other title appears. *Denn* ex dim. *Tarſwell* v. *Barnard.* 299

8. If the leſſor of the plaintiff be an infant, and the guardian undertake to pay the coſts, if the ſuit ſhall be determined againſt him, it is ſufficient, and the Court will not ſtay the proceedings till a ſufficient plaintiff be found. *Anon.* 300

9. If the heir apparent of a copyholder in fee, ſurrender in the lifetime of his anceſtor, and ſurvive him, the heir of ſuch ſurrenderor is not eſtopped, by that ſurrender of his anceſtor, from claiming againſt the ſurrenderee. *Goodtitle* ex dim. *Faulkner, James Shade and Mary his Wife, Samuel Ward and Hannah his Wife, and Ann Robinſon,* v. *Ann and William Morſe.* 300

10. It was decided in the court of Common Pleas, that an ejectment doth not lie of a meſſuage or tenement: but if it be of a meſſuage and tenement the Court will give leave to ſtrike out the words, and tenement. *Goodright* ex dim. *Welch* v. *Flood* 303

11. But, in the court of King's Bench, an objection being taken in arreſt of judgment, that the deſcription in this ejectment was too general and uncertain, being for a meſſuage and tenement; for which were cited 1 *Sid.* 295. 1 Ld. *Raym.* 191. Buller, J. ſaid, he remembered a caſe where a meſſuage or tenement had been held ſufficiently certain, and the rule was refuſed. *Doe* ex dim. *Stewart* v. *Denton.* 303

12. The ſame preciſion and exactneſs is not neceſſary in an ejectment, as in a *præcipe;* therefore the deſcription of the premiſes demanded being "fifty acres of furſe and heath," and "fifty acres of moore and marſh," was

was held well enough. *Conner* v. *Weſt.* 303

13. The Court will not endure a leſſee to defend (alone) an ejectment againſt his landlord, or thoſe claiming under him, on a ſuppoſed defect of title. *Driver* ex dim. *Oxendon* et al. v. *Laurence.* 304

14. One claiming as lord by *eſcheat*, ſhall be admitted defendant in an ejectment, brought againſt the tenant in poſſeſſion, by the leſſor of one claiming as heir at law. *Fairclaim* ex dim. *Fowler* et al. v. *Shamtitle.* 305

15. But the Court will refuſe to permit the *ceſtui que truſt*, not having been in poſſeſſion, to be made defendant in ejectment inſtead of the tenant, as landlord. *Lovelock* ex dim. *Norris* v. *Dancaſter.* 309

16. But the Court in this caſe, on the motion of Mr. Holroyd, permitted an heir, who had never been in poſſeſſion, to come in, and defend under an ejectment. The father, under whom he claimed, died juſt before, having firſt obtained a ſimilar rule. *Doe* d. *Hebblethwaite* et al. v. *Roe.* 310

17. So in this caſe, the Court permitted a deviſee, who had never been in poſſeſſion, to defend as landlord, under this ſtatute. *Lovelock* d. *Norris* v. *Lancaſter.* 310

18. In ejectment, on the demiſe of an heir by deſcent, the demiſe was laid on the day his anceſtor died, and held well enough after a verdict. *Roe* ex dim. *Wrangham* v. *Heyſey.* 310

19. In ejectment, the demiſe ſtated that one *M. S.* on ſuch a day, at Haſwell, in the county of B. demiſed to the plaintiff two meſſuages, two cloſes, &c. The Court held, that this amounted to a ſufficient certainty, that the lands lay in the vill of Haſwell. *Goodright* ex dim. *Smallwood* v. *Strother.* 311

20. In the caſe of a plain miſtake, the Court will enlarge the term. *Roe* ex dim. *Lee* v. *Ellis.* 311

21. The notice at the foot of the declaration being in the name of the nominal plaintiff inſtead of the caſual ejector, was held not a ſufficient ground of irregularity to ſet aſide the proceedings. *Hazlewood* ex dim. *Price* v. *Thatcher.* 312

22. In an ejectment againſt ſeveral tenants, in the ſeveral copies ſerved, the name of the individual tenant on whom the declaration was ſerved was prefixed to the notice inſtead of the names of all: and the Court were of opinion that one rule was ſufficient. *Roe* ex dim. *Burlton* et al. v. *Roe.* 312

23. Caſes on the ſervice of ejectments. 312, 313

24. In ejectment, the leſſor of the plaintiff muſt recover by the ſtrength of his own title, and not by the weakneſs of his adverſary's. *Richard Roe* ex dim. *Elizabeth Haldane and Thomas Urrie* v. *Wm. Harvey.* 313

25. The confeſſion of leaſe, entry, and ouſter, is ſufficient, in the caſe of a tenant in common, without proof of actual ouſter. *Oates* ex dim. *Wigfall* v. *Brydon.* 316

26. The plaintiff muſt prove the defendant in poſſeſſion of the premiſes; for if the defendant have any land in the pariſh mentioned in the declaration in ejectment, he may ſuppoſe when he is ſerved with the ejectment that the plaintiff intends to proceed for that; and if it turn out that the plaintiff ſues for other lands, it is hard that he ſhould be anſwerable for the coſts of the ejectment when he is not in fault. *Goodright* ex dim. *Balch* v. *Rich.* 316

27. In this caſe it became a queſtion, whether, in ejectment, one claiming title as heir is bound to deduce any pedigree in proof of his deſcent? And the Court were clear, that in order to recover an eſtate by deſcent, it is neceſſary to ſtate ſome pedigree to the jury, and ſhew how the leſſor of the plaintiff claims to be heir. *Roe* ex dim. *Thorne* v. *Lord* et al. 318

28. A ſingle admittance to a copyhold is evidence to prove the cuſtom of a manor, for lands to deſcend to the youngeſt nephew. *Doe* ex dim. *Maſon* v. *Maſon.* 320

29. On the trial of an ejectment for the

the reſidue of a term of 1000 years, the leſſor of the plaintiff proved poſſeſſion in himſelf; and thoſe under whom he claimed, ever ſince 6 *Ann.* But he did not prove all the meſne aſſignments; held that it ought to have been left to the jury, with a recommendation to preſume all the meſne aſſignments. *Earl* ex dim. *Goodwin* v *Baxter.* 320

30. The defendant, in an ejectment, is entitled to the general reply, where the plaintiff, claiming by deſcent, proves his pedigree, and ſtops; and the defendant ſets up a new caſe in his defence, which is anſwered by evidence on the part of the plaintiff. *Goodtitle* ex dim. *Revett* v. *Braham.* 320

31. A judgment in ejectment had been regularly obtained by the plaintiff, againſt the caſual ejector, by default: and the landlord of the premiſes had moved to ſet aſide this judgment; becauſe his tenant had not given him notice of his having been ſerved with an ejectment. And the Court were clearly of opinion, that the poſſeſſion ought not to be changed by a judgment in ejectment, where there had been no trial or opportunity of trying; though the obtaining the judgment might be owing to the default, or even to the treachery, of the defendant's own tenant. *Doe* ex dim. *Troughton* v. *Roe.* 321

32. On a motion to ſet aſide a rule to reply, it appeared that the landlord had applied to be made a defendant, and had entered into the common rule; but the leſſor of the plaintiff had never joined in the conſent rule: and it was objected that he could not be forced to proceed againſt a perſon, whom he never had accepted as defendant. But the Court held the rule to be regular; and that the nominal plaintiff might be nonproſſed thereby; but being nominal, the defendant could have no coſts. *Goodright* ex dim. *Ward* v. *Badtitle.* 321

33. But the Court will ſtay the proceedings in a ſecond ejectment, till the coſts of the former are paid; in a caſe like the laſt, where the leſſor of the plaintiff has neglected to enter into the conſent rule. For when the Court ſees manifeſt vexation and oppreſſion, it will exerciſe its juriſdiction over this fictitious proceeding to prevent it. *Smith* ex dim. *Ginger* v. *Barnardiſton.* 322

34. An ejectment brought by the fraudulent aſſignee of an inſolvent debtor, was ſtayed, till the coſts of former ejectments, which had been brought by the debtor himſelf, were paid. *Doe* ex dim. *Chambers* v. *Lewis.* 322

35. If a ſecond ejectment is in ſubſtance brought to try the ſame title, the rule is of courſe to ſtay the proceedings until the coſts of the former ejectment have been paid. *Keene* ex dim. *Angel* et al. v. *Angel.* 322

36. As an actual entry is neceſſary to avoid a fine, the party ſo avoiding it cannot recover the meſne profits that accrued before ſuch entry. Alſo if a declaration in treſpaſs contain two counts, and the defendant plead to one, and ſuffer judgment by default on another, and on the trial of the firſt the plaintiff only prove one act of treſpaſs which is covered by the ſecond count, he is not entitled to a verdict on the firſt count. *Lee Compere* v. *Hicks* et al. 568

37. The legal relation to the teſte of the writ is to be ſupported in maintenance of the *hab. fac. poſſ.* on judgment in ejectment. *Doe* ex dim. *Mary Beyer* v. *Roe.* 323

38. The plaintiff in ejectment, as tenant in common, recovered poſſeſſion of five-eighths of a cottage, with the appurtenances, and a writ of poſſeſſion was executed by the ſheriff, who turned the tenant out of poſſeſſion of the whole, and locked up the door: and the Court, upon motion, made a rule upon the ſheriff and the leſſor of the plaintiff, to reſtore to the tenant poſſeſſion of three-eighth parts of the premiſes. *Roe* ex dim. *Saul* v. *Dawſon.* 323

39. If one tenant in common recovers againſt another in ejectment by

by default, he may maintain treſpaſs for the meſne profits. *Goodtitle* v. *Tombs*. 313

40. The defendant having brought a writ of error in parliament, upon an ejectment on the demiſe of Boughey, the Court obliged him to enter into a rule, "Not to commit waſte or deſtruction, during the pendency of this writ of error." *Wharod* v. *Smart*. 325

41 Bail in error, on a judgment in ejectment, juſtify in double the ſum. *Evan Thomas* v. *Goodtitle*. 325

## ELEGIT.

1. Upon an elegit the ſheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making, in value, a moiety of the whole. *Den, leſſee of Taylor*, v. *the Earl of Abingdon*. 475

2. A plaintiff, who claims under an elegit ſubſequent to a leaſe granted to the tenant in poſſeſſion, cannot recover in ejectment, though he give the tenant notice that he does not mean to diſturb his poſſeſſion. *Doe* ex dim. *Da Coſta* v. *Wharton and Dixon*. 476

## ENGRAVINGS.

If the proprietor of a mezzotinto, or other print, will entitle himſelf to the benefit of the ſtat. 8. *Geo.* 2. cap. 13. and ſecure his property, he muſt engrave both his name and the day of the firſt publiſhing thereof on the plate, and print the ſame on the print. *Sayer* qui tam, &c. v. *Dicey* et al. 325

## ERROR.

1. The defendant in the original action need not obtain a judge's order to change his attorney upon bringing a writ of error: becauſe a writ of error is the commencement of a new action, the writ being returnable in a different court; in the ſame manner as a *ſcire facias* to revive a former judgment has been holden to be a new action in a variety of caſes. *Batchelor* v. *Ellis*. 326

2. Defendants having agreed under a conſolidation rule, not to bring any writ of error, cannot do ſo, though there be manifeſt error on the record. *Camden, Calvert, and King*, v. *Edie*. 326

3. But a conſent to confeſs a judgment does not imply a conſent not to bring a writ of error. *Wade* v. *Rogers*. 327

4. One defendant alone cannot bring error on a judgment againſt ſeveral. *Knox, eſq.* v. *Coſtello*. 327

5. Where a writ of error is amended in B. R. new bail ſhall be given to the amended writ in C. B. and the plaintiff below ſhall not take out execution for want of bail. *Rafael* v. *Vereſt*. 328

6. This was a writ of error returnable in parliament, brought upon a judgment in this court, in an action in debt upon a recognizance in error. And the plaintiff in error in parliament, not having entered into a recognizance, purſuant to 3 *J.* 1. c. 8. the defendant in the ſaid writ of error moved for and obtained a rule for the ſaid plaintiff in error, to ſhew cauſe, why the defendant in error ſhould not be at liberty to ſue out execution, for want of ſuch recognizance. *Trinder* v. *Watſon*, et al. 329

7. In error on a judgment, after a verdict upon a *ſcire facias* againſt bail, there muſt be bail to the writ of error; the *ſcire facias* being a perſonal action. *Pulteney* v. *Townſon*. 330

8. If the defendant, in error from C. B. into B. R. give an eight-day rule to certify the record, the record may be certified in leſs time, though the rule expire in vacation; and a *ſcire facias quare executionem non*, having been iſſued immediately upon the record being certified, returnable the firſt day of the following term, the defendant may ſerve the plaintiff in error on that day with a rule to appear to the *ſcire facias*, and a rule to aſſign errors. *Sambidge* v. *Houſley in error*. 330

9. It was agreed by the court and counſel, that a writ of error could not be *non proſs'd*, without a rule "to aſſign

ſign errors." *Leith* v. *Mac Ferlan. Johnſton* v. *Jebb.* 331

10. In error from the common pleas of a judgment by default. The error aſſigned was, that no warrant of attorney for the defendant (the now plaintiff in error), was entered on the record below; and the Chief Juſtice at chambers directed a proper warrant of attorney to be filed and entered; and thereupon a new *certiorari* iſſued, and the judgment was affirmed in the King's Bench. *French* v. *Cornelys.* 331

11. It is not aſſignable for error, that the plaintiff is adjudged to be in *miſericordiâ*, inſtead of the defendant. Nor after a judgment by default, on a promiſe to pay the debt and coſts, if the ſheriff will deſiſt from executing a writ of *fi. fa.* That it was not averred that the ſheriff did in fact deſiſt from the execution, nor what the amount of the poundage, &c. was, nor that the defendant had notice of ſuch amount. *Pullin one, &c.* v. *Stokes one, &c. in the Exchequer Chamber in error.* 331

12. In an action by bill, as of Trinity Term, 34 *Geo.* 3. againſt an attorney in the King's Bench, as acceptor of a bill of exchange, judgment went by default; and a writ of error being brought, the error aſſigned was, that there was no bill filed between the parties, in Trinity Term, 34 *Geo.* 3. to warrant the declaration and judgment, upon which a *certiorari* iſſued, reciting the error aſſigned, and requiring the Chief Juſtice of the King's Bench to certify, whether there was any ſuch bill between the parties, filed of record in that court, in Trinity Term, 34 *Geo.* 3. And the Court ſaid the real queſtion was, Whether there was a bill on the file of that term? and if there was, the Court would not inquire how it came there. *Parrott one, &c.* v. *Spraggon* et al. *in the Exchequer Chamber in error.* 332

13. It is irregular to rule the plaintiff in error, to aſſign errors, before the expiration of the rule to appear to the *ſcire facias. James* v. *Staples.* 333

14. Upon a writ of error to the Houſe of Lords, from B. R. a tranſcript of the record only goes up: and the record is ſuppoſed to be ſent back again hither; and if the judment is affirmed, B R. muſt ſue out execution. *Vicars* v. *Haydon.* 333

15. On a writ of error from C. B. though a tranſcript only is removed, B. R. may award execution. *Ibid.*

16. Upon a writ of error from Ireland (when allowed), in judgment of law, the record was removed into B.R.; but in fact, a tranſcript only came over: and when the judgment was affirmed, it was ſent back with a mandatory writ, iſſued from hence to the B.R. in Ireland, reciting the whole record and proceedings, and commanding them to award execution, by which the cauſe became reſtored to that court. *Ibid.*

17. So when a record is removed here from a county palatine court, by writ of error, and that writ is non-proſſed, this Court will award execution. *Cowperthwaite* v. *Owen* et al. *in error.* 334

18. A writ of error in the Exchequer Chamber, can only be quaſhed by that court. *Lloyd* qui tam, &c. v. *Skutt.* 334

19. If the jury aſſeſs more damages than are laid in the declaration, and judgment be entered accordingly, it is error. *Chevely* v. *Morris.* 334

20. But the Court will not in ſuch a caſe ſet aſide the ſaid judgment. *Taſwell* v. *Stone.* 336

21. But where a verdict is given for a greater ſum than the amount of the damages laid in the declaration, and for that cauſe a writ of error is brought—The Court will permit the plaintiff to enter a *remittitur* of the exceſs above the ſum, laid in the declaration, on payment of the coſts of the writ of error. *Pickwood* v. *Wright.* 335

22. An allowance of a writ of error, on a judgment by *nil dicit*, is ſo intirely a *ſuperſedeas* to a ſubſequent writ of execution, and all proceedings againſt the bail, that all may be ſet aſide upon motion. *Dudley* v. *Stokes.* 335

23. If the defendant brings a writ

of error, and the plaintiff bring another action on the judgment, and recover; he cannot sue out execution on the second judgment, till the writ of error be determined; and if he does, the Court will set it aside; for as he is restrained from suing out execution on the first judgment, if he were permitted to do so on the second, it would be permitting him to do that indirectly, which can not be done directly. *Bennvell* v. *Black.* 336

24. The Court will not set aside an execution sued out before, but executed after, the allowance of a writ of error served on the sheriff and the party, if the plaintiff, in error, has not regularly put in bail. *Lane* et al. v. *Bacchus.* 336

25. The Court will not stay proceedings in debt upon a judgment, while a writ of error is depending, if the writ of error appears to be brought merely for the purpose of delay. *Entwistl* et al. v. *Sheppard* et al. 336

26. So, if the principal has confessed that the writ of error is brought merely for delay. *Pool* v. *Charnock. Goodin* v. *Hammond. Mitchell* v. *Wheeler. Masterman* v. *Grant*, 337. *Box* v. *Bennet. Kempland* v. *Macauley. Levett* v. *Perry*, 338.

27. But the Court will stay the proceedings unless it be clear that the writ of error is brought for delay. *Christie* v. *Richardson.* 339

28. And the Court will not permit execution to be taken out, pending a writ of error in parliament, on the ground, that after judgment recovered, the defendant removed the record into the Exchequer Chamber, where the judgment was affirmed, without any argument or objection taken to it by the defendant. *Harrison* v. *Grote.* 339

29. In an action upon an East-India bond, interest was allowed after the rate of 9 per cent according to the Indian allowance, till signing the judgment; and from that time, till the actual payment of the money, after the rate of 5 per cent only, upon the accumulated sum ascertained by the judgment. *Bodily* v. *Bellamy.* 339

30. In this case it was referred to the master to compute interest on the sum given by the jury on the writ of enquiry, from the day of signing final judgment below, down to the time of the taxation of costs, the same to be added to the costs taxed for the plaintiff. *Zinck* v. *Langton.* 342

31. The court of Exchequer Chamber is bound to allow double costs to the defendant in error, on the affirmance of a judgment of the King's-bench; but it is entirely a matter in their discretion, whether or not interest shall be allowed on such affirmance. *Shepherd one, &c.* v. *Mackreth.* 342

32. And the court of Exchequer Chamber will allow interest to a defendant in error, under the stat. 3 *H.* 7. c. 10. on a judgment of non-pros, as well as on a judgment of affirmance; and, for the future, the interest allowed will be 5l. per cent, instead of 4l. *Sykes* v. *Harrison, in the Exch. Ch. in error.* 344

33. The bail in error are liable to the interest, from the time of the affirmance of the writ of error. *Welford* v. *Davidson.* 345

34. But the bail are not liable to pay interest on the judgment, between the signing of the judgment in B.R. and the affirmance of it in *Cam. Scacc. Frith* v. *Leroux*, et al. 345

35. Where judgment for the defendant, on a special verdict, is reversed in the Exchequer Chamber, that Court, on motion, will give a final judgment for the plaintiff. *Denn* ex dim. *Meller* v. *Moore, in error, in Exch. Cham.* 347

See also EJECTMENT, No. 39, 40.

## ESCAPE.

1. An action upon the case will lie against the keeper of a prison, for an escape upon mesne process, though the prisoner returns the same day, and the plaintiff proceeds to final judgment against him. *Ravenscroft* v. *Eyles.* 348

2. A bailiff who has arrested a prisoner on mesne process may retake him

him before the return of the writ, though he voluntarily permitted the prisoner to escape immediately after the arrest. *Atkinson* v. *Matteson* et al. 345

3. Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape: and the defendant may plead a retaking on a fresh pursuit to such a count, without traversing the voluntary escape. *Bonafous* v. *Walker*. 350

4. But an escape from the rules of the King's Bench prison, without the marshal's knowledge, is not a voluntary escape. *Ibid.*

5. And a voluntary return of a prisoner, after an escape, before action brought, is equal to a retaking on a fresh pursuit; but it must be pleaded. *Ibid.*

6. And an administratrix may maintain an action, in her own name, against the marshal, for the escape of a prisoner who is in execution, on a judgment obtained by her as administratrix. *Ibid.*

7. In debt against a sheriff or gaoler for an escape, the jury cannot give a less sum than the creditor would have recovered against the prisoner, namely, the sum indorsed on the writ, and the legal fees of execution. *Ibid.*

8. The bailiff of a liberty who has the return and execution of writs, is liable to an action of debt for an escape, if he remove a prisoner, taken in execution, to the county gaol, situate out of the liberty, and there deliver him into the custody of the sheriff. *Boothman* v. *the Earl of Surrey*. 352

9. Debt lies against a sheriff for an escape, to recover the whole debt and damages, if a defendant, taken in execution, be afterwards seen at large, for any the shortest time, even before the return of the writ. *Hawkins* et al. *assignees of Frost*, v. *Plomer and Hart*. 357

10. So, if a sheriff's officer, having taken a prisoner in execution, permit him to go about with a follower of his, before he takes him to prison, it is an escape. *Benton* v. *Sutton*. 358

11. And an action of debt will lie against a gaoler, for the escape of a prisoner in execution, though the escape were without the knowledge of, and without any fault whatever on the part of the gaoler, who, in such case, can avail himself of nothing but the act of God, or the king's enemies, as an excuse. *Alsept* v. *Eyles*. 360

12. The affidavit of the warden to be annexed to his plea, according to the stat. 8 & 9 *Will.* 3. & 27. s. 6. that the escape, for which debt is brought, was without his knowledge, may be conditional, "if any such escape there was;" for if the defendant knows nothing of any escape, he is not to be bound to admit by his affidavit, that an escape has actually happened. *West* v. *Eyles*. 362

13. If a sheriff, having arrested a defendant on mesne process, keep him in his custody after the return of the writ, and then carry him to prison, he is not liable to an action on the case as for an escape, if the jury find that the plaintiff has not been delayed or prejudiced in his suit. *Planck* v. *Anderson* et al. 362

14. In an action against the sheriff for the escape of a prisoner on mesne process, if the plaintiff cannot prove any debt against the prisoner who escaped, he must be nonsuited, and cannot recover nominal damages. *Alexander* v. *Macauley*. 364

15. In escape against the sheriff, if the plaintiff aver in his declaration, that J. S. was arrested under a writ indorsed for bail by virtue of an affidavit now on record, he must produce the affidavit in evidence, though the latter part of the averment was unnecessary. *Webb* v. *Herne* et al. 364

## ESSOIGN.

1. If an attorney appear on the face of the entry to have cast an essoign for a defendant, it is void. *Anson* v. *Jefferson*. 364

2. The plaintiff sued out a writ against the defendant, who was a peer of Great Britain, in a personal action, returnable the second return of Easter term. At the return, the defendant cast

caſt an eſſoign, which was not adjourned to any particular day. And on the firſt day of Trinity term, the plaintiff delivered his declaration. It was moved that the defendant might have an imparlance to Michaelmas term, the declaration not having been delivered before the eſſoign-day of Trinity term.—Per Curiam: The defendant is not entitled to an imparlance where the plaintiff is prevented from declaring before the eſſoign-day, by an eſſoign caſt. And the Court will be glad to uſe any means to prevent ſuch a delay attempted by the defendant. *Rooke* v. *the Earl of Leiceſter*. 365

3. If a writ be pleaded as ſued out on a day between the eſſoign-day, and the firſt day of term, and there be a ſpecial demurrer for that cauſe, the objection will not prevail, though the court do not ſit in fact till the *quarto die poſt*. *Belk* v. *Broadbent and wife*. 365

## ESTATE.

1. A deed of releaſe containing the words "all land, &c. belonging, uſed, occupied, and enjoyed, or deemed, taken, or accepted as part thereof, &c." was held to paſs leaſehold lands which anſwered that deſcription, as well as freehold, eſpecially againſt the releaſor. *Doe* ex dim. *Thomas Davies and James Williams, the younger*, v. *Thomas Williams*. 366

2. By a gift from father to ſon, by deed poll, of lands to hold to him, and his aſſigns, for ever, charged with 100l. to his younger brother, at the end of his apprenticeſhip, againſt all men, the ſon takes only an eſtate for life. *Wright* ex dim. *Allingham* v. *Lowley and wife*. 367

3. In a grant to *A. B.* remainder to his own heirs male, his heirs male take by deſcent. But if ſuch a limitation is made by will, or by a third perſon in a deed, the heir male takes by purchaſe. *Thomas Wills and Ann, his wife*, et al. v. *Henry Palmer, eſq.* et al. 368

4. William Creſwick, by deed of feoffment, conveyed the premiſes upon truſt, as to part to the uſe of the heirs of the ſaid William Creſwick on the body of the ſaid Sarah lawfully begotten or to be begotten; the male to be preferred before the female, and the elder before the younger: held that it was an eſtate in tail male. *Denn* ex dim. *William Creſwick* v. *Joſeph Hobſon* et al. 371

5. A ſettlement was made before marriage of a freehold eſtate, to the huſband and wife for life; and after their deceaſe, to the heirs of the huſband on the wife; and of copyhold, in borough Engliſh, to the huſband and wife, for life; and after their deceaſe, to the heirs of their two bodies, in like manner, and to the ſame uſes, as the freehold: held that the youngeſt ſon ſhall ſucceed as heir in tail to the copyhold. *Roe* ex dim. *Aiſtrop* v. *Aiſtrop*. 372

6. A limitation in a deed, to the uſe of *A.* for life, with remainder to the firſt ſon of the body of *A.* lawfully iſſuing; and for default of ſuch iſſue, to the ſecond, third, and other ſons of *A.* and of the ſeveral heirs male of the body and bodies of all and every ſuch ſon and ſons reſpectively iſſuing, gives an eſtate in tail male to the firſt ſon of *A.* *Owen* v. *Smyth*. 373

7. If an eſtate be limited, by deed, to huſband and wife, and their heirs on the body of the wife by the huſband to be begotten, both have an eſtate-tail. But if the remainder be limited to the heirs of the body of the wife, by the huſband to be begotten, the eſtate-tail veſts in the wife ſolely. *Denn* ex dim. *Trickett* v. *Gillet* et al. 375

8. A cuſtom to bar the entail of a copyhold by ſurrender, may ſubſiſt, concurrently with a cuſtom, to bar by a recovery, though the inſtances are much leſs frequent. *Doe* ex dim. *Wightwick* v. *Truby* et al. 377

9. The rule of *poſſeſſio fratris* does not apply to eſtates-tail, nor to inheritances in fee-ſimple, without an actual poſſeſſion of the brother of the whole blood; therefore, where *A.* and

*B.*

*B.* took eſtates-tail, and *A.* afterwards conveyed his moiety to *B.* in fee, by leaſe and releaſe, with a covenant to levy a fine; that created a baſe fee in *B.* which eſtate was afterwards confirmed by the fine, though that was not levied till after the death of the releaſee. *Doe* ex dim. *James Gregory and Diones Geere* v. *John Whichelo.* 379

10. In order to diſcontinue an eſtate tail, it is neceſſary that the party diſcontinuing ſhould be actually ſeiſed by force of the entail. *Driver* ex dim. *Burton* v. *Huſſey* et al. 381

11. The words of an act of parliament may operate to confirm an eſtate tail under a marriage ſettlement. *Goodright* ex dim. *Burton* v. *Rigby* et al. 382

12. A ſurrender of a copyhold to huſband and wife, and the ſurvivor, and after the death of the ſurvivor to the right heirs of both, veſts an immediate fee-ſimple in the huſband and wife by entireties, and the huſband cannot aliene or deviſe any part of it, but on his death the whole ſurvives to the wife. *Green* ex dim. *Crew* v. *King.* 384

13. If the legal intereſt in land deſcend in fee ſimple *ex parte maternâ*, and the equitable intereſt in fee ſimple *ex parte paternâ*, or *vice verſâ*, the equitable eſtate ſhall merge in the legal, and both follow the line through which the legal eſtate deſcended. *Goodright, leſſee of Alſton* v. *Wells* et al. 385

## ESTOPPEL.

1. An ejectment cannot be maintained contrary to the leſſor's own covenant. *Right* ex dim. *Green* v. *Proctor.* 297

2. In ejectment, which is a fictitious action to recover the poſſeſſion, the leſſor of the plaintiff ſhall not be permitted to defeat a ſolemn deed under his own hand, covenanting that the defendant ſhall enjoy the premiſes, and alſo for further aſſurance. *Goodtitle* ex dim. *Robert Edwards* v. *Peter Bailey.* 297

## EVIDENCE.

1. On a demurrer to evidence, every fact which the jury can infer, in favour of the party offering it, from the evidence demurred to, is to be conſidered as admitted. *Cockſedge* v. *Fanſhaw.* 247

2. In debt upon an award, and *nil debet* pleaded, the defendant cannot give in evidence partiality in the arbitrators in making the award; for the plea of *nil debet*, *primâ facie* admits the award, and there never was an inſtance where this kind of evidence was permitted to be given; it would be to ſuffer evidence that affects third perſons, the arbitrators themſelves. *Wills* v. *Maccarmick.* 435

3. In an action of treſpaſs, the defendants juſtified under a *fi. fa.*; and the Court held it "neceſſary for the "defendants, being ſheriffs' officers, "upon the trial of this cauſe, to pro-"duce and prove a copy of the judg-"ment upon which the ſaid writ of "*fieri facias* iſſued." *Martyn* v. *Podger* et al. 474

4. If the effects of an inteſtate are veſted in the crown by forfeiture, and letters of adminiſtration be granted to *A.* in conſequence of a warrant from the king, and they run in the uſual form, viz. "To pay debts," &c. but with this additional clauſe, "For the uſe "and benefit of his majeſty," *A.* ſhall be anſwerable as adminiſtrator for the debts of the inteſtate, and ſhall not be permitted to give evidence tending to queſtion the validity of the letters of adminiſtration. *Megit* v. *Johnſon* et al. *adminiſtrators of Lowe.* 487

5. A factor who ſells for the plaintiff, and is to have ſo much in the pound for commiſſion, is a good witneſs to prove the contract and ſale; for as a factor he is concerned both for the vendor and vendee: he is a mere go-between, and may be a good witneſs for either of them. *Dixon* et al. v. *Cooper.* 389

6. So alſo a perſon who is employed to ſell goods, and is to have for himſelf

himſelf whatever money he can procure for them beyond a ſtated ſum, is a competent witneſs to prove the contract between the ſeller and the buyer. *Benjamin* v. *Porteus.* 389

7. An executor in truſt, who has acted, may be examined as a witneſs. *Low* v. *Jolliffe.* 390

8. So alſo in this caſe, it was held that an executor who takes no beneficial intereſt, is a competent witneſs to prove the ſanity of the teſtator. And that if a perſon who is intereſted execute a ſurrender or releaſe of his intereſt, he may be examined as a witneſs, although the ſurrenderee, &c. refuſe to accept the ſurrender or releaſe. *Goodtitle, leſſee of Fowler* et al. v. *Welford.* 391

9. On the trial of an iſſue out of Chancery, it was diſputed, whether the name of one William Jones, ſubſcribed to a declaration of truſt, was genuine; and, to prove the handwriting forged, a witneſs was produced, who had frequently correſponded with Jones, but had never ſeen him write. *Gould* v. *Jones.* 392

10. Evidence of the general opinion of merchants, is allowed to be given to prove the cuſtom of merchants. *Camden* v. *Cowley.* 392

11. A creditor, having ſold his chance of recovering his debt, is a good witneſs to ſupport a commiſſion of bankrupt. *Granger* et al. *aſſignees of Lloyd*, v. *Furlong* et al. 392

12. A perſon liable to be contributory to a defendant, for damages recovered, is an incompetent witneſs for him. *French* v. *Backhouſe*, and *French* v. *Foulſion.* 393

13. A perſon is not a competent witneſs to impeach a ſecurity which he has given, though he is not intereſted in the event of the ſuit. *Walton* et. al. *aſſignees of Sutton*, v. *Shelley.* 394

14. But a perſon is a competent witneſs, unleſs he be intereſted in the event of the ſuit; and in ſome caſes, even an intereſted perſon is a competent witneſs from neceſſity. *Bent* v. *Baker* et al. 397

15. In an action againſt a maſter for the negligence of a ſervant, the latter is not a competent witneſs to diſprove the negligence, without a releaſe. *Green* v. *The New River Company.* 402

16. A corporation being lord of a manor, and having approved part of a common, and leaſed it, a freeman is not a competent witneſs to prove that a ſufficiency of common was left for the commoners: for the rent muſt be reſerved for the uſe of the corporation, and therefore the objection muſt prevail, however ſmall the intereſt may be in reality. *Burton* v. *Hinde.* 403

17. A like caſe of intereſt. *Trelawney* v. *Thomas.* 403

18. But an objection to the competency of witneſſes, diſcovered after a trial, is not a ſufficient ground, of itſelf, for granting a new trial, but it may have ſome weight with the Court, where the party applying appears to have merits. *Turner* et al. v. *Pearte.* 404

19. Witneſſes ought not to be admitted to give evidence againſt their own atteſtation. *Goodtitle* ex dim. *Alexander* et al. v. *Clayton.* 405

20. If a party wants the teſtimony of witneſſes, whom he cannot compel to attend, the Court may compel the other ſide to conſent, that the witneſſes may be examined upon interrogatories, and that the depoſitions thereon taken ſhall be read on the trial. *Moſtyn* v. *Fabrygas.* 406

21. A clerk of the poſt-office, accuſtomed to inſpect franks for the detection of forgeries, may be examined as a witneſs, to prove that the handwriting of an inſtrument is imitated, and not a natural hand, and alſo to prove that two writings, ſuſpected to be imitated hands, were written by the ſame perſon. *Goodtitle* ex dim. *Revett* v. *Braham.* 406

22. A witneſs may be aſked whether he has not been in the pillory for perjury. The anſwer cannot ſubject him to any puniſhment. *The King* v. *E. Edwards.* 407

*What may be received in Evidence.*

23. Close copies of proceedings in any court may be given in evidence in another court, without any but the common ſtamps. *Denn* ex dim. *Lucas* v. *Fulford.* 407

24. On a motion for a new trial, it was objected, that the evidence given at the former, to prove the reverſal of a decree of the court of Chancery, was inſufficient: 1ſt, Becauſe a copy of the reverſal only, and not the minute-book itſelf, was produced; 2dly, That if ſuch copy was admiſſible, yet it ought to have been upon ſtamps; 3dly, That the previous proceedings ought to have been ſhewn, whereas the decree only was produced. But the Court overruled the objections. *Jones* v. *Randall.* 408

25. It has been ſolemnly determined, that in a criminal proſecution you may give notice to the defendant to produce a paper in his poſſeſſion; and, in caſe he neglects to produce it, you may give other evidence of it. *The Att. Gen.* v. *Le Merchant.* 409

26. Evidence in aggravation may be given by affidavits, on bringing a defendant up to receive judgment. *The King* v. *Archer.* 410

27. A copy of an entry of an inſtitution, in the biſhop's inſtitution-book, is not evidence admiſſible and ſufficient to prove a preſentation by the patron to the living. For the preſentation under the hand and ſeal of the patron ought to be produced. *Tillard* v. *Shebbeare.* 411

28. An entry in the court-rolls of a manor, ſtating the mode of deſcent of lands in the manor, is admiſſible evidence of the mode of deſcent, though no inſtances of any perſon's having taken according to it be proved. *Roe* ex dim. *Beebee* v. *Parker.* 411

29. Where the right to the ſoil is in iſſue, entries written by the ſteward of a former owner, from whom title is derived, are admiſſible evidence, if the ſteward be dead. *Barry* v. *Bebbington.* 413

30. But entries made by a third perſon, deceaſed, in his books of receipts of rent from his tenant, for a particular eſtate, are not evidence to prove the identity of the land, in a cauſe between two others. *Outram* v. *Morewood.* 413

31. An allegation in an action for a falſe return to a *mandamus* of a cuſtom of payment, by the chapel-wardens of A. to the church-wardens of B. may be ſupported by evidence of a cuſtom of payment to officers acting only for the townſhip of B. not co-extenſive with the pariſh of B. but who have always been deſcribed as the churchwardens of B. Alſo an entry of the receipt of money by officers of a townſhip, from the officers of another townſhip, of a proportion of church rates, made in a pariſh book, is evidence to charge the latter officers with the ſame proportion in future. And another entry, explaining the proportions, made on the ſame page, is alſo admiſſible evidence. *Stead* et al. v. *Heaton* et al. 415

32. A Gazette is evidence of all acts of ſtate. *The King* v. *Daniel Holt.* 417

33. On the trial of an action for an illegal ſeizure, a judgment of acquittal in the Exchequer given in evidence, being a judgment *in rem*, is concluſive as to the queſtion of the illegality of the ſeizure, and precludes all reaſoning upon the conſtruction of a permit. *Cooke* v. *Sholl.* 419

34. A bill in Chancery is no evidence of the facts contained therein, not even of thoſe on which the prayer of relief is founded. *Doe* ex dim. *Bowerman* v. *Sybourn.* 419

35. A recovery in ejectment againſt the wife cannot be given in evidence, in an action againſt the huſband and wife for meſne profits. *Denn* v. *Joſhua White and wife.* 421

36. An inſtrument executed abroad, and witneſſed by a foreigner reſiding there, may be proved by evidence of the hand-writing of the witneſs, and of the contracting party, but not by the latter alone. *Barnes* v. *Trompowſky.* 421

37. In debt on bond, if one of the attesting witnesses be dead, and the other beyond the process of the Court, it is sufficient to prove the hand-writing of the witness that is dead. *Adam* et ux. v. *Kerr.* 422

38. Evidence of the day when a writ was actually sued out may be admitted, to obviate the fictitious relation of a declaration to the first day of the term, and thereby shew, that the cause of action arose subsequent to the bringing of the action. *Morris* v. *Pugh and Harwood.* 423

39. General declarations, or the answer of a parent in Chancery, are good evidence, after the death of such parent, to prove that a child was born before marriage; but not to prove that a child, born in wedlock, is a bastard. *Goodright* ex dim. *Stevens* v. *Moss* et al. 425

40. The defendant may give in evidence, the declarations or admissions of the plaintiff on the record, to defeat the action, although such plaintiff appear to be only a trustee for a third person. *Bauerman* et al. v. *Radenius.* 427

41. In establishing a title upon a pedigree, where it may be necessary to lay a branch of the family out of the case, it is sufficient to shew, that the person has not been heard of for many years, to put the opposite party upon proof that he still exists. *Rowe* v. *Hasland.* 430

42. On the trial of an action of trespass, the defendant may give evidence of title under the general issue. *J. Dodd* v. *Kyffin.* 430

43. In an action by an innocent indorsee, for a valuable consideration against the acceptor of a bill, in order to draw an inference, either that, at the time of his acceptance, he knew the name of the payee to be fictitious, or that he had given an authority to the drawer to draw the bill in question, by having given a general authority to him to draw bills on him, payable to fictitious persons, evidence is admissible of irregular and suspicious transactions and circumstances, relating to other bills drawn, payable to fictitious payees, though none of those transactions or circumstances have any apparent relation to the bill in question, and though none of them prove that any of those other bills were accepted with a knowledge that the payees mentioned in them were fictitious. *Gibson* v. *Hunter in error.* 431

44. Evidence of a house situate in the parish of M. will support an averment, in a declaration, of a house at S. S. being extraparochial, and both places usually going by the name of S. *Durbige* v. *Jakes.* 434

45. A witness may refresh his memory by any book or paper, if he can afterwards swear to the fact from his own recollection. But if he cannot swear to the fact from recollection any farther than as finding it entered in a book or paper, the original book or paper must be produced. *Doe* ex dim. *Church and Phillips* v. *Perkins and twenty-three other defendants.* 434

46. Parol evidence shall not be admitted to contradict an agreement in writing. *Meres* et al. v. *Ansell* et al. 435

47. In debt upon an award, and *nil debet* pleaded, the defendant cannot give in evidence partiality in the arbitrators in making the award; for the plea of *nil debet*, *primâ facie*, admits the award, and there never was an instance where this kind of evidence was permitted to be given; it would be to suffer evidence that affects third persons, the arbitrators themselves. *Wills* v. *Maccarmick.* 435

48. Matter of defence, arising after the action brought, may be given in evidence, if it happen before plea pleaded, in cases where the special matter may be given in evidence under the general issue. *Sullivan* v. *Montague.* 436

49. If a man has money in his hands, for which he will be equally answerable which ever way the question goes, he stands indifferent between the parties, and may be called as a witness. *Ilderton* v. *Atkinson.* 436

EX-

## EXCHANGE.

An exchange can only be between two parties; and if three mutually grant reciprocal eſtates to each other, viz. *A.* to *C.*, *B.* to *A.*, and *C.* to *A.*; and *A.* be evicted of the tenements granted by him to *B.*; *A.* cannot recover of *C.* the tenements granted to him by *A.* *The Provoſt of Eton college, and the ſame college*, v. *the Biſhop of Winchеſter, and Fontain, clerk.* 436

## EXCOMMUNICATION.

A writ *de excommunicato capiendo* ſtated, that the defendant was excommunicated in a cauſe of defamation and ſlander, merely ſpiritual; and held ſufficient.—If the ſentence of the greater, inſtead of the leſſer, excommunication be pronounced, it is only a ground of appeal: but this Court will not quaſh a writ *de excommunicato capiendo* for that objection.—It is not neceſſary that the defendant ſhould be reſident in the dioceſe at the time of the excommunication; it is ſufficient if he were there at the time of the citation. *The King* v. *Payton.* 443

## EXECUTION.

1. An allowance of a writ of error, on a judgment by *nil dicit*, is ſo entirely a ſuperſedeas to a ſubſequent writ of execution, and all proceedings againſt the bail, that all may be ſet aſide upon motion. *Dudley* v. *Stokes.* 335

2. If the defendant brings a writ of error, and the plaintiff bring another action on the judgment, and recover; he cannot ſue out execution on the ſecond judgment, till the writ of error be determined; and if he does, the Court will ſet it aſide. For as the plaintiff, in ſuch caſe, is reſtrained from ſuing out execution on the firſt judgment, if he were permitted to do ſo on the ſecond, it would be permitting him to do that indirectly, which cannot be done directly. *Benwell* v. *Black.* 335

3. But the Court will not in ſuch a caſe ſet aſide the judgment. *Taſwell* v. *Stone.* 336

4. The Court will not ſet aſide an execution ſued out before, but executed after, the allowance of a writ of error ſerved on the ſheriff and the party, if the plaintiff in error has not regularly put in bail. *Lane* et al. v. *Bacchus.* 336

5. The Court will not permit execution to be taken out, pending a writ of error in parliament, on the ground, that, after judgment recovered, the defendant removed the record into the Exchequer Chamber, where the judgment was affirmed, without any argument or objection taken to it by the defendant. *Harriſon* v. *Grote.* 339

6. On a judgment of above twenty years old, the Court gave leave to the adminiſtrator, *cum teſtamentum annexo*, of the plaintiff, to ſue out a *ſcire facias* to revive the ſame. But they ordered that no execution ſhould be taken out thereon, until either the ſheriff made an actual return of *ſcire feci*, or an affidavit was made and filed, of perſonal notice being ſerved on the defendant of the iſſuing ſuch *ſcire facias*. *Coxſgarne* v. *Fly.* 445

7. If a defendant has been once taken in execution, and afterwards diſcharged of the execution againſt his perſon, by the conſent of the plaintiff, he cannot be liable to any further execution upon it. *Vigers* v. *Aldrich.* 445

8. If the plaintiff conſent to diſcharge one of ſeveral defendants taken on a joint *ca. ſa.* he cannot afterwards retake him, or take any of the others. *Clark* v. *Clement and Engliſh.* 446

9. So where the defendant, having been charged in execution at the ſuit of the plaintiff, was diſcharged, on his undertaking to pay the debt at a future day; and on nonpayment at the day, the plaintiff ſued out a *fieri facias* againſt him. It was ordered that the latter writ might be ſet aſide. *Tanner* v. *Hague.* 446

10. A *teſtatum fieri facias* was ſet aſide for irregularity, on the ground that the plaintiff had not ſued out a *fi. fa.*

*fa.* to warrant the *teſtatum*. *Brand* v. *Mears*. 447

11. A *ca. ſa.* in a different county muſt be grounded on a *teſtatum*. *Alleu* v. *Allen*. 447

12. But the Court will not ſet aſide a *teſtatum capias ad ſatisfaciendum*, ſued out without an original *capias* to warrant it, though a writ of error has been brought, if a *capias ad ſatisfaciendum* have been afterwards ſued out, returned, and entered on the roll. *Milſtead* v. *Coppard*. 447

13. A *capias ad ſatisfaciendum*, made returnable at a day which falls out of term, is not void, but only liable to be ſet aſide upon motion for irregularity. *Campbell, eſq.* v. *Cumming*. 447

14. If a plaintiff recover a judgment againſt two defendants in B. R. and one of them bring a writ of error in *cam. ſcacc.* the plaintiff cannot charge the other defendant in execution till the record be remitted into the court of B. R. notwithſtanding the writ of error might have been quaſhed immediately, becauſe not brought by both defendants. *Laroche* v. *Waſbrough and Mailand*. 448

15. Where judgment is ſigned againſt a defendant in an inferior court of record, and he ſurrenders in diſcharge of his bail, but before he is charged in execution, is removed to the Fleet by *habeas corpus*. The court of C. B. will grant a *certiorari* to remove the record, in order to charge him in execution in the Fleet, by virtue of the ſtat. 19 *Geo.* 3. c. 70. ſ. 4. *Jordan* v. *Cole*. 448

16. The Court will diſcharge a defendant out of cuſtody who is in execution at the ſuit of a plaintiff, ſome time ſince deceaſed, on whoſe part no will has been proved, nor any adminiſtration granted, and whoſe family, on notice of a motion for the above purpoſe, decline interfering. *Broughton* v. *Martin*. 448

17. If a plaintiff cannot find ſufficient effects of the defendant to ſatisfy his judgment, the Court will order the ſheriff to retain, for the uſe of the plaintiff, money which he has levied in another action, at the ſuit of the defendant. *Armiſtead* v. *Philpot*. 449

18. The ſpecific goods of a teſtator in the hands of his executor, cannot be ſeized in execution, under a judgment againſt the executor in his own right, if the ſheriff have notice that the goods are not the proper goods of the executor. *Farr* et al. v. *Newman* et al. 449

19. But if an executrix uſe the goods of her teſtator as her own, and afterwards marry, and then treat them as the goods of her huſband, ſhe ſhall not be allowed to object to their being taken in execution for her huſband's debt. *Quick & ux.* v. *Sir W. Staines, kt. ſheriff*. 464

20. Where two writs of *fieri facias* againſt the ſame defendant are delivered to a ſheriff on different days, and no ſale is actually made of the defendant's goods, the firſt execution muſt have the priority, even though the ſeizure were firſt made under the ſubſequent execution. And if the perſon claiming under the ſecond execution pay the ſheriff the amount of the debt under the firſt execution for his ſecurity, the Court will not compel the ſheriff to refund that money on motion. *Hatchinſon* v. *Johnſton*. 466

21. If a warrant of attorney to confeſs judgment is given to a *bonâ fide* creditor, and judgment is immediately entered up, and execution levied, to defeat another creditor, entitled to execution: this preference is not fraudulent. *Holbird* v. *Anderſon*. 467

22. A *levari facias de bonis eccleſiaſticis* is a continuing execution, and a levy may be made under it, from time to time, after it is returnable, till the ſum indorſed be ſatisfied; but if it be actually returned, the authority of the biſhop is at an end. *Marſh, int.* et al. v. *Fawcett, clerk*. 468

23. An inquiſition made by the ſheriff's jury to aſcertain to whom the property of goods, taken under a *fi. fa.* belongs, though found in favour of *A.* is not admiſſible evidence in an action of trover for the goods, brought by

by *A.* againſt the ſheriff. *Latkow* v. *Eamer and Burnett, Sheriff of Middleſex.* 469

24. But the Court will not ſet aſide the inquiſition of a jury, ſummoned by the ſheriff, to enquire in whom the property of goods ſeized by him under a *fi. fa.* is veſted. *Roberts* v. *Thomas.* 470

25. The Court refuſed to grant an attachment againſt the ſheriff, becauſe he had returned to a writ of *venditioni exponas*, that part of the goods levied remained in his hands for want of purchaſers. *Leader* v. *Danvers.* 471

26. If, on an execution againſt one of two partners, the partnerſhip goods are taken and ſold, the ſheriff is to pay over to the other a ſhare of the produce, proportioned to his ſhare in the partnerſhip effects.—And the Court will direct it to be referred to the maſter, to take an account of the ſhare of the partnerſhip effects; and that the ſheriff ſhall pay a part of the money levied, equal to the amount of ſuch ſhare. *Eddie* v. *Davidſon.* 471

27. But if *A.* recover in tort againſt two defendants, and levy the whole damages on one, that one cannot recover a moiety againſt the other for his contribution; although it is otherwiſe in aſſumpſit. *Merryweather* v. *Nixan.* 471

28. Where a perſon, againſt whom a writ of *fi. fa.* is taken out, is in poſſeſſion of goods under a deed, which was given in conſideration of an antecedent debt, and a ſmall annuity payable from thenceforth, the ſheriff is warranted in returning *nulla bona*, if it appear that the memorial of ſuch annuity was not regiſtered according to the directions of the annuity-act, 17 *Geo.* 3. c. 26. ſ. 1. for in that caſe the deed is abſolutely void. *Croſley* v. *Arkwright.* 472

29. In an action of treſpaſs, the defendants juſtified under a *fi. fa*: and the Court held it neceſſary for the defendants, being ſheriffs' officers, upon the trial of this cauſe, to produce and prove a copy of the judgment upon which the ſaid writ of *fieri facias* iſſued. *Martyn* v. *Podger* et al. 474

30. Upon an elegit the ſheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c making, in value, a moiety of the whole. *Denn, leſſee of Taylor,* v. *the Earl of Abingdon.* 475

31. A plaintiff, who claims under an elegit ſubſequent to a leaſe granted to the tenant in poſſeſſion, cannot recover in ejectment, though he give the tenant notice that he does not mean to diſturb his poſſeſſion. *Doe* ex dim. *Da Coſta* v. *Wharton and Dixon.* 476

32. If it appear by the ſheriff's return to a writ of execution that greater fees have been taken for the levy than are allowed by 29 *Eliz.* c. 4. the ſheriff is liable to an action on the ſtatute for treble damages at the ſuit of the party grieved; and under that ſtatute the ſheriff cannot make any other charge except for the poundage. *Woodgate* v. *Knatchbull.* 477

33. Judgment on a warrant of attorney, entered in Eaſter vacation againſt a defendant, who died in Eaſter term, is good: but execution cannot be ſued out upon it, until it be revived againſt his repreſentative by *ſcire facias*. *Heapy* v. *Paris.* 480

34. A judgment, ſigned in any part of the term, or the ſubſequent vacation, relates back to the firſt day of the term, notwithſtanding the death of the defendant before judgment actually ſigned; and an execution, againſt the goods of the defendant, may be taken out upon it, teſted the firſt day of the term. *Bragner* v. *Joſeph Langmead.* 481

## EXECUTORS AND ADMINISTRATORS.

1. It is not decided, whether an executor, who has formally renounced, can afterwards retract ſuch renunciation before probate is granted to his co-executor, and obtain probate himſelf. *Rex* v. *Sir Edward Simpſon.* 482.

2. Payment of money to an executor,

tor, who has obtained probate of a forged will, is a diſcharge to the debtor of the inteſtate, notwithſtanding the probate be afterwards declared null, and adminiſtration be granted to the inteſtate's next of kin; and a probate, as long as it remains unrepealed, cannot be impeached in the temporal courts. *Allen, adminiſtrator of Thomas Prieſtman, otherwiſe Handy*, v. *Dundas*. 484

3. If the effects of an inteſtate are veſted in the crown by forfeiture, and letters of adminiſtration be granted to *A.* in conſequence of a warrant from the king, and they run in the uſual form, viz. "To pay debts," &c. but with this additional clauſe, "For the uſe and benefit of his majeſty," *A.* ſhall be anſwerable as adminiſtrator for the debts of the inteſtate, and ſhall not be permitted to give evidence tending to queſtion the validity of the letters of adminiſtration. *Megit* v. *Johnſon* et al. *adminiſtrators of Lowe*, 487.

4. An executor in truſt, who has acted, may be examined as a witneſs. *Law* v. *Jolliffe*. 390

5. So alſo in this caſe, it was held that an executor who takes no beneficial intereſt, is a competent witneſs to prove the ſanity of the teſtator. *Goodtitle, leſſee of Fowler*, et al. v. *Welford*. 391

6. If *A.* the ſervant of *B.* ſell the goods of *C.* an inteſtate, as well after his death as before, though by the orders of *C.* and pay the money ariſing therefrom into the hands of *B.*—*B.* may be ſued as an *executor de ſon tort*. Alſo, if a perſon having intermeddled in an inteſtate's affairs, has money belonging to the inteſtate in his hands at the time when an action is brought againſt him as executor, for a debt due from the inteſtate, he is liable as an executor *de ſon tort*. And what acts make a perſon liable as executor *de ſon tort* is a matter of law for the judge to decide; it is for the jury to ſay, whether the acts are ſufficiently proved. *Padget* et al. v. *Prieſt and Porter*. 490

7. If a creditor take an abſolute bill of ſale of the goods of his debtor, but agree to leave them in his poſſeſſion for a limited time, and in the mean time the debtor die, whereupon the creditor takes and ſells the goods, he will be liable to be ſued as executor *de ſon tort* for the debts of the deceaſed; for the debtor's continuing in poſſeſſion is inconſiſtent with the deed, and fraudulent againſt creditors. It being a general rule in the tranſfer of chattels, that the poſſeſſion muſt accompany and follow the deed.—Therefore, where the conveyance is abſolute, the poſſeſſion muſt be delivered immediately; where it is conditional, it will not be rendered void by the vendor's continuing in poſſeſſion till the condition be performed. *Edwards* v. *Harben, executor of Tempeſt Mercer*. 492

8. An executor *de ſon tort* cannot diſcharge himſelf from an action brought by a creditor, by delivering over the effects to the rightful executor after the action is brought. Nor can he retain for his own debt of a higher nature, by conſent of the rightful executor given after the bringing of the action by the creditor. *Curtis* et al. v. *Vernon, executor of Palmer*. 495, 496

9 If an arbitrator, under a reference between *A.* and *B.* adminiſtrator, award that *B.* ſhall pay a certain ſum as the amount of *A.*'s demand, *B.* cannot afterwards object that he had no aſſets, but may be attached for non-payment. *Worthington* et al. v. *Barlow, adminiſtratrix*. 499

10. A power of attorney, given by an executrix to act for her as executrix, does not authorize the accepting of bills of exchange to charge her in her own right, though for debts due from her teſtator. *Gardner* v. *Baillie*. 499

11. But where it appeared that the executrix had admitted that a bill which had been accepted by Thornton, with the knowledge of the executrix, was for a juſt debt, and that it ought to be paid; this was held to be ſufficient evidence of an authority given, to accept that particular bill, without

without reſorting to the letter of attorney. *Howard* et al. v. *Baillie, executrix of Baillie.* 501

12. If an action be brought againſt an adminiſtrator on promiſes of the inteſtate, and the declaration is on an *inſimul computaſſent* with the adminiſtrator, as ſuch, of money due from the inteſtate: this does not make him perſonally liable. *Secar* v. *Atkinſon, adminiſtratrix of Atkinſon.* 506

13. An executor cannot be charged as ſuch, either for money had and received by him, money lent to him, or on an account ſtated of money due from him as ſuch; thoſe charges making him perſonally liable: alſo the wife can only join with the huſband in bringing an action, where ſhe is the meritorious cauſe of action. And where the cauſe of demurrer to a declaration is, that the counts are improperly joined, the plaintiff cannot enter a *nolle proſequi* as to ſome, and leave the others remaining, *Roſe and Mercy his wife* v. *Bowler and Read, executors of Bowler.* 507

14. Where the leſſee of lands dies before the expiration of the term, and his adminiſtrator continues in poſſeſſion during the remainder and after the expiration of it; a diſtreſs may be taken for rent due for the whole term. *Braithwaite* v. *Cookſey.* 508

15. On a covenant that, in conſideration of a weekly payment to *A.* and his executors for a term certain, *A.* ſhall not exerciſe a particular trade; the executors of *A.* are not bound to abſtain from exerciſing it. *Cooke, adminiſtratrix*, v. *Colcraft.* 509

16. If a debtor make his creditor and another perſon executors, and the creditor neither proves the will nor acts as executor, he may maintain an action againſt the other for his demand on the teſtator. *A. and J. Rawlinſon* v. *Shaw, executor of Woodhouſe.* 510

17. A count, on a promiſe made by the defendant, as adminiſtrator, to pay money received by him, as ſuch, to the plaintiff's uſe, cannot be joined with other counts, on promiſes made by the inteſtate. *Jennings* v. *Newman, adminiſtratrix.* 511

18. A *ſcire facias*, on a judgment, muſt purſue the terms of the judgment: and, therefore, where an executor pleads *plenè adminiſtravit*, and the plaintiff does not take iſſue on it, but takes a judgment of aſſets, *quando acciderint*, the *ſcire facias*, on that judgment, muſt only pray execution of ſuch aſſets as have come to the executor's hands ſince the former judgment; and if it pray execution of aſſets generally, without confining it to that time, it cannot be ſupported. *Mara* v. *Quin, executrix.* 512

19. A creditor has a right, *ex debito juſtitiæ*, as well as the next of kin, to ſue upon an adminiſtration bond, in the name of the archbiſhop, or his ordinary. *The archbiſhop of Canterbury* v. *Houſe.* 515

20. A marriage covenant, with a truſtee for ſecuring proviſion for the wife, may be given in evidence by her, on a plea of *plenè adminiſtravit*, in an action brought againſt her as executrix. And ſhe may retain, out of the perſonal aſſets, ſo much as is equal to the damages ſhe has ſuſtained by the breach of ſuch covenant. *Loane* v. *Caſey, executrix.* 516

21. And a retainer may either be given in evidence, or pleaded. *Plumer, Sp.* v. *William Marchant, adminiſtrator of Peter Marchant.* 517

22. In debt, on bond, againſt an adminiſtrator; to which he pleaded a bond debt due to himſelf and retainer: it was held not neceſſary to aver in the plea that ſuch bond was given to himſelf for a juſt and true debt; nor to ſet out the letters of adminiſtration: for the plaintiff, by his declaration, admits him to be a lawful adminiſtrator. *Picard* v. *Brown, adminiſtrator of Bradſhaw.* 518

23. If an executor plead (to an action on bond) payment; and omit to plead *plenè adminiſtravit*, and a verdict be given againſt him on ſuch plea; it operates as an admiſſion of aſſets in an action founded on that judgment, ſuggeſting a *devaſtavit*.

*Erving*

*Erving* et al. v. *executors of J. Erving*, v. *Peters*. 519

24. If an executor or adminiſtrator plead *plenè adminiſtravit præter* a certain ſum, and afterwards to another action brought in the ſame term plead alſo *plenè adminiſtravit præter* the ſame ſum, and as to that ſum that he had confeſſed it in the other action, ſuch plea is a good bar. *Waters* v. *Ogden* et al. *adminiſtrators*. 524

25. To aſſumpſit on a bill of exchange by the plaintiffs, as indorſees, againſt the defendant as executrix of the acceptor, the defendant, after pleading four judgments recovered againſt her as executrix, pleaded a bond of indemnity given by the teſtator, and held good. *Cox* et al. v. *A. Joſeph, executrix of T. Joſeph*. 524

26. To a plea of *plenè adminiſtravit præter*, the plaintiff may pray judgment of the ſum admitted by the plea, and reply aſſets *ultra*. *Lockyer, eſq.* v. *Coward* et al. *executors of Frampton, widow, executrix of Frampton*. 525

27. On a plea of judgment recovered, and *plenè adminiſtravit præter*: replication that the defendants had and hath aſſets: if aſſets are proved in the defendant's hands, he may give evidence of the payment of other debts, with thoſe aſſets previous to the action brought. *Smedley* v. *Hill, executrix*. 526

28. An executor, having pleaded *non aſſumpſit*, and a ſpecialty debt ſufficient to cover the aſſets, was permitted to withdraw the firſt plea, on payment of the coſts occaſioned only by that plea. *Dearne* v. *Grimp* et al. *executors*. 527

29. The plaintiff in his replication ſhould rely on the ſums pleaded to cover the aſſets, not being the true debts; and that the judgments were kept on foot *per fraudem*, to prevent the plaintiff's recovering; and not reply *per fraudem* generally. *Peaſe* v. *Naylor and wife, executrix of M. Hall*. 527

30. A plea of judgment recovered on a ſimple contract, pleaded by an adminiſtrator to debt on bond, muſt aver that ſuch recovery was had before notice of the bond debt. *Sawyer* v. *Mercer, adminiſtrator*. 528

31. An outſtanding judgment againſt a teſtator or inteſtate, not docketted according to the direction of 4 & 5 *W. & M.* c. 20. cannot be pleaded by an executor or adminiſtrator to an action on ſimple contract. *Steel* v. *Rorke, adminiſtratrix*. 528

32. And on a plea of *plenè adminiſtravit*, to debt on a judgment againſt the inteſtate not docketted, the defendant may give in evidence payment of bond and other ſpecialty debts, which exhauſted all the aſſets. *Hickey* v. *Hayter*. 529

33. If an action of *aſſumpſit* is brought againſt an inhabitant of Middleſex by an adminiſtrator, and the damages found are under 40s. the defendant is entitled, under the ſtat. 23 *Geo.* 2. c. 33. by which, in ſuch caſes, the plaintiff is not to have his coſts, but to pay double coſts to the defendant, to have that ſuggeſted on the roll in the ſame manner as if the plaintiff had ſued in his own right; for there is no exception as to adminiſtrators in the ſtatute. *Waſe, adminiſtrator*, v. *Wyburd*. 531

34. But if an executor or adminiſtrator be ſued, it is otherwiſe. *Ailway* v. *Burrows*. 531

35. The Court ſet aſide a judgment and warrant of attorney given to ſecure an annuity for a defect in the memorial; but it being obſerved that as this was the caſe of an executor who could not be aware of the nature of the deeds, it would be hard to oblige him to pay coſts.—The Court being of that opinion, made the rule abſolute without coſts. *Dickenſon, executor*, v. *Boyne*. 531

36. In this caſe, it was decided that if an executor declare on a trover and converſion in the teſtator's life-time, and alſo on a trover and converſion after his death, and be nonſuited at the trial, he is not liable to pay coſts. *Cockerill, and wife, executrix of Moody*, v. *Kynaſton*. 531

37. But

37. But, in this case, where the plaintiffs declared in trover for the goods of the intestate, of which the wife as administratrix was possessed, and which came to the defendant's hands, by whom they were converted, &c. The plaintiffs being non-suited at the trial, the defendant obtained a rule for referring it to the master to tax the costs for him, which rule was made absolute without any cause being shewn. Afterwards it was moved to discharge that rule, on the ground that the administratrix, having sued of necessity in that character (because it appeared at the trial, that the goods had never come to her possession since the intestate's death, though the conversion was in her time), was not liable to pay costs. Rule to discharge the former rule discharged. *Bollard, and wife, administratrix*, v. *Spencer*. 533

38. If an executor sue as executor for money received by the defendant since the testator's death to the plaintiff's use, and fail, he is liable to pay costs. *Goldthwayte, and wife, executrix*, v. *Petrie*. 533

39. An executor, on discontinuing his action, shall pay costs, where he has knowingly brought it wrong. *Harris* v. *Jones*. 534

40. But if the action be clearly brought by mistake, he shall have leave to discontinue, without payment of costs. *Bennet* v. *Coker*. 534

41. An executor shall pay the costs of a *non pros*, for not declaring in due time. *Hawes, executrix*, v. *Saunders*. 535

42. So also in this case, it was held, that executors and administrators, plaintiffs, are liable to pay the costs of a *non pros*. *Higgs, administratrix*, v. *Warry*. 535

43. Executors are not liable to costs on a judgment as in case of a nonsuit, under the statute 14 *Geo*. 2. c. 17. *Booth* et al. *executors*, v. *Holt*. 536

44. Executors and administrators are liable to costs in error in cases where they would be liable in the original action. *Williams* et al. *executors of Braham*, v. *Riley*. 536

45. Judgment on a warrant of attorney, entered in Easter vacation against a defendant, who died in Easter term, is good: but execution cannot be sued out upon it, until it be revived against his representative by *scire facias*. *Heapy* v. *Parris*. 480

46. A judgment signed in any part of the term, or the subsequent vacation, relates back to the first day of the term, notwithstanding the death of the defendant before judgment actually signed; and an execution against the goods of the defendant may be taken out upon it, tested the first day of the term. *Bragner* v. *Joseph Langmead*. 481

47. The administratrix of an executor cannot sue for the double value of lands held over after notice to quit under a demise from the testator, contrary to 4 *G*. 2. c. 38. without taking out administration *de bonis non*; even though the tenant has attorned to her. *Tingrey, widow*, v. *Brown*. 537

## EXTENT.

1. A *fieri facias* upon a judgment recovered by a subject, though not completely executed, shall be preferred to the king's extent, sued out posterior to the judgment. *Uppom* v. *Sumner*. 538

2. And the like was determined in this case. *Rorke* v. *Dayrell*. 540

## FACTOR.

1. When, and in what cases, an assignment of a bill of lading by a factor, transfers the property of the goods before their arrival. *Wright and Rathbone, assignees of Scott*, v. *Campbell and Hayes*. 544

2. Every consignment to two factors jointly, imports a consent by the consignor for them to trust one another, but both are answerable and accountable for the whole. *Godfrey* v. *Saunders*. 545

3. A bill drawn on a factor, and payable out of the produce of goods in his hands, after discharging prior acceptances, and accepted by him generally, is chargeable on him, notwithstanding any balance then due to him in a running account with his principal. *Maber* v. *Massias*. 545

4. If a factor pledge the goods of his

his principal, the latter may recover the value of them in trover againſt the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee. *Daubigny and others* v. *Duval and another.* 546

5. A factor who becomes ſurety for his principal, has a lien on the price of the goods ſold by him, for his principal, to the amount of the ſum for which he has ſo become ſurety. *Drinkwater* et al. *aſſignees of Dowding*, v. *Goodwin.* 547

6. If a factor, who ſells under a *del credere* commiſſion, ſells goods as his own, and the buyer knows nothing of any principal, the buyer may ſet off any demand he may have on the factor, againſt the demand for the goods made by the principal. *George* v. *Claget*, et al. 546

7. A factor who ſells for the plaintiff, and is to have ſo much in the pound for commiſſion, is a good witneſs to prove the contract and ſale; for as a factor he is concerned both for the vendor and vendee: he is a mere go-between, and may be a good witneſs for either of them. *Dixon* et al. v. *Cooper.* 389

8. So alſo a perſon who is employed to ſell goods, and is to have for himſelf whatever money he can procure for them beyond a ſtated ſum, is a competent witneſs to prove the contract between the ſeller and the buyer. *Benjamin* v. *Porteus.* 389

## FALSE PRETENCES.

1. To conſtitute an offence within the ſtatute 30 *Geo.* 2. c. 24. money or goods muſt be obtained by the defendants by a falſe pretence, with an intent to defraud: and it is no objection that the pretence conſiſts in a repreſentation as of ſome tranſaction to take place at a future time. *John Young, S. Randall, W. Mullins, and J. Oſmer*, v. *The King.* 549

2. Where the pretence is conveyed by words ſpoken by one defendant in the preſence of others, who are acting in concert together, they may be all indicted jointly. *Ibid.*

3. And it is no objection in arreſt of judgment, that the indictment contains ſeveral charges of the ſame nature in the different counts. *Ibid.*

4. An indictment charging the defendant with obtaining money by falſe pretences is inſufficient, if it do not ſhew what the falſe pretences were; and if the defendant be convicted on it, the Court will reverſe the judgment, upon a writ of error. *The King* v. *Thomas Maſen.* 553

## FEE-FARM.

1. On a grant of a fee-farm rent, "without any deduction, defalcation, "or abatement, for, or in any reſpect "whatſoever," the grantee is entitled to receive the full rent without deducting the land-tax.

2. Alſo, diſtreſs is not incident to a fee-farm rent as ſuch, except the caſe is brought within the ſtatute of 4 *Geo.* 2. c. 28. ſ. 5. *Bradbury* v. *Wright.* 554

## FELONY.

1. Horſes are cattle within the black act. *The King* v. *John Paty.* 557

2. Offences againſt the black act may be proſecuted in any county, at the option of the proſecutor. *The King* v. *Richard Mortis.* 557

3. The defendant had been committed under the 2 *Geo.* 3. c. 28. for receiving part of a cargo belonging to a veſſel in the Thames, knowing the ſame to be ſtolen. And being now brought up by *habeas corpus*, it was moved that he might be bailed. He was remanded. *The King* v. *Wyer.* 558

4. The defendant having been committed for that "with force and arms, he made an aſſault on the proſecutor, with intent feloniouſly to ſteal, take, and carry away from the perſon," &c. was, on motion, diſcharged on bail, becauſe the commitment did not ſpecify any offence within the ſtat. 7 *G.* 2. c. 21. on which he was committed. *The King* v. *Remnant.* 558

5. It was moved on behalf of Richard Horner, and two others, who had been removed by *habeas corpus*, that they might be admitted to bail. The commitment ſtated, that the priſoners were charged "with defrauding and "robbing

" robbing John Cunnett, of Dunsford, yeoman, at Crediton, in the county of Devon, under divers falſe pretences, of the ſum of nineteen guineas in gold, and a ten-pound bank of England bill."—Motion denied. *Rex* v. *Horner*. 559

6. In an indictment for uttering a forged bank-note, the words, 'purporting to be a bank-note,' mean, that the note, upon the face of it, appears to be a bank-note, and the want of ſuch appearance cannot be ſupplied, ſo as to ſupport the indictment, by any repreſentations of the party when he diſpoſed of it. *The King* v. *Jones*, alias *Thomas Thorowgood*. 560

7. The ſtat. 18 *Geo.* 3. c. 19. which enables the Court, in certain caſes, to make an order on the treaſurer of the "county, riding, or diviſion," where the offence was committed, to pay the proſecutor and his witneſſes their expences, extends to inferior diſtricts, having juriſdiction to try felons, and raiſing their own rates ſimilar to the county rates. *The King* v. *John Myers*. 561

## FEOFFMENT.

A ſecret feoffment under a naked poſſeſſion is not ſufficient to ſupport a common recovery by tenant in tail in remainder. *Doe* ex dim. *Atkyns* v. *Horde* et al. 581

## FINES AND RECOVERIES.

1. A fine taken in Scotland, and regular in every reſpect, except that it was not taken in the preſence of an attorney of any of the courts of Weſtminſter-hall, was allowed by the Court on an affidavit made by Seton, the demandant, that there was no ſuch attorney reſident in or near the place where it was taken. *Seton* v. *Sinclair*. 563

2. A fine may be acknowledged *de bene eſſe*, by a *feme covert* without her huſband, where her huſband has previouſly acknowledged it, and is abroad. *Moreau's caſe*. 563

3. It ſeems that a tenant in tail having committed a felony may, before conviction, bar the next heir in tail by a fine. *Stevens* v. *Winning*. 563

4. If a fine is levied by tenant for life, remainder-man in tail, and reverſioner in fee, a declaration of uſes by the tenant for life and remainder-man in tail, does not bind the reverſioner, without his privity. And when no uſes are declared, parol evidence may rebut the reſulting uſe to the conuſor in favour of the conuſee, without any written declaration of the uſes in his favour. *Roe, leſſee of Roach, widow*, v. *Popham*. 564

5. When once the five years allowed to an infant to make an entry, for the purpoſe of avoiding a fine, begin, the time continues to run, notwithſtanding any ſubſequent diſability. *Doe* ex dim. *Count Duroure* v. *Jones*. 566

6. The exception in the firſt branch of the ſtatute, 4 *Hen.* 7. and the proviſo at the end of it, are to be taken together; and being ſo taken, they do not amount ſo much to an exception as a ſaving, the true meaning of which is, that the rights of thoſe perſons who are under diſabilities, and of their heirs, are ſaved as long as the diſabilities continue, and five years after, but no longer. *Dillon* v. *Leman* et al. 567

7. Where a tenant for life levies a fine, though it is no bar to thoſe in remainder, yet the remainder-man muſt make an entry before he can maintain an ejectment. *Doe* ex dim. *Lee Compere* v. *Hicks* et al. 568

8. And as an actual entry is neceſſary to avoid a fine, the party ſo avoiding it cannot recover the meſne profits that accrued before ſuch entry. *Lee Compere* v. *Hicks* et al. 568

9. A bill filed in Chancery is no claim to avoid a fine. *Glumdalclitch on the demiſe of Naunton* v. *Leman*. 571

10. The return of the writ of covenant in a fine was refuſed to be amended, the deed to lead the uſes being colourable, and the fine taken from a dying woman. *Lindſay* v. *Gray and wife*. 571

11. The term of a fine is not amendable. *Heath* v. *Sir John Eardley Wilmot* et al. 572

12. Nor will the Court amend a fine by a change of the chriſtian name of a party. *Robert Dixon* v. *Lawſon* et ux. 572

13. An eſtate tail with reverſion to the king in fee, muſt be clearly of the gift or proviſion of the king, to be protected by ſtat. 34 *Hen.* 8. c. 20. from being barred by a common recovery. *Perkins* ex dim. *of Vowe*, v. *Sewell.* 572

14. Lands will paſs by a will made before a recovery is completely ſuffered, if the will be after the deed to lead the uſes. *Selwyn* v. *Selwyn.* 579

15. Where the deviſor had three ſiſters (one of whom was married), and deviſed land to truſtees and their heirs, "In truſt that they and their heirs ſhould, during the life of the married ſiſter, receive the rents and profits, and pay the ſame to the two other ſiſters, their heirs and aſſigns; and from and after the deceaſe of the huſband, in caſe the married ſiſter ſhould be then living, to the uſe of the three ſiſters ſeverally in thirds for life, with ſeveral remainders to their firſt and other ſons, in tail; remainder to the daughters as tenants in common, with croſs remainders between the ſiſters on default of iſſue of their bodies reſpectively; remainder over in tail." The condition of the married ſiſter's ſurviving her huſband is not annexed to any of the limitations ſubſequent to the limitation of the life eſtate. And the remainder-man in tail can alone make a good tenant to the *præcipe* upon the death of the three ſiſters without iſſue, notwithſtanding the huſband be then living. *Horton* v. *Whittaker.* 127

16. In this caſe, the intention of teſtator was to prevent a common recovery being ſuffered; but the Court ſaid, where a teſtator intends that which by law he cannot do, the law will not allow his intention to take effect. *Driver* ex dim. *Edgar* v. *Edgar.* 574

17. A common recovery ſuffered by a remainder-man in tail is not ſufficient, unleſs the life eſtate appear to have been duly ſurrendered, in order to make a perfect tenant to the *præcipe*, and ſuch ſurrender cannot be preſumed. *Goodtitle* ex dimiſſ. *Bridges* et al. v. *Duke of Chandos.* 575

18. A ſecret feoffment under a naked poſſeſſion is not ſufficient to ſupport a common recovery by tenant in tail in remainder. *Doe* ex dim. *Atkyns* v. *Horde.* 581

19. *A.* tenant for years, remainder to *B.* for life, remainder to the firſt and other ſons of *B.* in tail, remainder to the heirs of *B.* in tail; *A.* and *B.* join in a leaſe and releaſe to make a tenant to the *præcipe*, and ſuffer a recovery; held that the eſtate-tail limited to the ſons of *B.* is not diveſted by the recovery, nor is there any forfeiture of the reſpective eſtates of *A.* and *B.* *Smith* ex dim. *Richards* v. *Clifford.* 589

20. If a tenant in tail by purchaſe under a ſettlement made by his anceſtor *ex parte maternâ* ſuffer a recovery, and declare the uſes to himſelf in fee, he takes the fee as a purchaſer deſcendible to his paternal heirs. And if a tenant in tail by deſcent from the maternal anceſtor ſuffer a recovery, and declare the uſes to himſelf in fee, the eſtate will deſcend to the heirs *ex parte maternâ*, whether it be copyhold or freehold. *Roe* ex dim. *Crow* v. *J. Baldwere and Elizabeth his wife, and J. Ancell Bellamy.* 592

21. A tenant in tail may by leaſe and releaſe, or by bargain and ſale, paſs a baſe fee; a defeaſible eſtate to the releaſee or bargainee, voidable by the iſſue in tail. *Goodright* ex dim. *Tyrrel, vid.* v. *Mead and Shilſon.* 599

22. Though the deeds to make a tenant to the *præcipe* be not executed till after the execution of the writ of *ſeiſin*, ſtill the recovery will be good by the 14 *Geo.* 2. c. 20. if the deeds be executed in the term in which the recovery is ſuffered. *Goodright* ex dim. *of Burton* v. *Rigby.* 600

23. On a writ of error from a judgment on *ſcire facias*, in the court of King's

King's Bench in Ireland, brought to reverſe four common recoveries in the court of Common Pleas, it was objected that the deſcriptions were bad; firſt, "All thoſe, the Caſtle Town, and lands of, &c. containing by eſtimation ſo many acres," without ſetting out the quality of the lands, as, meadow, paſture, wood, and ſo forth; that a recovery would not lie of a town, and that ſo many acres by eſtimation was uncertain. Objection 2d, That others were deſcribed thus, "all that part of the town and lands, &c. now or late in the tenure of ſuch and ſuch a perſon, which was vague and uncertain." Objection 3d, That two parcels were deſcribed as "containing a plough-land," which was alſo vague and uncertain. In reſpect of the premiſes in the city, it was objected, that they were all demanded by the deſcription of "meſſuage or tenement," which was uncertain, and alſo as being ſaid to be "now or late in the tenure, &c." But all theſe objections were overruled. *Maſſey* v. *Rice.* 602

24. On reading the deed to lead the uſes, and a fine levied in conſequence of the ſame, the common recovery ſuffered in this caſe was amended by changing Ann, the wife of Henry Goodwin, to Elizabeth. *Mayre* v. *Coulthard.* 605

25. Alſo a recovery was in this caſe amended by a more accurate deſcription of the vill and county from the deed to lead the uſes. *Watſon* v. *Cox.* 605

26. It is no objection to the paſſing a common recovery, that the order of the names of the vouchees in the *præcipe* at bar and the *dedimus* varies. *Lang* v. *Woodhouſe.* 605

27. The Court will give leave to amend a miſtake in the writ of entry in a common recovery. *John Norman Croſs* v. *William Grey.* 606

28. But no amendment can be allowed of a recovery, where the recovery as it ſtands has lands of the vouchee to operate upon. *Aſton* et al. v. *Baldwin.* 607

29. If the return of a writ of ſummons in a common recovery be on Sunday, and the vouchee dies on that day, the recovery is bad. *Swann* v. *Broome.* 607

30. The Court will not enlarge the return of a writ of ſummons in a common recovery, ſo as to make a term intervene between the teſte and the return. *Barnard* v. *Woodcock.* 813

31. A fine cannot be amended by increaſing the number of acres, the deed of uſes being general, and the intent only proved by affidavit. *Powel* et al. v. *Peach.* 614

32. The like motion was made to enlarge the return of the writ of ſummons, as in the laſt caſe of Barnard and Woodcock, and received the ſame denial from the Court. *Gibbons* v. *Stevenſon.* 615

33. In caſe in nature of deceit, to reverſe a recovery of lands in ancient demeſne, all the parties to the recovery muſt be before the Court. *The King* v. *Hadlow.* 615

## FISH.

On a conviction on ſtat. 5 *Geo.* 3. c. 14. for preſervation of fiſh, it ſhould appear thereon, that the fiſhing was without the conſent of the owner. *Rex* v. *Corden.* 616

## FORGERY.

Payment of money to an executor, who has obtained probate of a forged will, is a diſcharge to the debtor of the inteſtate, notwithſtanding the probate be afterwards declared null, and adminiſtration be granted to the inteſtate's next of kin; and a probate, as long as it remains unrepealed, cannot be impeached in the temporal courts. *Allen, adminiſtrator of Thomas Prieſtman, otherwiſe Handy,* v. *Dundas.* 484

## FOREIGN LAWS.

1. Whether an action can be ſupported in England, on a contract which is void by the law of England, but valid by the law of the country where the matter was tranſacted, is a great queſtion,

queſtion, and has not yet been determined. *Robinſon* v. *Bland.* 617

2. The way of knowing foreign laws is, by admitting them to be proved as facts, and the Court muſt aſſiſt the jury in aſcertaining what the law is. *Moſtyn* v. *Fabrigas.* 618

3. And every action tried here, upon a contract made abroad, muſt be tried by the law of England. *Holman* v. *Johnſon.* 618

FRAUD and FRAUDULENT CONVEYANCE.

1. A ſettlement by tenant in fee for the maintenance of herſelf and children for life, to raiſe portions for younger children, and the ſurplus to her heir at law, ſhe having then many ſons and daughters, is a voluntary ſettlement, and void againſt purchaſers, under 27 *Eliz.* And a leſſee at rack-rent is a purchaſer for a valuable conſideration. *Goodright* ex dim. *Humphreys* et al. v. *Moſes.* 618

2. If a warrant of attorney to confeſs judgment is given to a *bonâ fide* creditor, and judgment is immediately entered up, and execution levied, to defeat another creditor, entitled to execution; this preference is not fraudulent. *Holbird* v. *Anderſon.* 467

3. If a creditor take an abſolute bill of ſale of the goods of his debtor, but agree to leave them in his poſſeſſion for a limited time, and in the mean time the debtor die, whereupon the creditor takes and ſells the goods, he will be liable to be ſued as executor *de ſon tort* for the debts of the deceaſed; for the debtor's continuing in poſſeſſion is inconſiſtent with the deed, and fraudulent againſt creditors. It being a general rule in the transfer of chattels, that the poſſeſſion muſt accompany and follow the deed. *Edwards* v. *Harben, executor of Tempeſt Mercer.* 492

4. What ſhall be a good conſideration to ſupport a ſettlement by a parent, by way of remainder to the younger brothers of the intended huſband, eldeſt ſon of that parent. *Roe* ex dim. *Hamerton* v. *Mitton.* 620

5. If a perſon, having ſeveral creditors, convey by deed the legal intereſt in part of his real and perſonal property to a truſtee, in truſt (after deducting the expences reſpecting the truſt), out of the rents and profits, to pay half the ſurplus to the grantor for his own uſe, and the reſidue among certain creditors named in a ſchedule, without any intention of fraudulently delaying the creditors not named in the ſchedule in obtaining their demands, the deed is good in law. *Eſtwick* v. *Caillaud.* 622

6. A marriage ſettlement made in conſideration of a large portion with the wife, by which the houſehold goods belonging to Lord Montfort, at his lordſhip's houſe in town, and which were very minutely particulariſed in a ſchedule annexed to the ſettlement, were all conveyed to the plaintiffs, as truſtees, for the uſe of Lord Montfort for life; remainder to Lady Montfort for life, remainder to the firſt and other ſons of the marriage in ſtrict ſettlement; was held good. *Cadogan* et al. v. *Kennet.* 624

7. To make a voluntary ſettlement void againſt a ſubſequent purchaſer, within the ſtat. 27 *Eliz.* c. 4. it muſt be covinous and fraudulent, not voluntarily only. *Doe* ex dim. *Watſon* et al. v. *Routledge.* 627

FREE BENCH.

1. A leaſe for years, by a copyholder, with the licenſe of the lord, where the widow, by cuſtom, would be entitled to her free bench, if the copyholder had died ſeiſed, defeats the widow of her free bench. *Saliſbury* ex dim. *Cooke* v. *Hurd.* 277

2. But the widow is entitled to her free bench in copyhold lands, ſurrendered to the uſe of the huſband, though he may never have been admitted thereto. *Vaughan* ex dim. *Atkyns, eſq.* v. *Atkyns, widow.* 278

GAME.

1. A life-eſtate of leſs than 150l. per annum is not a qualification to kill

kill game. *Lowndes, esq.* v. *Lewis, clerk.* 633

2. An equitable as well as legal estate gives a qualification under the game laws: but the clear value of the necessary estate, means the value, clear at least, of all mortgages or incumbrances, created by the owner, or those under whom he claims. *Wetherell* v. *Hall.* 634

3. A diploma conferring the degree of doctor of physic, granted by either of the universities in Scotland, does not give a qualification to kill game under 22 and 23 *Car.* 2. c. 25. Also an esquire, or other person of higher degree, as such, is not qualified under that act; though the son of an esquire, or the son of other person of higher degree, is. *Jones* v. *Smart.* 635

4. A lord of a hundred, or wapentake, cannot grant a deputation to a game-keeper. *The Earl of Aylesbury* v. *Pattison.* 638

5. And it is no defence to an action for penalties on the game laws that the defendant has a deputation from a person claiming to be lord of the manor, if there appear to be no ground for the claim. *Calcraft* v. *Gibbs.* 638, 639

6. But a game-keeper of a lord of a manor has a right to carry a gun any-where out of the manor. *Rogers* v. — *Carter, esq.* 641

7. Under the certificate-act 25 *G.* 3. c. 50. only those defendants who are acquitted upon a prosecution for seizing guns are entitled to treble costs. *Smith* v. *Wallis.* 644

8. Two persons cannot be convicted in separate penalties under 5 *Ann.* c. 14. s. 4. for using a greyhound to destroy game. *The King* v. *P Bleasdale.* 644

9. In a conviction on the game laws, the information must negative, specifically, every one of the qualifications in the stat. of 22 & 23 *Car.* 2. c. 25. *The King* v. *John Wheatman.* 644

10. In an action against an unqualified person for using a gun. The declaration stated, that the defendant used a gun, being an engine to kill and destroy the game. In arrest of judgment it was objected, that it was not averred that the defendant used the gun for the destruction of game, but the Court overruled the objection. *Avery* v. *Hoole.* 645

11. Keeping of dogs of the kinds enumerated, is, as well as using them, an offence against the game laws; and evidence *primâ facie* of the purpose for which they are kept. *Rex* v. *Hartley.* 645

12. The like point. *The King* v. *Thompson.* 646

13. And proof that the defendant did keep and use a gun to kill and destroy the game, is sufficient evidence to support a conviction on the game laws, though the witness add his reason for believing it, that the gun was fired by the defendant who was walking about a piece of ground at H. with that apparent intent. *The King* v. *T. Davis.* 469

14. It is no objection to an information on the game laws that it is not *qui tam.*—Also on the information, charging the defendant with keeping and using a dog and also a gun on the same day, he can only be convicted in one penalty.—And if the evidence be given on the same day that the defendant appeared and pleaded, it will be intended that the evidence was given in his presence. *The King* v. *W. Lovet.* 650

15. And although it has been held by the court of King's Bench (from an unwillingness to overturn a precedent in Burn though erroneous, which has been long acted under), that in a conviction on the game laws, evidence that the defendant kept and used a gun to destroy game, is sufficient, without shewing how and in what manner in particular; yet as this is contrary to the established rule in all other convictions, the Court has constantly reprobated the practice, and declared themselves to be of opinion, that it is the duty of magistrates, in all cases, to state the whole of the evidence,

evidence, and not merely the result of it. *Same case.* 651

16. On a question of qualification of a defendant for killing game, the convicting magistrates may ground their opinion of his not being qualified, on the fact of the defendant's having on a former day sworn under the income-act to an estate under 100l. a-year. *The King* v. *Clarke.* 652

17. A conviction on 5 *Ann.* c. 14. was quashed because the witness was not sworn and examined in the presence of the defendant, for it is not sufficient to read over the deposition in the defendant's presence. But the evidence need not negative every specific qualification under the 22 and 23 *Car.* 2. 25. *The King* v. *Thomas Spencer Crowther.* 653

18. The lord of a manor who is also a justice of the peace, is entitled to a month's notice of an action brought against him, for taking away a gun in the house of an unqualified person, by stat. 24 *Geo.* 2. c. 44. for it will be presumed that he acted as a justice. *Briggs* v. *Sir Frederick Evelyn.* 653

## GAMING.

1. An horse-race is gaming within the stat. 9 *Ann.* c. 14. *Blaxton* v. *Pye.* 654

2. And if a bet be unlawful on one side, and lawful on the other, neither can be recovered, for want of mutuality. *Clayton* v. *Jennings.* 655

3. A match for 25l. a side, is a running for 50l. within the horse-race act. *Bidmead* v. *Gale.* 655

4. The like point. *Johnson* v. *Bann. Ximenes* v. *Jacquet.* 656

5. A foot-race is also a game within the stat. 9 *Ann.* c. 14. *Brown* v. *Berkley.* 656

6. An action brought by the loser to recover back money lost at play is remedial and not penal, and a new trial may be had therein. And if company never part, though dinner intervenes, the loss is at one sitting. *Bones* v. *Booth.* 656

7. And that one witness saw a dice box and dice on the table, round which many persons were assembled, the play having been discontinued on the witness's entering the room, was held sufficient to convict the defendant. *The King* v. *John Liston.* 657

## GAOLS.

The lord of a franchise is not, as such, bound to repair a gaol within it: but he may be subject to such a charge by immemorial usage. *The King* v. *the Earl of Exeter.* 659

## GAVELKIND.

The possession of one coheir in gavelkind is not the possession of the other, where he enters with an adverse intent, to oust the other. *Davenport* v. *Tyrell.* 660

## HABEAS CORPUS.

1. The court of Common Pleas has a general jurisdiction to grant writs of habeas corpus in all cases whatsoever. *Wood's case.* 660

2. A master is not entitled to sue out an *habeas corpus* to bring up an apprentice out of the custody of another. *The King* v. *Reynolds.* 664

3. But the lord chief justice has power, under an old statute passed in the reign of Henry 8. of granting warrants for the purpose of bringing up apprentices in this situation. *The King* v. *Edwards.* 664

4. In cases of writs of habeas corpus directed to private persons, to bring up infants, the Court is bound, *ex debito justitiæ*, to set the infant free from an improper restraint; but they are not bound to deliver them over to any body, nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them. *Rex* v. *Sir Francis Blake Delaval, William Bates, and John Fraine.* 665

5. An habeas corpus was granted to compel the defendant to bring in the body of Elizabeth Vernon, an infant, under 21, who had eloped from her father. *The King* v. *Ward.* 6

6. On a motion on behalf of the relations and friends of one Mrs. Francis Savage [it being repreſented, that ſhe was too infirm and weak to be brought into court by an habeas corpus], the Court made a rule to ſhew cauſe why an information ſhould not be exhibited againſt the defendant, for the miſdemeanors charged in the affidavits; and added that certain perſons ſhould, at all proper times and ſeaſonable hours, have free acceſs to her. *Rex* v. *Peter Wright.* 666

7. So where it appeared, upon the affidavit of a phyſician, that the perſon confined was a lunatic, and not fit to be introduced in court, and that the relations were applying for a commiſſion of lunacy againſt her.—The Court enlarged the time for making the return to an habeas corpus. *Rex* v. *W. Clarke.* 666

8. A member of the Houſe of Commons, committed for a breach of privilege, cannot be diſcharged on an habeas corpus during the ſeſſion. *Braſs Croſby's caſe.* 667

9. No habeas corpus lies for an alien enemy a priſoner of war, however ill uſed or deceived. *The caſe of three Spaniſh ſailors.* 675

10. An *hab. corp. ad ſatiſ. & recip.* may be returnable *immediatè* and before a judge. *Dr. Betteſworth* v. *Hugh Parker Bell, eſq.* 676

11. The Court will not receive the return of an habeas corpus, till the return-day. *Stephen Maſh's caſe.* 676

12. On an habeas corpus to produce the body, with the cauſes of taking, and detaining: the party muſt return an anſwer to the taking, as well as detaining. *Elizabeth Warman's caſe.* 677

13. "I had not at the time of receiving this writ, &c. nor have I ſince had, the body, &c. detained in my cuſtody, &c." is an equivocal return, and bad. *The King* v. *James Winton.* 677

*Habeas corpus ad teſtificandum.*

14. In general, an *habeas corpus ad teſtificandum* will lie, to remove a perſon in execution to be a witneſs, but the Court will refuſe it where the application appears to be a mere contrivance. *Rex* v. *Burbage.* 678

15. But the Court will not grant an *habeas corpus ad teſtificandum* to bring up a priſoner of war.—The preſence of witneſſes in that ſituation is generally obtained by an order from the ſecretary of ſtate.—It was here ſtated, that this application had been made, but without ſucceſs.—The Court then granted a rule to ſhew cauſe why the defendant ſhould not conſent, either to admit the fact, or that the priſoner ſhould be examined upon interrogatories; and if this conſent ſhould be refuſed, the Court ſaid they would put off the trial from time to time, to give the plaintiff an opportunity of filing a bill in equity. *Furly* v. *Newnham.* 678

16. On a rule upon the defendant to ſhew cauſe why he had not obeyed a writ of *habeas corpus ad teſtificandum*, requiring him to bring up two ſailors, the anſwer given was, that the writ was not ſigned by a judge. *Rex* v. *Roddam.* 678

17. The defendant being brought up on an attachment for diſobeying an habeas corpus, and having agreed with the injured parties, was diſmiſſed on payment of a fine of 10l. only. *The King* v. *Captain Falkingham.* 679

## HACKNEY COACHES.

Under the ſtatute 10 *Geo.* 3. c. 44. ſ. 7. a juſtice of the peace after convicting a hackney coachman for refuſing to go with his coach, may immediately commit him to the houſe of correction, if he do not pay the penalty. *Duck* v. *Addington.* 679

## HAWKERS AND PEDLARS.

1. The manufactures of Scotland may be vended in England, by wholeſale, without a licence, from the hawkers' office. *Maxwell* v. *Mayor.* 680

2. Only one horſe-licence was required for hawkers, pedlars, and petty chapmen, travelling with ſeveral beaſts under the old act of 9, 10 *W.* 3. c. 27. ſ. 1. and 3. but this is now altered by 22 *Geo.* 3. c. 26. and a licence

cence is required for each beaſt above the firſt. *Rex* v. *Robotham.* 681

3. A conviction of the defendant for trading as a hawker, pedlar, and petty chapman, without having a licence, having been removed by *certiorari*, certain objections taken thereto, were over-ruled. *Rex* v. *Smith.* 681

4. The like caſe. *Rex* v. *Aiken.* 681

5. No hawker can expoſe goods to ſale in any part of a market town but the public market place, by 29 *Geo.* 3. c. 26. ſ. 16, 17. *The King* v. *Redſearne.* 682

## HEIR.

1. Where lands deſcended to two daughters of the father by the firſt *ventre*, and, after his death, an infant ſon was born of a ſecond *ventre*, the mother at that time reſiding in part of the premiſes, and receiving rent for the other parts, both before and after the birth of her ſon; and the ſon died at the age of five weeks and three days. It was held that this was a ſufficient actual ſeiſin in the infant ſon, to make a *poſſeſſio fratris*; ſo that the lands ſhall not deſcend from him to his ſiſters of the half blood, but to a more remote heir of the whole blood. *Goodtitle* ex dim. *Newman* v. *Newman.* 682

2. *A.* died ſeiſed, leaving two infant daughters by different *ventres*; held that an entry generally by the mother of the youngeſt daughter, as her guardian in ſoccage, conſtituted a ſufficient ſeiſin in the eldeſt infant daughter, to carry the deſcent of her moiety, on her death, to her heirs. *Doe* ex dim. *Parnet* v. *Keen.* 685

3. If an eſtate, *pour autre vie*, be limited to a man, his heirs, executors, adminiſtrators, and aſſigns, and be not deviſed, it deſcends to the heir as a ſpecial occupant. *Atkinſon, adminiſtratrix*, v. *Baker.* 686

4. If there be an agreement before marriage, that a ſettlement ſhall be made of the wife's eſtate, reſerving to her a power of diſpoſing of it, which agreement is ſigned by the intended huſband and wife, but not ſealed; and before the marriage the wife diſpoſes of it to the huſband, who ſurvives her, and deviſes the eſtate by will; the title of his deviſee is ſuch a doubtful equity as cannot be ſet up in an ejectment againſt the title of the wife's heir-at-law. *Doe* ex dim. *Hodſden* v. *Staple.* 687

5. Where an obligor is ſeiſed of a reverſion in fee, expectant on ſeveral eſtates tail; this reverſion, coming into poſſeſſion into the hands of his heir, is then aſſets by deſcent, to charge him with the debt. *Smith* et al. *executors*, v. *Parker* et al. 689

6. A deviſe to the heir of *M.* may be good as *deſignatio perſonæ*, and he may take in the life-time of *M. Goodright, on the demiſe of Brooking*, v. *White.* 21

7. A deviſe to the right heirs of huſband and wife, is a deviſe to ſuch perſon as anſwers the deſcription of heir to both, namely, a child to both; and if no preceding eſtate be given to the father and mother, ſuch child ſhall take as a purchaſer. *Roe* ex dim. *Nightingale* v. *Quartley.* 28

8. In ejectment, whether one claiming title as heir, is bound to deduce any pedigree in proof of his deſcent? *Roe* ex dim. *Thorne* v. *Lord* et al. 318

9 By a gift from father to ſon, by deed poll, of lands to hold to him, and his aſſigns, for ever, charged with 100l. to his younger brother, at the end of his apprenticeſhip, againſt all men, the ſon takes only an eſtate for life. *Wright* ex dim. *Allingham* v. *Dowley and Wife.* 367

10. In a grant to *A. B.* remainder to his own heirs male, his heirs male take by deſcent. But if ſuch a limitation is made by will, or by a third perſon in a deed, the heir male takes by purchaſe. *Thomas Wills and Ann his wife*, et al. v. *Henry Palmer, eſq.* et al. 368

11. If the legal intereſt in land deſcend in fee ſimple *ex parte materná*, and the equitable intereſt in fee ſimple *ex parte paternâ*, or *vice verſâ*, the equitable eſtate ſhall merge in the legal, and both follow the line through which the legal eſtate deſcended. *Goodright, leſſee of Alſton*, v. *Wells* et al. 385

12. If

12. If a tenant in tail by purchaſe under a ſettlement made by his anceſtor *ex parte maternâ* ſuffer a recovery, and declare the uſes to himſelf in fee, he takes the fee as a purchaſer, deſcendible to his paternal heirs. And if tenant in tail by deſcent from the maternal anceſtor ſuffer a recovery, and declare the uſes to himſelf in fee, the eſtate will deſcend to the heirs *ex parte maternâ*, whether it be copyhold or freehold. *Roe* ex dim. *Crow* v. *J. Baldwere and Elizabeth his wife, and J. Ancell Bellamy.* 592

13. The poſſeſſion of one coheir in gavelkind is not the poſſeſſion of the other, where he enters with an adverſe intent, to ouſt the other. *Davenport* v. *Tyrrell.* 660

See alſo DEVISES, ESTATE, INFANT IN VENTRE SA MERE.

HIGHWAYS AND TURNPIKES.

1. The whole pariſh is bound to repair a highway of common right. *Rex* v. *Inhabitants of Great Broughton.* 691

2. In this caſe it was determined, that if a pariſh lies in two diſtinct counties, an indictment for not repairing the highway may be brought againſt that part of the pariſh in which the ruinous road lies. *Rex* v. *Inhabitants of Weſton-under-Penyard.* 691

3. But it has been ſince decided, that if a pariſh be ſituate part in one county, and the reſt in another, and a highway lying in one part be out of repair, an indictment againſt the inhabitants of that part only, is bad: the indictment muſt be againſt the whole pariſh. *The King* v. *The Inhabitants of Cliſton.* 692

4. A queſtion was put by the Court, Whether a perſon bound, *ratione tenuræ*, to repair a road, could not be indicted in the county where it lay, though the perſon lived out of the county? And it was admitted that he might. *Ibid.*

5. If a pariſh, conſiſting of two diſtricts, bound to repair ſeparately, be convicted, the Court will grant a *ſpecial mandamus* for a rate to be levied on the diſtrict bound to repair. *The King* v. *Townſhend* et al. 695

6. If the inhabitants of a townſhip, bound by preſcription to repair the roads within the townſhip, be expreſſly exempted by the proviſions of a road act from the charge of repairing new roads to be made within the townſhip, that charge muſt neceſſarily fall on the reſt of the pariſh. *The King* v. *the Inhabitants of Sheffield.* 695

7. If the truſtees, under a road act, turn a road through an incloſure, and make the fences at their own expence, and repair them for ſeveral years, they cannot be compelled to continue ſuch repairs, unleſs there be a ſpecial proviſion in the act to that effect. *The King* v. *Llandilo.* 698

8. The commiſſioners appointed by 6 *Geo.* 3. c. 78. (an act for dividing and incloſing certain lands in the pariſh of C.) which enacts that the public roads to be ſet out by them ſhould be repaired in ſuch manner as other public roads are by law to be repaired, and that the private roads ſhould be repaired by ſuch perſon or perſons as they ſhould award, have no power to impoſe on the pariſh at large the burden of repairing any of the private roads ſet out in purſuance of the act. *The King* v. *Cottingham.* 699

9. Caſe on the conſtruction of the old highway act, 7 *Geo.* 3. c. 42. ſ. 1. which directed, "that upon the 22d of September in every year, the conſtables, headboroughs, tithingmen, churchwardens, ſurveyor or ſurveyors of the highways, and houſeholders, being aſſeſſed to any parochial or public rate, ſhall aſſemble together at the church, &c. and the major part of them ſo aſſembled, ſhall make a liſt," &c. *Rex* v. *Pettiward.* 701

10. The magiſtrates are not bound to appoint ſurveyors of the highways from the liſt of perſons returned to them under ſtat. 13 *Geo.* 3. c. 78. if in their opinion the perſons named in the liſt are not qualified: but they may appoint other perſons of the pariſh who are qualified. *The King* v. *C. Baldwin.* 702

11. No appeal lies to the quarter ſeſſions againſt the allowance of the accounts of the ſurveyor of the highways under the ſtat. 13 *Geo.* 3. c. 78. *The King* v. *Weſt Riding of Yorkſhire.* 703

12. The like point. *The King* v. *W. Mitchell* et al. 705

13. The inhabitants of a pariſh, into which a road is turned by turnpike truſtees, are not bound to do ſtatute work thereon. *Wheeler* v. *Cooper.* 705

14. What ſhall be deemed a highway. *White* v. *Smith* et al. 706

15. It is not a good juſtification in treſpaſs that the defendant has a right of way over part of the plaintiff's land, and that he went upon the adjoining land becauſe the way was impaſſable from being overflowed by a river. *Taylor* v. *Whitehead.* 708

16. Juſtices have power to ſtop up roads under the general highway act, in caſes only where a new road is ſet out. — *Page, eſq.* v. *Howard.* 709

17. A preſentment of a highway, being out of repair, by a juſtice of peace, upon his own view, is traverſable generally. *Rex* v. *Juſtices of peace for Wiltſhire.* 711

18. A preſentment by two juſtices of a highway as being out of repair; being traverſed and iſſue joined thereon, a *venire* was awarded on the record, for twelve jurors to try the iſſue. *The King* v. *St. Michael,* &c. 712

19. A preſentment muſt allege the road to lie in the pariſh; otherwiſe the pariſh is not bound to repair. *Rex* v. *Inhabitants of Hartford.* 712

20. An indictment ſtated the highway to be leading from the pariſh of H. towards and unto the pariſh of G. and held bad; for the words "from" and "to" are both excluſive. *The King* v. *Gamlingay.* 712

21. Indictments for not repairing highways were formerly taken ſtrictly, but of late greater latitude has been allowed. *Rex* v. *Harrow.* 713

22. Upon an indictment for erecting a wall acroſs a highway, not ſtating the nuiſance to be continuing, there need not be judgment to abate it: but it is otherwiſe, where it is ſtated in the indictment as an exiſting nuiſance. *The King* v. *William and John Stead.* 714

23. A perſon indicted for not repairing roads *ratione tenuræ* ſhall pay the coſts of the proſecutor. *The King* v. *Wingfield.* 715

24. And if the judge certify on the back of the record, that the defence was frivolous, this is in effect an awarding of the coſts againſt the defendant, under 13 *Geo.* 3. c. 78. ſ. 64. *The King* v. *Clifton.* 715

25. But the coſts can only be awarded by the Court before whom the indictment is had. *The King* v. *Chadderton.* 715

26. The truſtees of a public turnpike act, which empowers them to erect toll-houſes and mortgage the tolls, and which declares there ſhall be no priority among the creditors, have no power to mortgage the toll-houſes or gates: and if in fact they have made ſuch a mortgage, and an ejectment is brought againſt them by the mortgagee, they are not eſtopped by their deed from inſiſting that the act gives them no ſuch power. *Fairtitle* ex dim. *Mytton,* et al. v. *Gilbert.* 716

27. Where a jury are to be ſummoned under a turnpike-act to aſcertain the value of land, it muſt appear that the truſtees acted within their juriſdiction, and that notice to the parties intereſted was given. *The King* v. *J. Bagſhaw, eſq.* 717

## HOLYDAYS.

1. St. Barnabas is not a legal holiday at the Seal-office. *Figgins* v. *Willie.* 718

2. The like point. *Sparrow* v. *Cooper.* 719

3. Neither is the 29th of May a holyday in any of the law-offices. *Pater* v. *Croome.* 720

## HORSE-RACES.

An action will lie againſt the clerk of the courſe for the entrance-money payable to the ſecond-beſt horſe. 722

See alſo GAMING.

## INCLOSURE ACTS.

1. Where, by the terms of an incloſure act, for incloſing the waſtes of

of a manor, a certain portion was to be made to the lord in lieu of his right and intereſt in the ſoil, and the reſidue was to be allotted to the ſeveral tenants in fee, diſcharged from all cuſtomary tenures, &c. a ſaving clauſe, reſerving to the lord all ſeignories incident to the manor, and all rents, fines, ſervices, &c. and all other royalties and manorial juriſdictions whatever, will not reſerve mines under thoſe allotments to the tenants, though it appear there was a ſubſiſting leaſe of ſuch mines at the time the act paſſed, granted by the lord of the manor. *Townley* v. *Gibſon*, et al. 722

2. No technical form is neceſſary in the awards of commiſſioners of incloſure; but, if they ſubſtantially purſue their powers in ſhutting up old roads, thoſe roads effectually ceaſe. *Pick* v. *Clarkſon*. 725

INDICTMENT.

1. An indictment will lie for keeping a place for fighting of cocks, boxing, playing at cudgels, and miſbehaving. *Rex* v. *Higginſon*. 728

2. An indictment will lie for conſpiring to charge another that he had taken out of a bag a quantity of human hair. *Rex* v. *Riſpal*. 728

3. A certificate by juſtices of the peace, that a highway (indicted) is in repair, is a legal inſtrument, recognized by the courts of law, and admiſſible in evidence after conviction, when the Court are about to impoſe a fine; and, conſequently, it is illegal to conſpire to pervert the courſe of juſtice, by producing a falſe certificate in evidence to influence the judgment of the Court. *The King* v. *Mawbey, Liptrott, Leyceſter, and Cooper*. 728

4. An indictment will lie for entering a burying ground, and taking a coffin out of the earth, and taking thence a dead body. *The King* v. *Lynn*. 735

5. It is an offence at common law, to obſtruct the execution of powers granted by a ſtatute, and an indictment for ſuch offence need not, and ought not, to conclude "*contra formam ſtatuti*." *The King* v. *Smith*, et al. 736

6. The juſtices may proſecute at common law for diſobediene to their order, for it is an offence at common law, and, therefore, puniſhable by indictment. *Rex* v. *Balme*. 700

7. If a party proceed againſt a defendant by action and indictment for the ſame aſſault, the Court will not compel him to make his election. *Jones* v. *Clay*. 738

8. An indictment will not lie for delivering leſs beer than contracted for as the due quantity. *The King* v. *Wheatley*. 738

9. So in this caſe, an indictment for delivering leſs oats than the quantity contracted for, as the due quantity, was, on motion, alſo quaſhed: without argument. *Rex* v. *Dunnage*. 741

10. So an indictment for ſelling, as two chaldron of coals, a quantity defective by ſo many buſhels. *Rex* v. *Oſtorn*. 741

11. An indictment will not lie againſt a defendant for taking in and delivering unmarried women. *Rex* v. *Felix Macdonald*. 741

12. An indictment will not lie for a mere civil injury, as for entering the proſecutor's yard, and digging the ground, and erecting a ſhed. *Rex* v. *John Storr*. 742

13. Or for pulling off the thatch of a man's dwelling-houſe. *Rex* v. *Atkins*. 743

14. The like caſe. *Rex* v. *Bake*. et al. 743

15. An indictment does not lie againſt a private perſon for knowingly expoſing to ſale, and ſelling, wrought gold under the ſterling alloy, as and for gold of the true ſtandard weight; which is indictable in goldſmiths. *Rex* v. *Bower*. 744

16. An indictment will not lie at common law charging that the defendant deceitfully intending by crafty means and devices to obtain poſſeſſion of certain lottery tickets, the property of *A*. pretended that he wanted to purchaſe them for a valuable conſideration, and delivered to *A*. a fictitious order, &c. purporting to be a draft upon a banker for the amount, which

which he knew he had no authority to draw, and that it would not be paid by virtue of which he obtained poſſeſſion of the tickets and defrauded the proſecutor of the value. *The King* v. *B. Lara.* 745

17. No indictment will lie for exerciſing a trade in a borough, being a foreigner, and not having made any compoſition with the mayor and bailiffs of the borough, for his freedom. *The King* v. *J. Sharples.* 746

18. A motion on behalf of a proſecutor, for leave to quaſh his own indictment, is not a motion of courſe. *Rex* v. *Webb.* 746

19. Nor will the Court quaſh a motion on the behalf of a defendant, they may put the party to demur. *Rex* v. *Crookes.* *Rex* v. *Sutton.* 746

20. Where the grand jury take upon themſelves to find part of the ſame indictment to be true, and part falſe, the whole is void; but where there are two diſtinct counts, the finding *billa vera*, as to one count only, and rejecting the other is good. *Rex* v. *Fieldhouſe.* 746

21. An indictment was quaſhed, becauſe ſeveral defendants were joined in it. *Rex* v. *John Tucker and eleven others.* 747

22. And the Court may, impoſe terms on a proſecutor before they allow him to quaſh the indictment. *The King* v. *Webb.* 747

23. Upon a demurrer to an indictment, found in an inferior court, objections may be taken, as well to the juriſdiction of ſuch court, as to the ſubject-matter of ſuch indictment. And where the caption of the indictment ſtates the court of quarter-ſeſſions, where ſuch indictment was found, to have been held on an impoſſible day, it is fatal. *The King* v. *Fearnley.* 748

24. The offence being alleged in the indictment to have been committed in the time of the late king, and charged to be againſt the peace of the now king, is fatal, and renders the indictment inſufficient. *Rex* v. *Lookup.* 749

25. On an indictment, it was moved in arreſt of judgment: 1ſt, Becauſe no proper *venue* was laid. The indictment only ſtated it to be at the pariſh aforeſaid, no pariſh having been before mentioned.—2dly, Becauſe the offence was laid to be againſt the form of the ſtatute, and it was only an offence at common law: and the Court ſaid, there was clearly no foundation for the laſt objection; as it had been frequently over-ruled as ſurplus age. But as to the firſt point, they inclined to think the objection fatal. *The King* v. *Mathews.* 750

26. An indictment that the defendant contracted with a manufacturer to go to a foreign country called America, not being within the dominions of the crown; after verdict held good *The King* v. *Myddelton.* 750

## INFANT.

1. A conveyance of an infant mortgagee is binding, and cannot be avoided by entry during infancy. *Zouch* ex dim. *Abbott and Hallet* v. *Parſons.* 751

2. An infant ſlave in the Weſt Indies executed an indenture, by which he covenanted to ſerve *B.* for a certain term of years as his ſervant, and *B.* covenanted to do certain things on his part; *B.* then came to England with the ſlave. In an action againſt *A.* who had ſeduced him from the ſervice of *B.*, *A.* was not permitted to allege that the contract was void, as being made by an infant and a ſlave. *Keane* v. *Boycott.* 758

3. Aſſumpſit on an account ſtated does not lie againſt an infant. *Trueman* v. *Hurſt.* 761

4. An infant who lives with, and is properly maintained by, the parent, cannot bind himſelf to a ſtranger for neceſſaries. *Bainbridge* v. *Pickering.* 762

5. A joint warrant of attorney, to confeſs judgment by an infant and another, may be vacated againſt the infant only. *Motteux* v. *St. Aubin*, et al. 762

6. A warrant of attorney given by an infant, is abſolutely void, and the Court

Court will not confirm it, though the infant appear to have given it (knowing that it was not valid), for the purpoſe of colluſion. *Saunderſon* v. *Marr.* 763

7. An infant is not eligible to the office of a burgeſs in a corporation, where the charter does not expreſsly authorize the corporation to grant inchoate rights. *Rex* v. *Carter.* 763

8. When once the five years, allowed to an infant to make an entry for the purpoſe of avoiding a fine, begin, the time continues to run, notwithſtanding any ſubſequent diſability. *Doe* ex dim. *Court Duroure* v. *Jones.* 566

INFANT EN VENTRE SA MERE.

1. Lands, &c. are deviſed to *B.* for life, and, after his deceaſe, to all and every ſuch child or children of *B.* as ſhall be living at the time of his deceaſe: held that a poſthumous child of *B.* ſhall ſhare equally with thoſe who were born in his life-time. An infant *en ventre ſa mère* is conſidered as born for all purpoſes which are for his benefit. *Doe, on the demiſe of Clarke,* v. *Clarke.* 17

2. A deviſe to a child *en ventre ſa mère* at the time of the father's death, is good; becauſe as the birth muſt neceſſarily happen within leſs than nine months after the death of a perſon in being, that conſtruction will introduce no inconvenience. *Long* v. *Blackall.* 34

3. A child *en ventre ſa mère* may take an eſtate tail. *Whitelock* v. *Heddon.* 153

INFORMATION.

1. An information lies for joining in an unlawful combination and conſpiracy to remove an infant of about eighteen, out of the hands of the defendant, to whom ſhe was bound an apprentice by her father without the knowledge or approbation of the father, and to place her in the hands of another for the purpoſe of proſtitution. *Rex* v. *Sir Francis-Blake Delaval, William Bates, and John Fraine.* 765

2. An information was granted for attempting to bribe a privy-counſellor to procure a reverſionary patent of an office grantable by the king, under the great ſeal. *Rex* v. *Samuel Vaughan.* 767

3. A commitment by a juſtice of peace for a time certain, as for fourteen days, under the vagrant-act, is a commitment in execution, and the party is not entitled to be bailed. And if another magiſtrate, on illegal and corrupt motives, diſcharge a perſon ſo committed, the Court will grant an information againſt him. *The King* v. *R. Brooke,* et al. 769

4. An information will be granted for circulating hand-bills previous to a trial to influence the jury. And the affidavits taken before a judge at *niſi prius,* who put off the trial of the cauſe for that reaſon, may be read. *The King* v. *Joliffe.* 772

5. In this caſe an information was granted againſt an overſeer for procuring a pauper to marry a pauper with child of a baſtard, in order to get the baſtard ſettled in the pariſh where the huſband was ſettled. *Rex* v. *Tarrant.* 776

6. But in this caſe, the Court refuſed to grant an information, and ſaid it would be more proper in all ſuch caſes, to take the common remedy, and proceed by way of indictment. *Rex* v. *Compton.* 776

7. An information was granted againſt juſtices of the peace for refuſing to grant a licence to ſell ale; merely from a motive of reſentment. *Rex* v. *Robert Hann and John Price.* 776

8. The like point. *Rex* v. *Williams,* and *Rex* v. *Davis.* 777

9. And the ſame principle was laid down in this caſe. *Rex* v. *Baylis,* 777
*The King* v. *Holland and Forſter.* 777

10. It is a general rule, that the Court will not grant an information for a private libel, charging a particular offence, unleſs the proſecutor will deny the charge upon oath. *The King* v. *Miles,* 778. *The King* v. *Haſwell, and the ſame* v. *Bate.* 778

11. Neither will the Court grant an information againſt a magiſtrate for having improperly convicted a perſon, unleſs

unleſs the party complaining makes an exculpatory affidavit, denying the fact. *The King* v. *Webſter.* 780

12. And in this caſe the Court ſaid, they had thought it proper to eſtabliſh as a general rule for the future, that when a perſon applies for an information, he is underſtood to waive his right to bring an action, unleſs the Court ſhould, on hearing the whole matter, be of opinion that it is a proper ſubject to be tried in a civil action, and ſhould ſpecifically give him leave to do ſo. *The King* v. *Sparrow and Urquhart.* 781

13. And if it be a ſufficient puniſhment if the defendants pay the coſts; they will diſcharge the rule on thoſe terms. *The King* v. *Morgan. The King* v. *Cozens*, et. al. 781

14. The Court will not grant an information upon a verbal challenge, unleſs an affidavit from the perſon who delivered the challenge is produced. *The King* v. *A. S. Willett.* 782

15. An information was refuſed for miſpending money collected under a brief. *King* v. *St. Botolph Biſhopſgate*, 783

16. So for miſapplication of corporation-money. *The King* v. *Watſon*, et. al. 783

17. Nor will the Court grant any information againſt juſtices acting in ſeſſions, unleſs in very flagrant caſes. *The King* v. *Juſtices of Seaford.* 784

18. An information will not be granted againſt juſtices, who have not, ſtrictly ſpeaking, acted legally, unleſs they have acted corruptly. *The King* v. *Jackſon*, et al. 784

19. General rules laid down as to informations. *King* v. *Robinſon.* 785

20. The Court will never grant an information upon the application of the attorney-general, in caſes proſecuted by the crown; becauſe the attorney-general has a right himſelf, *ex officio*, to exhibit one. *Rex* v. *Philipps, Lucas and Gibſon.* 786

21. The like point. *Rex* v. *Williams Davis Phillips.* 786

22. Neither will the Court give the attorney-general leave to quaſh an information filed *ex officio*; for he may ſtop the proceedings upon it by *nihil proſequi*, and file another. *The King* v. *Stratton*, et al. 786

23. An information may be filed by the ſolicitor-general, while the office of attorney-general is vacant. *Rex* v. *John Wilkes.* 787

24. A motion for a criminal information againſt a magiſtrate for ſuppoſed miſconduct during the term, may be applied for at any time during the term. *The King* v. *R. Carpenter Smith.* 790

25. But for an offence before the term, the information muſt be applied for ſufficiently early, to give the defendant time to ſhew cauſe againſt the rule within the term. *The King* v. *Taylor.* 791

26. One joint information againſt ſeveral defendants cannot iſſue upon ſeparate and diſtinct rules obtained againſt each defendant. *Rex* v. *Heydon, and four others.* 791

1. Judgment on convictions. *The King* v. *De Teſſier*, 791. *The King* v. *Peter Annet*, 791. *The King*. v. *Parſons*, et al. 791

2. The Court will not diſpenſe with the perſonal appearance of the defendants in an information on pronouncing judgment, where the ſentence may be corporal. *Rex* v. *Hann and Price.* 792

## INFORMATION QUI TAM.

When a ſtatute creates a penalty, and ſays that one moiety ſhall be to the uſe of the king and the other to a common informer, the king may ſue for the whole, unleſs a common informer has commenced a *qui tam* ſuit for the penalty. In ſuch a caſe, the king may recover the penalty by an information filed by the attorney-general in this court. *The King* v. *Mordecai Hymen.* 792

## INNS OF COURT.

A ſurrender of chambers to the treaſurer and ancients of the ſociety, made with their aſſent, to the intent that they might grant the ſaid chambers to a purchaſer, paſſes the eſtate to ſuch purchaſer

chaſer before admiſſion. *Doe* ex dim. *Warry*, et al. v. *Miller*, et al. 793

INQUISITION.

1. An inquiſition made by the ſheriff's jury to aſcertain to whom the property of goods, taken under a *fi. fa.* belongs, though found in favour of *A.* is not admiſſible evidence in an action of trover for the goods brought by *A.* againſt the ſheriff. *Lathow* v. *Lamer and Burnet, Sheriffs of Middleſex.* 469

2. But the Court will not ſet aſide the inquiſition of a jury, ſummoned by the ſheriff, to inquire in whom the property of goods ſeized by him under a *fi. fa.* is veſted. *Roberts* v. *Thomas.* 470

INSOLVENT DEBTORS.

1. *Under the lords' act.*]—An order for the diſcharge of an inſolvent debtor under the lords' act, ſ. 16. cannot be made by a judge in term-time. *Haſkins* v. *Morris.* 793

2. An application may be made for the diſcharge of an inſolvent debtor out of cuſtody under the lords' act, 33 *Geo.* 2. c. 28. where the neglect to apply in time aroſe from the miſconduct, and not merely from the ignorance or miſtake of the agent employed. *Pearce* et al. v. *Taylor.* 793

3. If a defendant be arreſted on a *ca. ſa.* and eſcape, and be afterwards retaken and committed to priſon in the next term, he may apply in the following term, to be diſcharged under the lords' act; for the words in that ſtatute, "charged in execution," mean being detained within the walls of the priſon. *Vaughan* v. *Durnell.* 794

4. A priſoner who is taken in execution for more than 300l. and afterwards reduces his debts below that ſum, by paying ſome of his creditors, is not entitled to be diſcharged under the lords' act in the next term after he has ſo reduced his debt; unleſs it be alſo the next term after he was taken in execution. Ex parte *Hubbard.* 795

5. A defendant, charged in execution on a *qui tam* action, cannot be diſcharged on ſurrendering his effects under the lords' act, 32 *Geo.* 2. c. 28. *Hart*, qui tam, v. *Hawkins.* 795

6. But a defendant in execution for the contempt, and for the coſts on a *quo warranto* information, may be diſcharged under the lords' act. *The King* v. *Pickerill.* 795

7. If a priſoner, brought up to be diſcharged under ſ. 16. of the lords' act, deliver in a falſe ſchedule and is remanded, the Court will not, at the inſtance of a creditor, even with the priſoner's conſent, order him to be brought up a ſecond time, for the purpoſe of amending his ſchedule, and aſſigning over that property which he had before concealed. *Hutchins* v. *Heſketh.* 796

8. The bringing up a priſoner a ſecond time under the lord's act, 32 *Geo.* 2. c. 28. ſ. 13. is in the diſcretion of the Court; and he may be brought up again on the laſt day of the term. *Bates* v. *Gamble.* 796

9. Where a priſoner has been brought into court to be diſcharged under the lords' act, ſ. 13. and, upon his examination, the Court have refuſed to diſcharge him, they will not afterwards diſcharge him on that act, though he make an affidavit of circumſtances in anſwer to the cauſe ſhewn, on his examination, againſt his diſcharge; and that thoſe circumſtances were not then diſcloſed, owing to a miſtake. *Thornton*, et al. v. *Dunphy.* 796

10. An inſolvent debtor has a right to his diſcharge, if his groats be not paid before ten at night of the day on which they are payable; and this right is not waived by the turnkey on the felons' ſide accepting them after that time. *Fiſher* v. *Bull.* 797

11. If a judge make an order for a priſoner's diſcharge under the lords' act, 32 *Geo.* 2. c. 28. ſ. 33. out of term, it is final. *Lench* v. *Pargiter.* 797

12. When a debtor is in execution at the ſuit of partners, on a joint debt, one of them may give a note for the groats. *Meux*, et al. v. *Humphry.* 797

13. But a note for the groats muſt be ſigned by all the leſſors of the plaintiff in ejectment. *The King on the proſecution of Moore and wife, and* —— *and wife* v. *Wilkinſon.* 797

14. So alſo when ſeveral executors are plaintiffs, a note given to an inſolvent debtor under the lords' act muſt be ſigned by all of them. *Lepine*, et al. *executors* v. *Bayley*. 797

15. No ſtamp is neceſſary for a promiſſory note for the payment of a priſoner's groats under the lords' act. *Tekell* v. *Baſey*. 798

16. The half pay of a lieutenant in a reduced regiment of foot need not be included in his ſchedule delivered in under the lords' act. *Flarty* v. *Odlum*. 798

17. Caſes under general inſolvent acts, *Ernſt*, et al. v. *Sciaccaluga*, 799. *Maſon* v. *Vere*, 799. *Norris* v. *Lery*, 800. *Ford* v. *Chilton*, 800. *Hartwell* v. *Vere*, 801. *Maſon* v. *Vere*, 802. *Hatt* v. *Verdier*, 802. *Bowen* v. *Hill*, 802. *Blandford*, et al. *executors of Froud* v. *Foote*, 803. *Workman* v. *Leake*, 803. *Paget* v. *Wheate*, 804. *Lord Kinnaird*, et. al. v. *Barrow*, 805. *The King* v. *W. Jones, eſq.* 805. *The King* v. *The Juſtices of Surrey*, 806. *Caſtleman's caſe*, ads' *Price, Clerk*, 807. *Rex* v. *Caſtleman*, 807. *Brown* v. *Rivers*, 807. *Spalton*, et al. v. *Moorhouſe*, 807. *Buxton*, et al. v. *Mardin*. 808

## INSPECTION OF BOOKS.

1. In an action brought by the corporation for toll againſt the defendant, the Court on his application granted a rule for inſpection of ſuch parts of the deeds, &c. as related to that matter, on the town-clerk, which he was to give upon oath. *The Corporation of Barnſtable* v. *Lathey*. 809

2. The Court cannot grant a rule for the inſpection of papers, unleſs there be a cauſe in the court, and ſome proceeding in it. *The King* v. *G. Babb*. 810

3. In a queſtion concerning right of common, claimed by the defendant, as a freeholder within the manor of Upottery, in Devonſhire. A rule was made abſolute to permit the defendant to inſpect the court rolls. *Addington* v. *Clode*. 811

4. So in this caſe, in an action by one copy-holder againſt another, the Court made the rule abſolute, for inſpecting all books and rolls relating to the defendant's title. *Folkard* v. *Hemet*, et al. 811

5. Leave to inſpect the court rolls, &c. of a manor will be granted of courſe on the application of a tenant of the manor who has been refuſed that permiſſion by the lord. *The King* v. *Shelley*. 811

6. But a freehold tenant has no right to call for the inſpection of the court-rolls of a manor, unleſs there be ſome cauſe depending. *The King* v. *Allgood*. 812

7. The Court refuſed a rule to inſpect a report from the Eaſt India board of inquiry upon which an information had been filed againſt the defendant. *The King* v. *Holland*. 813

8. On an information for election-bribery, the proſecutor moved for a rule to inſpect the books of the corporation of Eveſham; but the Court refuſed the ſame, being an attempt to make the corporation furniſh evidence in a criminal proſecution. *The King* v. *Heyden*. 813

9. In this caſe inſpection of the books of Clement's-Inn, to prove payment of poor's rates, or being within the pariſh of *A*. was denied, being private books, and the queſtion concerning a private right. *Allan* v. *Top*. 814

10. And no inſpection of books, &c. will be granted till iſſue joined. *Hodges* v. *Athis*. 814

## INSURANCE FROM FIRE.

1. An exception in a policy of inſurance from fire, in caſe the houſe be burnt by reaſon of any uſurped power, does not exempt the inſurers from paying on a loſs occaſioned by a mob. *Drinkwater* v. *the Corporation of the London Aſſurance*. 814

2. If a policy of inſurance againſt loſs by fire, allows fifteen days for the payment of the annual premium, and a loſs happens in the mean time, the inſurers are not liable, though the aſſured tendered the premium before the end of the fifteen days, but after the loſs. *Tarleton* et al, v. *Staniforth*, et al. 814

3. A deed-poll, containing an inſurance

surance against fire, may refer to conditions in a printed paper, without ſtamp, ſeal, or ſignature: and it may be a part of thoſe conditions that the inſured ſhall procure a certificate of his character; and that the loſs happened without fraud. *Routledge, adminiſtrator of Routledge* v. *Burrell, bart.* 816

4. And the production of ſuch a certificate is a condition precedent to a recovery againſt the inſurers on the policy; and it is not ſufficient to ſhew that a certificate was produced and ſigned by many reputable houſeholders of the pariſh, and that the miniſter and churchwardens being applied to, without any reaſonable or probable cauſe wrongfully and unjuſtly refuſed to ſign it. *Wood*, et al. *aſſignees of Lockyer and Bream, bankrupts* v. *Worſley.* 816 818

INSURANCE ON LIVES.

The concealment of circumſtances on a life inſurance is not ſo fatal, if the life be warranted good, as if it be a common inſurance. *Roſs* v. *Bradſhaw.* 824

INTEREST.

1. In this caſe it was referred to the maſter to compute intereſt on the ſum given by the jury on the writ of enquiry, from the day of ſigning final judgment below, down to the time of the taxation of coſts, the ſame to be added to the coſts taxed for the plaintiff. *Zinck* v. *Langton.* 342

2. The court of Exchequer Chamber is bound to allow double coſts to the defendant in error, on the affirmance of a judgment of the king's-bench: but it is entirely a matter in their diſcretion, whether or not intereſt ſhall be allowed on ſuch affirmance. *Shepherd one, &c.* v. *Mackreth in the Exchequer Chamber in Error.* 342

3. And the court of Exchequer Chamber will allow intereſt to a defendant in error, under the ſtat. 3 *H.* 7. c. 10. on a judgment of non-pros, as well as on a judgment of affirmance; and, for the future, the intereſt allowed will be 5l. *per cent.* inſtead of 4l. *Sykes* v. *Harriſon, in the Exchequer Chamber in Error.* 344

JOINDER IN ACTION.

1. Where the cauſe of demurrer to a declaration is, that the counts are improperly joined, the plaintiff cannot enter a *nolle proſequi* as to ſome, and leave the others remaining. *Roſe and Mercy his wife* v. *Bowler and Read, executors of Bowler.* 507

2. A count, on a promiſe made by the defendant, as adminiſtrator, to pay money received by him, as ſuch, to the plaintiff's uſe, cannot be joined with other counts, on promiſes made by the inteſtate. *Jennings* v. *Newman, adminiſtratrix.* 511

JURIES.

1. No more than twenty-three can be ſworn on the grand-jury; becauſe, if a number, amounting to two full juries, or more, ſhould be ſworn, it might happen that a complete jury of twelve might find a bill to be a true one, though other twelve, or even many more than twelve of the very ſame jury, might reject it as an untrue one. 824

2. If the inhabitants of an hundred have enjoyed an immemorial exemption from ſerving on juries, they are not liable to be ſummoned, under any of the different ſtatutes relative to juries. *The King* v. *Pugh.* 825

3. A jury's repreſentations in favour of a criminal, after conviction, is to be cenſured. *Rex* v. *Edmund Thirkell.* 826

JUSTICES OF THE PEACE.

1. If juſtices of peace adjourn their proceedings to a day ſubſequent to the repeal of an act of parliament, under which they derive their authority, their juriſdiction will ceaſe. *Rex* v. *Juſtices of the Peace for the city of London.* 826

2. A charter granting juriſdiction to borough magiſtrates over a diſtrict not within the borough does not exclude the county juſtices without expreſs words. And though ſuch charter contain words of reference to former

charters in which exclusive jurisdiction is given to the borough justices within the borough, and that they shall have jurisdiction within the new district in *tam amplis modo et formâ*, &c. yet if there be in the latter charter a saving clause of the rights of the crown, and of all other persons, the borough magistrates have only a concurrent jurisdiction with the county justices. *Blankley* v. *Winstanley*, et al. 827

3. Also where the words of a charter are doubtful, they may be explained by long usage. *Ibid.*

4. And where two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting to grant alehouse licences, their jurisdiction attaches, so as to exclude the others appointing a subsequent meeting, though they may all meet together on the first day. But if, after such appointment, the other set of magistrates meet on a subsequent day, and grant other licences, their proceeding is illegal, and the subject of an indictment. *The King* v. *T. Sainsbury, Esq.* et al. 835

5. The secretary of state is not, as such, a conservator of the peace; neither can he issue a general warrant to search for and seize the person of any one. *Entick* v. *Carrington*, et al. *king's messengers.* 837

6. To state upon an appeal, that those against whose acts you complain are justices, is so far an admission of their jurisdiction. *Rex* v. *Fisher, and Rex* v. *Towill.* 844

7. In an action of trespass, assault, and false imprisonment, against a justice of the peace, he was permitted to pay twelve guineas into court, pursuant to the statute 24 *Geo.* 2. having omitted to tender amends. *Cashourn* v. *Ball.* 845

8. No action can be brought against a justice of the peace for an act done by him in that character, without giving him a month's notice of the writ, or process, intended to be sued out, as well as of the cause of action. *Lovelace* v. *Curry.* 845

See also CONVICTION, INDICTMENT, INFORMATION.

LANDLORD AND TENANT.

1. The Court will not endure a lessee to defend (alone) an ejectment against his landlord, or those claiming under him, on a supposed defect of title. *Driver* ex. dim. *Oxenden* et al. v. *Laurence.* 304

2. A judgment in ejectment had been regularly obtained by the plaintiff, against the casual ejector, by default: and the landlord of the premises had moved to set aside this judgment; because his tenant had not given him notice of his having been served with an ejectment. And the Court were clearly of opinion, that the possession ought not to be changed by a judgment in ejectment, where there had been no trial or opportunity of trying; though the obtaining the judgment might be owing to the default, or even treachery, of the defendant's own tenant. *Doe* ex dim. *Frowghton* v. *Roe.* 321

3. Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder and after the expiration of it; a distress may be taken for rent due for the whole term. *Braithwaite* v. *Cookfey.* 508

4. The administratrix of an executor cannot sue for the double value of lands held over after notice to quit under a demise from the testator, contrary to 4 *Geo.* 2. c. 28. without taking out administration *de bonis non*; even though the tenant has attorned to her. *Tingrey, widow,* v. *Brown.* 537

LEASE.

If a freehold lease for lives be limited to *A.* and the heirs of his body, with remainders over, *A.* may dispose of the whole and defeat the remainders by any conveyance during his lifetime. *Doe,* ex dim. *Blake,* v. *Luxton.* 37

LEVARI FACIAS.

A *levari facias de bonis ecclesiasticis*

is

is a continuing execution, and a levy may be made under it, from time to time, after it is returnable, till the sum indorsed be satisfied; yet if it be actually returned, the authority of the bishop is at an end. *Marsh, knt.* et al. v. *Fawcet, clerk.* 469

LIBEL.

See INDICTMENT. INFORMATION, No. 10, 11.

LIFE ESTATE.

If an estate, *pour autre vie*, be limited to a man, his heirs, executors, administrators, and assigns, and be not devised, it descends to the heir as a special occupant. *Atkinson, administratrix* v. *Baker.* 636

LUNATICS.

The Court will stay the return of an *habeas corpus* upon the affidavit of a physician, that the person confined is a lunatic, and not fit to be introduced in court, and that the relations are applying for a commission of lunacy. *Rex* v. *W. Clarke.* 666

LYING-IN WOMEN.

An indictment will not lie against a defendant for taking in and delivering unmarried women. *Rex* v. *Felix Mac Donald.* 741

MANDAMUS.

1. The Court will not grant a writ, in the nature of a *mandamus*, to the mayor and aldermen for the time being, being the judges of the mayor's court at Bombay, in the East Indies, commanding them to hold a court for the examination of witnesses, unless the cause of action has arisen in India. *Francisco* v. *Gilmore.* 286

2. If a parish, consisting of two districts, bound to repair separately, be convicted of not repairing, the Court will grant a *special mandamus* for a rate to be levied on the district bound to repair. *The King* v. *Townshend*, et al. 695

MANUFACTURES.

See HAWKERS and PEDLARS, No. 1. INDICTMENT.

MASTER AND SERVANT.

1. In an action against a master for the negligence of a servant, the latter is not a competent witness to disprove the negligence, without a release. *Green* v. *the New River Company.* 402

2. If *A.* the servant of *B.* sell the goods of *C.* an intestate, as well after his death as before, though by the orders of *C.* and pay the money arising therefrom, into the hands of *B.*—*B.* may be sued as an *executor de son tort*. *Padget* et al. v. *Priest and Porter.* 490

3. A master is not entitled to sue out an *habeas corpus* to bring up an apprentice out of the custody of another. *The King* v. *Reynolds.* 664

4. But the lord chief justice has power, under an old statute passed in the reign of *Henry* 8. of granting warrants for the purpose of bringing up apprentices, and Lord *Mansfield* frequently exercised that power. *The King* v. *Edwards.* 664

MARRIAGE.

1. A marriage covenant, with a trustee for securing provision for the wife may be given in evidence by her, on a plea of *plenè administravit*, in an action brought against her as an executrix. And she may retain, out of the personal assets, so much as is equal to the damages she has sustained by the breach of such covenant. *Loane* v. *Casey, executrix.* 516

2. In this case an information was granted against an overseer for procuring a pauper to marry a pauper with child of a bastard, in order to get the bastard settled in the parish where the husband was settled. *Rex* v. *Tarrant.* 776

3. But in this case a similar information was denied on account of the great inconvenience of obliging persons in low circumstances, to shew cause against an information, and the Court said it would be more proper in all such cases to take the common remedy, and proceed by way of indictment. *Rex* v. *Compton.* 776

MORTGAGE.

See HIGHWAYS and TURNPIKES.

NEW TRIAL.

1. An objection to the competency of witnesses, discovered after a trial, is not

not a ſufficient ground, of itſelf, for granting a new trial; but it may have ſome weight with the Court, where the party applying appears to have merits. *Turner*, et al. v. *Pearle*. 414

2. In granting new trials, the Court know no limitations (except in ſome excepted caſes), ſuch as thoſe greater than miſdemeanors; but they will either grant or refuſe a new trial, as it will tend to the advancement of juſtice. In miſdemeanors there is no authority to ſhew a new trial can be granted, in order that the guilt or innocence of thoſe who may have been convicted may be again examined into. *The King* v. *Mawbey*. 734

NOTICE OF ACTION.

See JUSTICES OF PEACE, No. 8.

OFFICERS.

A military officer, in the ſervice of the Eaſt-India Company, has not a right to reſign whenever he pleaſes. *Captain Parker* v. *Lord Clive*, 281. *Vertu* v. *Lord Clive*. 282

PARISH.

An allegation in an action for a falſe return to a *mandamus* of a cuſtom of payment, by the chapel-wardens of *A.* to the churchwardens of *B.* may be ſupported by evidence of a cuſtom of payment to officers acting only for the townſhip of *B.* not co-extenſive with the pariſh of *B.* but who have always been deſcribed as the churchwardens of *B.* Alſo an entry of the receipt of money by officers of a townſhip, from the officers of another townſhip, of a proportion of church rates, made in a pariſh book, is evidence to charge the latter officers with the ſame proportion in future. And another entry, explaining the proportions, made on the ſame page, is alſo admiſſible evidence. *Stead* et al. v. *Heaton* et al. 415

PARLIAMENT.

A member of the Houſe of Commons, committed for a breach of privilege, cannot be diſcharged on an *habeas corpus* during the ſeſſion. *Braſs Croſby's Caſe*. 667

PAYING MONEY INTO COURT.

See JUSTICES OF PEACE, No. 7.

PENE ADMINISTRAVIT.

1. Where the defendant bound himſelf as adminiſtrator to abide by an award to be made touching matters in diſpute between his inteſtate and another, and the arbitrators awarded that he, as adminiſtrator, ſhould pay, &c. held that he could not plead *plenè adminiſtravit* to the debt on the bond. *Barry* v. *Ruſh*. 479

2. But the mere ſubmiſſion to an award by an adminiſtrator is not an admiſſion of aſſets; and a promiſe by an adminiſtrator to pay the debts of the inteſtate, if there be no aſſets, is *nudum pactum*. *Pearſon*, et al. *aſſignees of Scott* v. *Henry adminiſtrator of Henry*. 479

3 If an executor plead (to an action on bond) payment; and omit to plead *plenè adminiſtravit*, and a verdict be given againſt him on ſuch a plea; it operates as an admiſſion of aſſets in an action founded on that judgment, ſuggeſting a *devaſtavit*. *Erving* et al. *executors of J. Erving* v. *Peters*. 519

4. If an executor or adminiſtrator plead *plenè adminiſtravit præter* a certain ſum, and afterwards to another action brought in the ſame term plead alſo *plenè adminiſtravit præter* the ſame ſum, and as to that ſum that he had confeſſed it in the other action, ſuch plea is a good bar. *Waters* v. *Ogden* et al. 524

5. To aſſumpſit on a bill of exchange by the plaintiffs, as indorſees, againſt the defendant, as executrix of the acceptor; the defendant, after pleading four judgments recovered againſt her as executrix, pleaded teſtator became bound to indemnify *T. J.* againſt a certain other bond, and held well. *Cox* et al. v. *A Joſeph, executrix of T. Joſeph*. 521

6. To a plea of *plenè adminiſtravit præter*, the plaintiff may pray judgment of the ſum admitted by the plea, and reply aſſets *ultra*. *Lockyer, eſq.* v. *Coward*.

*v. Coward*, et al. *executors of Frampton, widow, executrix of Frampton.* 525

7. On a plea of judgment recovered, and *plenè administravit præter*; replication that the defendants had and hath aſſets: if aſſets are proved in the defendant's hands, he may give evidence of the payment of other debts, with thoſe aſſets, previous to the action brought. *Smedly* v. *Hill, executrix.* 526

8. An executor having pleaded *non aſſumpſit*, and a ſpecialty debt ſufficient to cover the aſſets, was permitted to withdraw the firſt plea, on payment of the coſts occaſioned only by that plea. *Dearne* v. *Grimp.* 527

9. To *aſſumpſit* for goods ſold and delivered, the defendants pleaded two judgments, recovered and unſatisfied, one for 240l. and the other for 60l.; and then pleaded *plenè adminiſtravit*, except to the value of 130l. which was not ſufficient to ſatisfy thoſe judgments. To this the plaintiff replied, that both judgments were obtained by fraud. PER CURIAM. The plaintiff in reply ſhould have relied on the ſums, which were pleaded to cover the aſſets, not being the true debts; and that the judgments were kept on foot *per fraudem*, to prevent the plaintiff's recovering; and not replied *per fraudem* generally. *Peaſe* v. *Naylor, and wife, executrix of M. Hall.* 527

10. A plea of judgment recovered on a ſimple contract, pleaded by an adminiſtrator to debt on bond, muſt aver that ſuch recovery was had before notice of the bond debt. *Sawyer* v. *Mercer.* 528

11. An outſtanding judgment againſt a teſtator or inteſtate, not docketted according to the direction of 4 & 5 *W. & M.* c. 20. cannot be pleaded by an executor or adminiſtrator to an action on ſimple contract. *Steel* v. *Rorke.* 528

12. And on a plea of *plenè adminiſtravit*, to debt on a judgment againſt the inteſtate not docketted, the defendant may give in evidence payment of bond and other ſpecialty debts, which exhauſted all the aſſets. *Hickey* v. *Hayter.* 529

## POSSESSIO FRATRIS.

See HEIR, No. 1.

## QUI TAM.

See *Information qui tam*, and INSOLVENT DEBTORS, No. 5.

## QUO WARRANTO.

See INSOLVENT DEBTORS, No. 6.

## RESERVATION.

Where by the terms of an incloſure act, for incloſing the waſtes of a manor, a certain portion was to be made to the lord in lieu of his right and intereſt in the ſoil, and the reſidue was to be allotted to the ſeveral tenants in fee, diſcharged from all cuſtomary tenures, &c. a ſaving clauſe, reſerving to the lord all ſeignories incident to the manor, and all rents, fines, ſervices, &c. and all other royalties and manerial juriſdictions whatever, will not reſerve mines under thoſe allotments to the tenants, though it appear there was a ſubſiſting leaſe of ſuch mines at the time the act paſſed, granted by the lord of the manor. *Townley* v. *Gibſon*, et al. 722

## SECRETARY OF STATE.

See JUSTICES OF THE PEACE, No 5.

## SETTLEMENT.

1. A ſettlement by tenant in fee for the maintenance of herſelf and children for life, to raiſe portions for younger children, and the ſurplus to her heir at law, ſhe having then many ſons and daughters, is a voluntary ſettlement, and void againſt purchaſers, under 27 *Eliz.* And a leſſee at rack-rent is a purchaſer for a valuable conſideration. *Goodright* ex dim. *Humphreys* et al. v. *Moſes.* 618

2. What ſhall be a good conſideration to ſupport a ſettlement by way of remainders to the younger brothers of the intended huſband, eldeſt ſon of the parent. *Roe* ex dim *Hamerton* v. *Mitton*, et al. 610

3. A ſettlement in conſideration of a marriage portion of the houſehold goods belonging to Lord *Montfort*, at his lordſhip's houſe in town; and which were very minutely particularized in a ſchedule annexed to the ſettlement, for the uſe of Lord *Montford* for life; remainder to Lady *Montfort* for life, remainder

mainder to the firſt and other ſons of the marriage in ſtrict ſettlement, was held good. *Cadogan* v. *Kennet*. 624

4. To make a voluntary ſettlement void againſt a ſubſequent purchaſer, within the ſtat. 27 *Eliz.* c. 4. it muſt be *covinous* and *fraudulent*, not *voluntary* only. *Doe* ex dim *Watſon*, et al. v. *Routledge*. 627

5. If there be an agreement before marriage, that a ſettlement ſhall be made of the wife's eſtate, reſerving to her a power of diſpoſing of it, which agreement is ſigned by the intended huſband and wife, but *not ſealed*; and before the marriage the wife diſpoſes of it to the huſband, who ſurvives her, and deviſes the eſtate by will; the title of his deviſee is ſuch a doubtful equity as cannot be ſet up in an ejectment againſt the title of the wife's heir-at-law. *Doe* ex dim. *Hodſden* v. *Staple*. 687

SHERIFF.

1. Where two writs of *fieri facias* againſt the ſame defendant are delivered to a ſheriff on different days, and no ſale is actually made of the defendant's goods, the firſt execution muſt have the priority, even though the ſeizure were firſt made under the ſubſequent execution. And if the perſon, claiming under the ſecond execution, pay the ſheriff the amount of the debt under the firſt execution for his ſecurity, the Court will not compel the ſheriff to refund that money on motion. *Huthinſon* v. *Johnſton*. 466

2. If it appear by the ſheriff's return to a writ of execution that greater fees have been taken for the levy than are allowed by 29 *Eliz.* c. 4. the *ſheriff* is liable to an action on the ſtatute for treble damages at the ſuit of the party grieved; and under that ſtatute the ſheriff can not make any other charge except for the poundage. *Woodgate* v. *Knatchbull*. 477

SLAVES.

An infant ſlave in the Weſt-Indies, executed an indenture, by which he covenanted to ſerve *B.* for a certain term of years as his ſervant, and *B.* covenanted to do certain things on his part; *B.* then came to England with the ſlave. In an action againſt *A.* who had ſeduced him from the ſervice of *B.* *A.* was not permitted to allege that the contract was void, as being made by an infant and a ſlave, and therefore, that the declaration, which ſtated him to have been retained as a ſervant for a term of years, was not proved; for the Court held that the effect of ſuch a contract might be the manumiſſion of the ſlave: and conſequently, that it was for his own benefit; and being for his own benefit, that it was, at moſt, only voidable by the infant himſelf, and not by a ſtranger. *Keane* v. *Boycott*. 758

SOLICITOR GENERAL.

See INFORMATION, No. 24.

SUNDAY.

How far a writ be returnable on a Sunday, ſhall be good. *Swann* v. *Broome*. 607

TRADE.

On a covenant that, in conſideration of a weekly payment to *A.* and his executors for a term certain, *A.* ſhall not exerciſe a particular trade; the executors of *A.* are not bound to abſtain from exerciſing it. *Cooke, adminiſtratrix*, v. *Colcraft*. 506

TRESPASS.

It is not a good juſtification in treſpaſs that the defendant has a right of way over part of the plaintiff's land, and that he went upon the adjoining land becauſe the way was impaſſable from being overflowed by a river. *Taylor* v. *Whitehead*. 708

TRUSTS.

*A.* being *ceſtui que* truſt of a term, afterwards purchaſes the fee in his own name, and deviſes the premiſes in fee to his heir, whom he makes his executor and reſiduary legatee, and dies: held clearly that the term ſhall go with the fee to the heir, and not to the perſonal repreſentative. *Goodright* ex dim. *Francis Hoole*, v. *Joſeph Sales*. 41

TRUSTEES.

1. Under certain circumſtances, the jury may preſume a ſatisfied term to have been ſurrendered to the *ceſtui que uſe*: but if no ſuch preſumption be made, and it appear on a ſpecial verdict in ejectment that ſuch a term is ſtill outſtanding in a truſtee who is not joined in bringing the ejectment, the *ceſtui que uſe* cannot recover. *Goodtitle* ex dim. *Owen Jones* v. *Evan Jones* et al. *in error.* 293

2. On an ejectment to recover premiſes in mortgage, on the ſeveral demiſes of the truſtees, for the mortgagor, under a marriage ſettlement, and the perſonal repreſentatives of the mortgagee, it was held good, becauſe the truſtees were in fact in this caſe not truſtees for the mortgagor, but truſtees for the mortgagee. *Armſtrong* ex dim. *Tinker* et al. v. *Peirſe* et al. 296

3. The Court will refuſe to permit the *ceſtui que truſt*, not having been in poſſeſſion, to be made defendant in ejectment inſtead of the tenant, as landlord. *Lovelock*, ex dim. *Norris*, v. *Lancaſter.* 309

VAGRANTS.

A commitment by a juſtice of peace for a time certain, as for fourteen days, under the vagrant-act, is a commitment in execution, and the party is not entitled to be bailed. And if another magiſtrate, on illegal and corrupt motives, diſcharge a perſon ſo committed, the Court will grant an information againſt him. *The King* v. *R. Brook*, et al. 769

WAGERS.

See GAMING, HORSE-RACES.

WARRANTS.

General warrants, illegal. *Entick* v. *Carrington*, 837. *Money* v. *Leach.* 841

WARRANTRY.

See INSURANCE UPON LIVES.

# APPENDIX

TO THE

# THIRD VOLUME

OF

*THIS ABRIDGMENT.*

Compriſing Caſes determined during the time it has been at Preſs.

## DISTRESS.

Exall *v.* Partridge, *et al.* Tr. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 308.

THE goods of a ſtranger, on the premiſes of another, were diſtrained by the landlord for rent in arrear; and the ſtranger was obliged to pay the rent to redeem them; held that the ſtranger might maintain *aſſumpſit* for money paid to the uſe of the original leſſees who were bound by their covenants to the landlord, although ſome of them had, to the knowledge of the plaintiff, before he placed his goods on the premiſes, aſſigned their intereſt to one of their co-leſſees, who was in the excluſive poſſeſſion at the time.—This was an action upon promiſes for money paid, laid out, and expended, for the uſe of the defendants. At the trial it appeared in evidence, that the three defendants were leſſees of certain premiſes, by deed, from one *Welch*, to whom they thereby covenanted to pay the rent; and that two of the defendants afterwards, with the plaintiff's knowledge, aſſigned their intereſt to *Partridge*, the other co-leſſee, who was a coachmaker; ſubſequent to which aſſignment, the plaintiff put his carriage upon the premiſes, under the care of *Partridge*, where it was taken as a diſtreſs by *Welch*, the landlord, for rent in arrear; and the plaintiff, in order to redeem it, was obliged to pay the rent due, taking, at the time, a receipt from *Welch*'s attorney as for ſo much received on account of the three defendants. The preſent action was brought to recover that ſum. The plaintiff was nonſuited, on the ground that the action ſhould have been brought againſt *Partridge* alone, he being the perſon in the ſole poſſeſſion of the premiſes at the time with the knowledge of the plaintiff, who had truſted him only with the poſſeſſion of his property; and he, alſo, being the perſon ultimately reſponſible to the other two defendants; and therefore it was ſaid, that the money muſt be taken to have been paid for his uſe only.—A rule was obtained, calling on the defendants to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and, after cauſe ſhewn—PER CURIAM: One of the propoſitions ſtated by the plaintiff's counſel

counſel certainly cannot be ſupported, that *whoever is benefited by a payment made by another is liable to an action of aſſumpſit by that other*; for one perſon cannot by a voluntary payment raiſe an aſſumpſit againſt another. But here was a diſtreſs for rent due from the three defendants; the notice of diſtreſs expreſſed the rent to be due from them all; the money was paid by the plaintiff in ſatisfaction of a demand on all, and it was paid by compulſion; therefore this action may be maintained againſt the three defendants. The juſtice of the caſe indeed is that the one, who muſt ultimately pay this money, ſhould alone be anſwerable here: but as all the three defendants were liable to the landlord for the rent in the firſt inſtance, and as by this payment made by the plaintiff all the three were releaſed from the demand of the rent, this action may be ſupported againſt all of them.—Rule abſolute.

## EJECTMENT.

SERVICE of a declaration in ejectment on one of two tenants in poſſeſſion is good ſervice on both: in this caſe it was expreſsly ſworn, that a declaration was tendered to one of the tenants in poſſeſſion, who refuſed to receive it, and thereupon a copy was faſtened on a part of the premiſes. Doe, *ex dim.* John Bailey, *v.* Roe, Hil. Ter. 39 Geo. 3. C B. 1 *Pul. & Boſ.* 369.

If a declaration be ſerved on the wife of the tenant in poſſeſſion, and ſhe neglect to deliver it to her huſband, it will be good ſervice, and he muſt anſwer for her default: but in this caſe the ſervice being upon the neice, and nailing another copy to the door: and the wife having acknowledged that the declaration came to her hands, and that ſhe had ſent the ſame to her huſband, THE COURT held this inſufficient; and ſaid, that it would be going farther than they had ever gone to admit the mere acknowledgment of the wife to bind the huſband. Goodtitle, *ex dim.* Read, *v.* Badtitle, Hil. Ter. 39 Geo. 3. C.B. 1 *Pul. & Boſ.* 384.

So, ſervice of a declaration in ejectment (there being no tenant in poſſeſſion of the premiſes, which conſiſted of a large wood) upon a perſon appointed by the court of Chancery to manage an eſtate for an infant; and who had cut and ſold the underwood, was held inſufficient, the Court being of opinion, that it amounted to no more than a ſervice on a gentleman's bailiff. Goodtitle, *ex dim.* Roberts and wife, *v.* Badtitle, Hil. Ter. 39 Geo. 3. C B. 1 *Pul. & Boſ.* 385.

## ERROR.

THE defendant in error having recovered a judgment in an action of *aſſumpſit* in the court of Common Pleas, the plaintiff in error brought a writ of error, without joining her huſband, and aſſigned her coverture as error in fact; to which the defendant in error pleaded *in nullo eſt erratum*. The writ of error was quaſhed in the laſt term, on the ground that a feme covert could not ſue out a writ of error without her huſband. But the maſter having ſome doubt whether or not the defendant in error were entitled to the coſts on the writ of error under the ſtatute 4 *An.* c. 16. ſ. 25. THE COURT ſaid, there was no reaſon why the defendant in error in this caſe ſhould not have his coſts. And they referred to the caſe of *Cooper* v. *Ginger*, 1 *Str.* 606; and 2 Lord *Raym.* 1403, where it was holden that the ſtatute was not confined to thoſe caſes only where a variance from the original record was aſſigned as error; but that it extended to all writs of error by reaſon of the words in the ſtatute, "or "other defect." Margaret M'Namara *v.* Fiſher, Tr. Ter. 39 Geo. 3. BR. 8 *Ter. Rep.* 302.

# ESCAPE.

Griffiths v. Eyles, Eaſter. 39 Geo. 3. C. B. 1 *Pul. & Buſ.* 413.

To debt for an eſcape, defendant pleaded a negligent eſcape, and voluntary return, ſince which the priſoner had been ſafely kept. Plaintiff in his replication admitted the negligent eſcape and voluntary return, but alleged that the priſoner had not been ſafely kept ſince that time, having again eſcaped, which was a different eſcape from that mentioned in the plea, and the ſame for which the action was brought. Defendant, in his rejoinder, traverſed the allegation that the priſoner had not been ſafely kept, and then pleaded to the latter part of the replication as to a new aſſignment, a negligent eſcape, voluntary return, and ſafe keeping ſince, in the ſame manner as in the plea. This latter part of the rejoinder the Court refuſed to ſtrike out on motion, but held it bad on ſpecial demurrer. Alſo a plea that, if the priſoner eſcaped ſeveral times (without ſpecifying them), he returned as often, is bad.—This was an action of debt for an eſcape out of execution, againſt the defendant, as warden of the Fleet. Pleas: 1ſt, *Nil debet*. 2dly, That the eſcape was without the knowledge, privity, conſent, or permiſſion, of the defendant, and againſt his will; and that before he knew of the eſcape, and before the filing of the bill, the priſoner, voluntarily, and of his own accord, returned back into the cuſtody of the defendant, and continually, from thenceforth hitherto, hath been, and ſtill is, there kept and detained in execution, at the ſuit of the ſaid plaintiff. This was accompanied by an affidavit on the part of the defendant, according to the proviſions of 8 & 9 *Will.* 3. c. 27. ſ. 6. that the eſcape was without his privity. The plaintiff, in his replication, 1ſt, joined iſſue on *nil debet*; 2dly, admitting that the eſcape was without the privity of the defendant, and that the return to priſon was voluntary, went on to allege that the priſoner had not, from thenceforth, been kept and detained in the cuſtody of the defendant, but that after he had ſo returned into cuſtody, and after the defendant had notice of the former eſcape, and before the exhibiting the bill, the defendant permitted and ſuffered the priſoner to eſcape and go at large in manner as the plaintiff had complained againſt him, "which "ſaid laſt-mentioned eſcape is another and different eſcape than the eſcape "mentioned in the plea of the defendant ſo by him laſtly above pleaded "in bar, as aforeſaid; and was, and is, the very ſame identical eſcape for "which the ſaid plaintiff brought this action and exhibited his aforeſaid "bill, and this," &c. The defendant in his rejoinder having traverſed the allegations that the priſoner had not been ſafely kept ſince his voluntary return, with a verification in the uſual way, proceeded: "And as to "the ſaid ſuppoſed eſcape ſo by the ſaid plaintiff newly aſſigned *actionem* "*non*, becauſe if any ſuch eſcape ſo newly aſſigned was made by the ſaid "priſoner, the ſame was ſo made by the ſaid priſoner privately, and with-"out the knowledge, privity, conſent, or permiſſion of the defendant, and "againſt his will; and that afterwards, and before the defendant knew "of ſuch eſcape, and before the filing the bill of him, the ſaid plaintiff, "againſt the ſaid defendant in this behalf, to wit, on, &c. at, &c. the ſaid "priſoner voluntarily, and of his own accord, returned back again into "the cuſtody of the ſaid defendant, and continually from thenceforth hi-"therto had been, and ſtill is, kept and detained in the cuſtody of the ſaid "defendant in execution at the ſuit of the ſaid plaintiff for the debt and "damages aforeſaid, in form aforeſaid, recovered by the ſaid plaintiff; "which ſaid eſcape in this plea mentioned, if any ſuch was made, is the "ſame eſcape whereof the ſaid plaintiff hath above in his ſaid *new aſſign-*"*ment* in this behalf alleged againſt him the ſaid defendant. And this, "&c. wherefore he prays judgment if the ſaid plaintiff ought to have or "maintain his aforeſaid action in reſpect of the premiſes ſo newly aſſigned

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"againſt him," &c. EYRE, Ch. J. There is a difference between this caſe, and that of two pleas pleaded without leave of the Court: the two pleas are diſtinct from each other; this is but one rejoinder containing double matter; it may be a ſubject for demurrer, but not for the exerciſe of the ſummary juriſdiction of the Court.

In conſequence of this intimation from the Court a ſpecial demurrer was afterwards put in, aſſigning for cauſes, "that the ſaid rejoinder is double and multifarious in this, that it contains two ſeparate and diſtinct anſwers, and offers two ſeparate and diſtinct iſſues upon the aforeſaid replication of the above plaintiff to the ſaid plea of the defendant, ſo by him laſtly above pleaded in bar, whereas only one iſſue could or ought to have been offered or taken upon the ſaid replication, or upon the matter therein contained; and that the ſaid rejoinder is alſo double and informal in this, that it offers to put in iſſue two diſtinct and different eſcapes, whereas the plaintiff hath originally declared upon and in his ſubſequent replication hath ſupported his ſaid declaration by only one eſcape, and that according to the rules of good pleading the ſaid rejoinder ſhould and ought to have been confined to and have concluded with a traverſe, which is thereby taken on the ſaid eſcape ſo ſet forth in the ſaid replication of the ſaid plaintiff, yet the ſaid defendant hath very unneceſſarily and inartificially extended the ſaid rejoinder to further and other and different matter, by way of ſuppoſed ſecond anſwer to the ſaid replication, whereas only one anſwer could or ought to have been made to, and only one iſſue offered or taken upon the ſaid replication, or in or by the ſaid rejoinder; and that the matter ſo ſecondly alleged in the ſaid rejoinder is no anſwer to the ſaid replication, nor direct or poſitive denial of the eſcape therein mentioned, but only an argumentative denial of ſuch eſcape, whereas the ſaid eſcape ſhould have been expreſsly and directly traverſed and denied by the ſaid rejoinder; and that the ſaid rejoinder is calculated to occaſion the trial of two ſeparate iſſues upon one and the ſame fact, and alſo to introduce a vexatious and unneceſſary length of pleading in this cauſe; and that the ſaid rejoinder is repugnant and informal in this, that although in one part thereof it conſiders the ſaid replication and anſwers the ſame as being a replication, yet, in another part thereof, it conſiders the ſaid replication as being a new aſſignment, and profeſſes to anſwer the ſame accordingly; and that the ſaid rejoinder is, in various other reſpects, repugnant, multifarious, inſufficient, and informal."—Joinder in demurrer. *Eyre*, CH. J. If the obſervation be well-founded, that the common forms of replication in theſe caſes ſtop at the allegation, that the warden has not kept the priſoner in cuſtody ſince the firſt voluntary return; the conſequence is, that this replication is not merely ingenious but informal; and my doubt has been, whether the firſt fault was not committed by the plaintiff. But, in truth, it ſeems to me that the latter part of the replication is nothing more than an amplification of the denial that the defendant had kept the priſoner in ſafe cuſtody; it amounts to this, that he had not kept him in ſafe cuſtody, for he had permitted him to eſcape afterwards. It does not appear to me that this rejoinder will enable the defendant to give in evidence any ſecond voluntary return. The defendant, by his plea, excuſes an eſcape, upon the ground of the priſoner having voluntarily returned and remained in his cuſtody ever ſince. Now put the caſe that the priſoner had made two or three eſcapes, and had returned as many times, the defendant was bound to ſtate them all in his plea, in order to eſtabliſh the averment that the priſoner had been kept in ſafe cuſtody ever ſince. If this be not the caſe, the pleadings may go on for ever. The defendant, therefore, has made the real fault, as there is nothing in the replication in the nature of a new aſſignment. Perhaps had the plaintiff merely traverſed the allegation in the defendant's plea, it would have been ſufficient and the ſhorteſt way,

way, though I do not think him wrong for putting in a more explicit contradiction. THE COURT, however, gave the defendant leave to amend, on payment of costs; intimating, at the same time, that it must be done in such a way as not to preclude the question being brought to issue as soon as possible. Accordingly the defendant amended his second plea, by inserting an allegation, "that *if the said prisoner did, at any* "*time or times*, after the said commitment, &c. go at large from and out "of the said prison of the Fleet, and from and out of the custody of him, "the said defendant, he, the said prisoner, so escaped and went at large "privately and without the knowledge, &c. of him, the defendant, and "against his will; and *that if any such escape or escapes was, or were, so* "*made, the said prisoner, after such escape or escapes, and before the defend-*"*ant knew of such escape or escapes, and before the filing of the bill, volun-*"*tarily, and of his own accord, returned back again into the custody of the* "*defendant*, and continually, from thenceforth, until, and at the time "of the commencement of the suit, was, and hath been, and still is, "kept and detained," &c. EYRE, Ch. J.—The defendant knows, and is bound to know, the state of his prison, and whether there has been an involuntary escape and a subsequent return and safe keeping of the prisoner since that time, or whether there has been no escape at all. If there has been one escape, and one return; or if there have been ten escapes, and ten returns, and the defendant thinks fit to plead them, and to insist, that independent of such escapes the prisoner has been kept in safe custody, he is at liberty to do so. But he cannot plead hypothetically, that if there has been any escape there has also been a return. He must either stand upon an averment that there has been no escape, or that there have been one, two, or ten escapes, after which the prisoner returned, and that having kept him in custody since that time he is entitled to give that answer to the plaintiff's charge. The defendant must take upon himself to state the escapes specifically, that the plaintiff may have an opportunity of combating his assertion. With respect to the plaintiff's replication, it never abandoned the escape laid in the declaration. To that escape the defendant pleaded what was an answer, as far as it went; in reply to which the plaintiff admitted the fact of the defendant's plea; but added, that he did not complain of the escape previous to the return, but that the defendant had not kept the prisoner in custody since that return.—THE COURT again gave the defendant leave to amend, by striking out the latter part of the rejoinder which had been demurred to, and leaving the traverse of the allegation, that after the return of the prisoner, and after notice of the former escape, the defendant voluntarily permitted the prisoner to escape (1).

## EVIDENCE.

Dr. Moises *v.* Dr. Thornton, Hil. Ter. 39 Geo. 3. B.R. 3 *Ter. Rep.* 303.

THE mere production in court of a diploma of doctor of physic under the seal of one of the universities is not in itself evidence to shew that the party named in the diploma is entitled to that degree.—The plaintiff, a physician, brought an action against the defendant for slander, for saying

(1) The defendant having amended accordingly, issue was joined on the traverse, and the cause came on to be tried before *Eyre*, Ch. J. at the Guildhall sittings after this term. At the trial the plaintiff proved a notice of an escape to the defendant, and an escape subsequent to that notice, but did not prove any escape previous to the notice. Upon this the lord chief justice nonsuited him, holding, that the first escape must still remain the *gist* of the action, and would be purged or not, as it should turn out that the prisoner had or had not been safely kept since his voluntary return after that escape.

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of him, in his profeſſion, "*He is a quack; and if he ſhews you a diploma "it is a forgery:*" and in the declaration the plaintiff averred that he was a phyſician, and had *duly taken the degree of doctor of phyſic.* In ſupport of that averment, he produced at the trial a diploma, purporting, on the face of it, to be granted by the univerſity of St. Andrew's, in Scotland, and to have the univerſity ſeal appendant to it. And in order to authenticate the inſtrument, the plaintiff's counſel offered to call a witneſs, who had been ſent into Scotland for the purpoſe (having before had no knowledge of that univerſity, its conſtitution, or profeſſors), and who was ready to prove that he attended in the public library of the univerſity, and applied to the perſons there aſſembled in their public capacities of rector and profeſſors of the univerſity, and that the perſons ſo aſſembled acknowledged to him that the ſignatures ſubſcribed to the diploma conferring the degree of doctor of phyſic on the plaintiff, were of their proper hand-writing reſpectively; and that they informed him that the ſame was granted by the univerſity in full ſenate; and, in further confirmation thereof, the witneſs had ſeen each profeſſor ſign a certificate in his preſence (correſponding with the hand-writing of their ſignature to the diploma) which certificate was as follows: "Univerſity Library, St. "Andrew's, April 13th, 1798. *Sederunt.* Doctor *Hill*, Rector, Doctor "*Arnot*, &c. (naming ſeveral other members preſent). The univerſity "agree to confer the degree of doctor of medicine on Mr. *Hugh Moiſes*, "of Pimlico, late ſurgeon to the Weſt Middleſex regiment, on teſtimo- "nials from *George Pearſon*, M. D. of the College of Phyſicians, Lon- "don, and lecturer on phyſic, and *Andrew Thynne*, M. D. of the College "of Phyſicians, London, and lecturer of midwifery. Extracted from the "univerſity records by *John Cook*, Cl. Univ. At St. Andrew's, Mar. 21ſt, "1799. That the above is a true and faithful extract of the minute in "the original record of the univerſity; that, in conſequence of the above "reſolution, a diploma was extended and ſubſcribed by the rector, princi- "pals, and all the profeſſors; and that the univerſity ſeal was appended "to the ſaid diploma, is certified by *G. H.*" &c. (ſigned as before ſtated to have been ſeen by the witneſs). The ſaid witneſs was further informed by the officer, whoſe duty it was to affix the univerſity ſeal to their public acts, that the ſeal affixed to the diploma produced in evidence was ſuch ſeal, and that he recollected to have affixed the ſame. Lord KENYON was of opinion at the trial, that this was not ſufficient evidence of the facts neceſſary to authenticate the inſtrument offered, either that the perſons, whoſe names were ſubſcribed to the diploma, had authority to grant the ſame; or that the ſeal affixed thereto was the proper ſeal of the univerſity; and, therefore, nonſuited the plaintiff.—Afterwards a rule to ſhew cauſe why the nonſuit ſhould not be ſet aſide having been obtained, and cauſe ſhewn, the Court diſcharged the rule.—PER CURIAM: It is not neceſſary to prove the ſeal of a corporation in the ſame manner as the ſeal of an individual, by producing the witneſs who ſaw the ſeal affixed: but when an inſtrument, having a ſeal affixed to it, purporting to be a corporate ſeal, is produced in evidence, it is neceſſary to prove that it is the ſeal of the corporation, if there be any doubt about it; otherwiſe any inſtrument, with a ſeal to it, might be produced in court as an inſtrument ſealed by the corporation. The inſtrument produced in this caſe was either the original act, or a copy of it: if it were produced as the original act by which the univerſity conferred the degree, the plaintiff ſhould have proved the inſtrument by legal evidence. It ſhould have been proved that the ſeal affixed to it was the ſeal of the univerſity, but no ſuch evidence was given. If produced as a copy of the original act, it ſhould have been proved in the uſual way, as a copy, *viz.* it ſhould have been compared with the original book by the witneſs who produced it: for the univerſity of St. Andrew could not, under their ſeal, give evidence that the plaintiff had taken ſuch a degree. Even if it be not neceſ-

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ſary in general for the party to ſhew that he has regularly taken his degree, in this caſe it was neceſſary, becauſe the plaintiff alleged in his declaration "that he had duly taken the degree of doctor of phyſic."

## EXECUTORS.

Wilton, *v.* Hamilton, Tr. Ter. 39 Geo. 3. C.B. 1 *Pul. & Boſ.* 445.

*A.* SUED, as executrix of *B.* on a policy effected by *B.* in his life-time, in which he was jointly intereſted with *C.* and *D.* now living, and was nonſuited: the Court held that ſhe was entitled to the privilege of an executrix to be exempt from coſts.—This was an application to the Court to direct the prothonotary to tax coſts againſt the plaintiff who had been nonſuited. The grounds on which it was attempted to differ this from the common caſe of an executrix, were as follow: The plaintiff declared, as executrix of her huſband, on a policy of aſſurance effected by him in his life-time, and in which he was jointly intereſted with two others. The firſt count ſtated, that the teſtator, in his life-time, for the uſe of himſelf, *S. L.* and *S. B.* effected the policy for himſelf, and as agent, &c.; that the teſtator *S. L.* and *S. B.* were intereſted, &c.; that afterwards, *in the life-time of the teſtator*, the ſhip ſailed on her voyage, *and that afterwards*, and during the voyage, ſhe was loſt. The ſecond count only differed from the firſt in ſome circumſtances, which could not affect this motion. The third and fourth were money counts, ſtating, that the defendant was indebted to the plaintiff, as executrix, for money paid by the teſtator in his life-time, to the uſe of the defendant; and for money had and received by the defendant, in the life-time of the teſtator, to his uſe. EYRE, Ch. J.—On the two firſt counts we may infer, that the loſs happened in the life-time of the teſtator; and, with regard to the money counts, the promiſe is an implication of law, ſince the teſtator is the perſon to whom the debt is ſubſtantially due. The plaintiff was entitled to bring this action, and ſhe could only bring it in right of her teſtator. The rule of law is clear. With regard to ſuch cauſes as fall under the cognizance of the executrix herſelf, ſhe ſues at her peril; the privilege is given on account of the ſituation in which ſhe ſtands as to thoſe claims of the teſtator which were executed in his life-time. It is her duty to convert thoſe claims into aſſets, which ſhe muſt do with ignorance and uncertainty, and on that account ſhe is protected from coſts. BULLER, J. I am of the ſame opinion. It makes no difference that the ſurviving parties, for whoſe intereſt this policy was made, might have brought the action in their own names.

END OF THE THIRD VOLUME.

[*T. Davison, Whitefriars.*]

# ERRATA.

In page 32, line 35, instead of *testator* read *testatrix*.
320, side note, instead of *Wilf.* 63, read 3 *Wilf.* 63.
393, side note, instead of 5 *Ter.* Rep. read 5 *Bur.* Rep.
654, side note, instead of 2 Wilf. 903, read 309.
763, second side note, read *Cowp. Rep.* 220.
793, side note, line 13, instead of 1 Pul. & Bof. 93, read 92.
818, line 26, instead of *Defendants* read *Defendant*.
same page, line 31, instead of *therefore* read *further*.
824, in first side note, dele *London* and read *Roſs* v. *Bradſhaw*, *Tr. Ter.* 1 *Geo.* 3. *B.R.* 1 *Black.* 312.
same page, line 17, instead of *vim* read *vie*.
same page, line 22, instead of *ſea* read *marine* inſurances.
same page, line 24, add a side note, "*Mich. Ter.* 1 *Geo.* 3. *B.R.* 2 *Burr. Rep.* 1088."
same page, line 31, instead of *me* read *Sir James Burrows*.
same page, line 32, instead of *me* read *him*.
826, line 33, instead of *derived* read *derive*.
835, line 8, instead of *the* licences read *ale* licences.
845, line 23, instead of *In action* read In *an* action.